

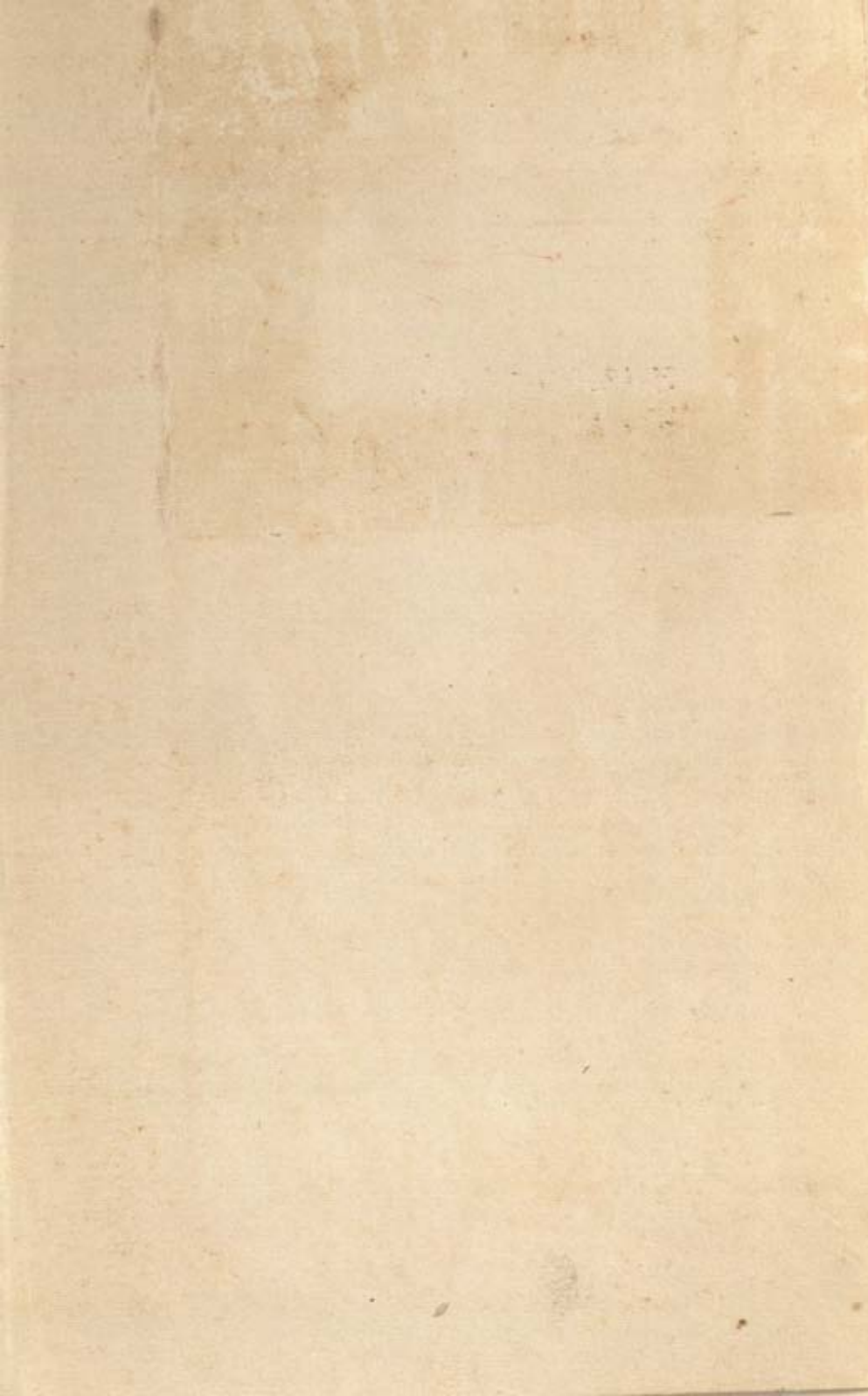
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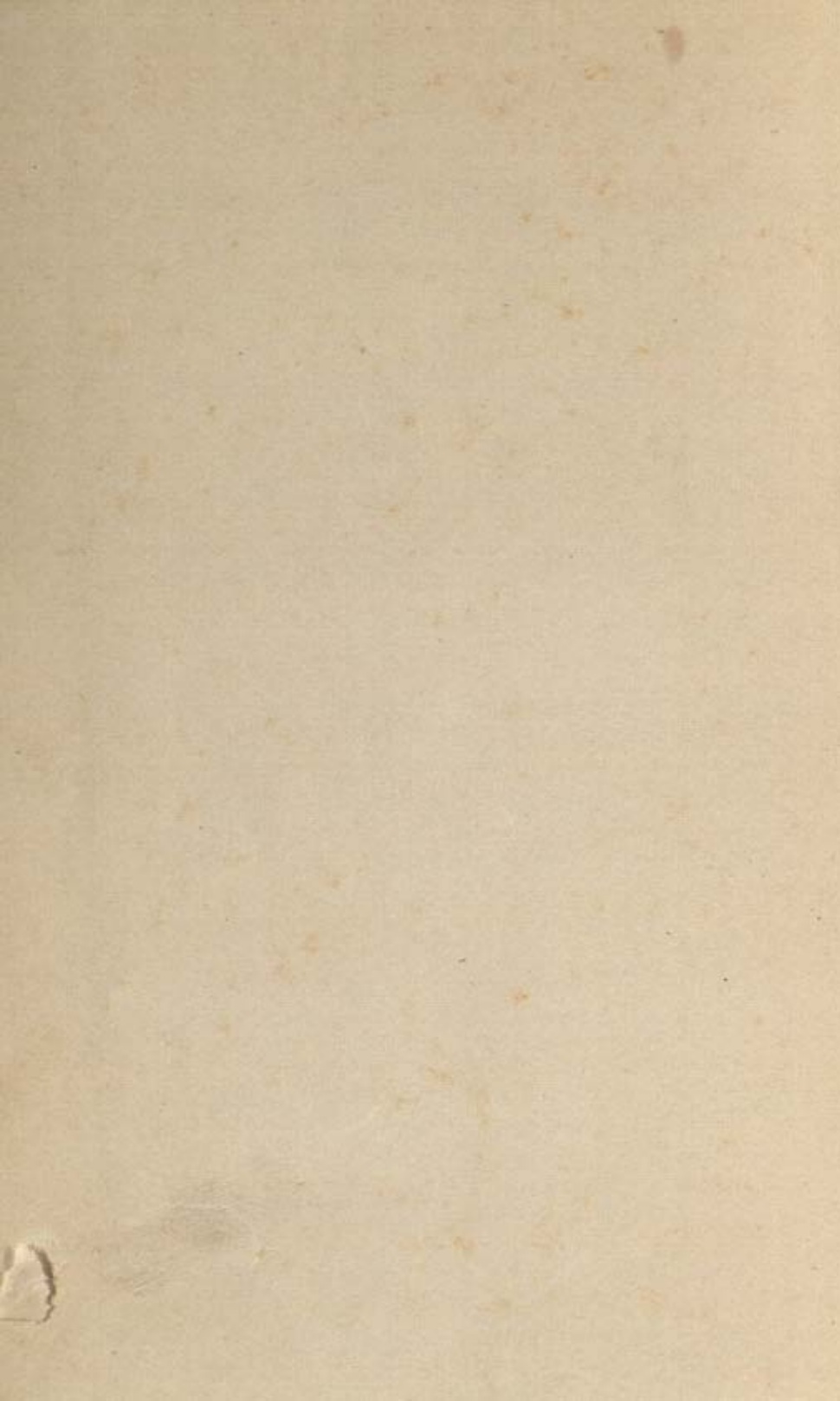
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INTRODUCTION TO
MODERN HINDU LAW



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INTRODUCTION TO MODERN HINDU LAW

42810

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Index of Cases

Preliminary Note. There is no standard method of referring to Indian cases, though the *All India Reporter's* method seems to be nearly ideal. No index can be entirely satisfactory, especially where the user is trying to memorize the names of leading cases. Moreover Indian editors and printers often unconsciously vary the heading of the duplicated judgment, because the common names have as yet no universally-accepted spelling. The same case will have different spellings in different reports, and cases are not unknown in which different plaintiffs' names are used. An Indian name may have many parts, or apparent parts, the number, importance, and significance of these varying with caste and region. Some castes now have surnames, like Europeans: the majority could not be identified if the last of a series of names or name-parts were referred to. Still less suitable would be the first of the series, which may be a title or mode of address. When a deity is a party it is often useless to isolate parts of the name. In a students' book the names of the parties must appear at the foot of the page in a convenient form, and yet it should be possible to check on the case from the law-report to the textbook and vice versa. The reports almost always give the names in full, though initials are becoming more common.

The method adopted here is, as far as possible and with occasional exceptions where I could not be consistent, to index the cases under the first most truly personal name of the party. Discarded names appear in this index in brackets where they precede the selected name. In order to avoid the impression that the same half-dozen gentlemen have been litigating for the last century, the footnote references often have two out of the series of names for the first party, omitted names being indicated by initials where desirable. If the report shows the first part as 'C. P. Singh', there is no problem. *C. P. Singh* will appear in the footnote-reference, and the entry is indexed alphabetically as Singh (C. P.). But 'Mati Lal Das', which is really a single compound name, will appear at the foot of the page as *Mati* or *Mati Lal* (though this truncates the name), and is indexed under *Mati*. South Indian names create problems and complete consistency is impossible. 'Dharwar Chandrasekhara Sarma' would appear as *Chandrasekhara*, under which he would also be indexed. Dharwar is his place-name, and Sarma his

caste-designation. 'Chenchavuru Narayanaswami Padmanabhaswami Iyer' would appear as *C. N. Padmanabhaswami*, for the first name is his village and the second his father; he would be indexed under the third. 'Sarat Chandra Banerjee' would be indexed under Sarat. Ideally 'Krishna Govindaji Ranade' ought to be cited only under Krishna, for that is his 'own' name, but it frequently happens that such a case is known as *Krishna Govindaji's case*, and it is helpful to distinguish cases where common names appear. Chetty, Banerjee and Ranade are nearly useless for purposes of reference, unless by chance the actual report shows them preceded by initials, when we have no choice. The Chettiers have a *vilasam* consisting, in part, of a row of initials: these have to remain, wherever practicable.

Sri (otherwise Shri), Srimati, Raja, Maharaja, Rao, Lala, Babu, Mahant, Patel, and often Chaudhary (various spellings are in use), are among the titles. Musammat (abbreviated Mt or, better, Mst) indicates a widow in Northern India. Devi, Kumari, Amma, Ammal, Bai or Ben, whether as prefixes or suffixes, indicate a lady, and in some cases whether or not she is married. Purely conventional affixes are common; and I have even seen cases indexed in the law-reports under 'Dr'.

An orientalist would like to set about the names, especially to modernize the barbarous spellings of the older cases. But neither misspellings nor barbarisms can be tampered with, as we must stick to the forms given in the reports. Nowadays people are found writing Chari (for Acharya) and even Nanda (for Ananda), so there can hardly be any complaint if a convention is adopted for our limited purpose which is convenient and enables the cases to be identified with reasonable speed.

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Preface

THIS book was written to serve two classes of readers. The first comprises the student of Hindu law for the examinations of the Universities of India and Pakistan and the University of London and also the student taking the Hindu law part-paper in the examinations for Call to the English Bar. It is very unusual for any member of this numerous class to read Hindu law without a teacher to guide his study. The second group I have in mind is somewhat smaller, and more diverse. It includes those who need a concise introduction to this complicated and therefore elusive subject for the management of their affairs, or in order to study modern systems of law comparatively. I hope I shall sometimes put a practitioner upon the right track or start a fruitful train of thought; but I have not written primarily for him. After all, excellent practitioners' books are on the market. But I admit I have my eye upon the practitioner of tomorrow, for a reason which will appear.

The Indian law student, as I have found from experience, prefers statements of law to be brief. His time is limited, and he will naturally take advice as to which chapters of law he is expected to know thoroughly. So long as he remains a student no subject can be read in a leisurely manner. One wishes, for his sake, that the law had fewer uncertainties, and could be stated more succinctly. I have avoided lengthy expositions, repetition, the out-of-date and antiquarian wherever these could be avoided, and irrespective of convention in these matters. I have eschewed extensive quotations from original sources and all distractions from the business in hand. This leads to a style which is much less leisurely than that of most textbooks to which students outside India are accustomed.

It would be perfectly true to suggest that ideally an introduction to Hindu law should start with a collection of the original Sanskrit texts upon which our older authorities are founded, should follow these by describing the effect of the principal of those authorities, and proceed to explain, with illustrations of the anomalies and inconsistencies, how rules emerged at each stage. It would be quite rational to expect an introductory book to enable one to open any

volume of the Indian law reports and understand any Hindu law case. But there are good, if somewhat peculiar, reasons for not aiming at any such goal. When a reader has mastered this book and has discovered the peculiar interest in the Hindu system, its strange vitality and adaptability, and its instructive recent history — when in short he has lost the initial suspicion that here is something both foreign and quaint — he will naturally want to go further, and reach backwards into history. He will not have consulted many modern cases before they have themselves invited him to do this. But he must be warned that the two major sources of the Anglo-Hindu law, namely the Sanskrit texts in translation and the earlier British-Indian cases, are somewhat esoteric and opaque. Much of the meaning of the Sanskrit authorities is not expressed, and what is expressed gave rise to many doubts. In the earlier case-law many a false start was made, and many a blind alley entered. Thousands of cases are obsolete without having actually been so declared judicially. Many a dictum is misleading while the decision is sound.

It seems that the Sanskrit texts and their translations and older interpretations now belong to the orientalist and the legal historian. Modern law has parted company in fact, if not always nominally, with the ancient sources. The spirit of those sources often lives on, particularly in the realm of the joint family, but the letter is little looked to. In playing the role of a legal historian the advocate expounds not what really happened but what the courts have on the whole held happened. One who takes Hindu law seriously must not be alarmed at this fictional approach. Administration of law often requires an artificiality of approach, provided that the result which is achieved is unobjectionable. Mahamahopadhyaya Dr Pandurang Vaman Kane's great encyclopedia, *History of Dharmasastra*, has placed the classical and the later law (with some comments on the codified system) and the philosophies of earlier stages into a certain perspective. Anyone who feels strong enough to venture upon the ocean of the Anglo-Hindu law, with its charted and uncharted islands and shoals that are the Sanskrit texts, will certainly take that as his guide. The days are long past when Sanskritists became infuriated at judges' 'demonstrations that the moon is made of green cheese'. Orientalists no longer expect a judge active in Hindu law

cases to have immersed himself in classical learning. Meanwhile we have to occupy ourselves with the law of the land, the most intimate law of a very large section of mankind; and this book is an introduction to *modern* Hindu law.

The reader should not comment on the appearance here of cases decided as long ago as 1858. The current law, particularly that of the joint family, has deep roots, and principles laid down a century ago, in quaint language no doubt, are often as active now as ever they were. They have sometimes been given a 'new look' by a peculiar process practised in the Supreme Court of India. Old principles, clothed in antique phrases, are refurbished, sometimes regretfully accepted as too old to be corrected, and sent on their way in a little professorial lecture. It is thus quite worthwhile to refer to a Supreme Court decision which restates, if without originality, a rule laid down long ago by the Privy Council. The practitioner needs to know the rule's origin, and its history; but the student likes to see his country's judiciary adopting it in words of their own choice and in contexts which at once make sense.

There is the best of authority for taking this course. We ought to take recent — and few — authorities for our present purpose. When the former Chief Justice of Madras, Sri P. V. Rajamannar, was retiring at the end of a career remarkable for solid and knowledgeable judgments in matters of Hindu law, he said,¹

'It will be idle on the part of a young lawyer to spend his time with historical development of a principle when it is found enunciated authoritatively in one of the latest decisions of the Supreme Court. Which learned Judge would listen patiently to an argument from a junior advocate on a question covered by a recent decision of the Supreme Court if he were to begin from Justinian and Coke and the reports of the Sadr Divani Adalat?'

The rhetorical question looks absurd, but what he was saying tactfully is nothing less than the truth: that the *Mitakshara*, and 'Macnaghten' and 'Strange' and *Moore's Indian Appeals* had, by and large, had their day. While practitioners' books will continue to explain how alienation of undivided interests came into South India, the student needs only to know that it did so, and where he will find the fact stated recently in so many words.

But the student of today is the practitioner of tomorrow, and the judge of the day after. Our present judiciary are

¹ [1961] K.L.T. (Journal) 56; [1961] 1 M.L.J. (Journal) 40.

capable of the occasional howler.¹ Even the Supreme Court has been detected in a surprising piece of ignorance.² Judges rely upon counsel, and the blame must be shared. Slips on the bench today are due largely to the methods of teaching and learning adopted a quarter of a century ago. I am very much aware of the responsibility undertaken by one who attempts to lay down that matrix in the student's mind. Where this initial work is clumsily done; where the writer is too busy to alter his work to accommodate recent, and perhaps constructive, decisions; where out-of-date and misleading material is copied from earlier publications; where inconsistent propositions are lumped together without attempt either at reconciliation or a frank exposure of the difficulty — in every such case the book as a whole is liable to be a failure. Clients, and ultimately even the reputations of courts, may suffer. A string of unsteady Hindu law cases from my favourite High Court have recently shaken even its enviable reputation: the fault lies in large measure with the teachers and textbooks of about twenty years ago. Misleading impressions are very difficult to eradicate. If I have not done my duty at the first attempt (and there are many hundreds of propositions of law concerned) I hope colleagues in India and Pakistan will not hesitate to point out to me where I have failed. My aim is best indicated by an anecdote.

On the subject of a coparcener's merging his self-acquisitions with the joint stock the Supreme Court, taking a somewhat suspicious view of the learning of a well-known Indian jurist formerly a member of the Judicial Committee, reviewed the law and referred with approval to a dictum in *Rajanikanta Pal v. Jagamohan Pal*³ as correctly expressing the position. I incautiously referred a student to this case. In due course he reproached me for plunging him into a quagmire of disputed issues of fact for the sake of a three-line dictum which was not closely linked to the issues of the case. Perhaps it was the worst example of an unclear

¹ See [1955] S.C.J. (Journal) 139-50; (1956) 58 Bom. L.R. (Journal) 1-11 and *Krishnamurthi v. Dhruwaraj* [1961] 2 S.C.J. 582, [1961] 2 M.L.J. 152 (SC) where a Full Bench decision was overruled; also [1958] S.C.J. (Journal) 259-64 and [1959] 2 M.L.J. (Journal) 19-21.

² In *Dattajirao* AIR 1960 S.C. 1272 everyone concerned with the case failed to notice the effect (§§ 128, 163) of the adopted child's illegitimacy (p. 1274, col. i).

³ AIR 1923 P.C. 57, 50 I.A. 173.

handling of bewildering papers that the Privy Council ever had the misfortune to display. The student's complaint was justified, and a substitute was provided.¹ But meanwhile his time had been wasted and his optimism crippled. In my selection of authorities I have tried to avoid this trap. If I have been successful every case ought to be worth reading, and that too without risk. Where a case has a doubtful or incorrect feature I have tried to indicate it immediately after the reference. At times no selection was practicable and I have had to offer a poor, wretched authority: but if it carries the weight in practice its position at the foot of my page is justified.

Since law-students of South Asia are obliged to master more topics of law than their contemporaries in Europe, they are notoriously reluctant to read cases. I shall never forget the occasion when I asked a Bachelor of Laws to fetch me 6 I.A., and he asked, 'Which six?' I owe, then, an explanation why I have found so many cases necessary. My footnotes are not intended as a decoration for the page, or merely to justify my propositions. It will be noticed that many propositions do not have an authority appended. These are instances where I am stating an opinion or a virtual truism, and it is usually clear which is which. I do not give an authority for a proposition like 'My mother is not a barren woman'. That leaves authorities for statements which require support. I advise the student to look up as many of them as possible. A man who does not know his way through the cases I cite, or suitable counterparts which his teacher prefers, cannot know Hindu law. The shameful defeats that 'Mayne' and 'Mulla' continually suffer in the courts and at the hands of critics² warn the textbook-writer, and his reader, that the writings of 'jurists' are no authority whatever until, as sometimes happens, a

¹ See § 547 (ii) B below.

² R. B. Pandit at (1961) 63 Bom. L.R. (Journal) 100-2. Even Homer nods, and the normally reliable Raghavachariar (to whom, in my student days, I owed so much) solemnly denies the widow's right, under the former system, to alienate to pay her husband's time-barred debts (4th edn, 1960, S. 531, p. 532), though the contrary had been established as long ago as 1878, had been re-affirmed in an Oudh case of 1940, and had been explained fully in the 11th edn of Mayne, published in 1950, para. 646, at p. 770. Raghavachariar's sense of discomfort with his text is revealed in his footnote no. 181, which by no means corrects it. The court's dissatisfaction with the older textbooks is expressed too often to make full citation practicable, but the student will enjoy the

court advisedly relies upon them. There is much to be said for the rule of not citing a jurist until he is dead: the only time (to my knowledge) that learned judges did me the honour of citing an opinion I had expressed and of relying upon it I was obliged to apologise, as I had changed my mind in the meanwhile. Naturally the teacher will have alternative cases which he feels better exemplify my propositions, or throw a new light upon them. The ideal case is one in which the teacher himself participated, his own teacher or a colleague led for a party, or a judge who is a well-known personality gave the leading judgment. Even if the quality of the law which emerges may not be first-rate, the presence of the case to the student's mind as a living, and perhaps amusing, incident more than makes up for any such lack. Hence recent decisions by living judges have a special educational value, though they may have decided nothing new. The drama of litigation invariably has intriguing and fabulous side-issues;¹ and the student's mind is readily supplied with hooks upon which the solid propositions of law can be hung by an enterprising teacher. The statuesque Privy Council decisions of fifty years ago can hardly be made to appeal in quite the same way. Learning law can be made fun, and the over-reporting of decisions in present-day India affords ample opportunities.

Much of the fun with modern Indian case-law is due to the system itself. The Supreme Court is not bound by its own decisions, though even its dicta ought to be followed by inferior courts.² It can revise a dictum *per incuriam* just as the Privy Council did before it. Where contrary views are expressed the latest pronouncement binds all the Courts.³ Since the Supreme Court exercises appellate jurisdiction of the amplest character we can be quite sure that there are lines of authority in the various High Courts which are wrong. The student is advised to treat the current line of

remark in *Ramaji v. Manohar* AIR 1961 Bom. 169, 180-1, that Mulla, 12th edn., para. 194A, was wholly unsupported by the decision upon which it relied for the statement that a widow may bind the estate for debts incurred in running her husband's business. When the giants fall so easily the beginner need not feel ashamed of his own initial difficulties.

¹ For example Dr K. N. Katju's reminiscences at (1947) 1 I.L. Rev. 314ff.

² See Sri V. K. Sircar at AIR 1962 Jour. 13-23. Cf. *Baburao v. Madho* AIR 1961 Bom. 29 with *Kalyan v. Baldev* AIR 1961 H.P. 2.

³ *Messrs N. K. Bhavan v. C. T. Officer* AIR 1961 Mys. 4.

authority in his own State as 'right', at least for the time being. No doubt there are times where it is not at all easy to know what the line of authority is. But he must be loyal to his own High Court until he is engaged in a case where reference to a Full Bench would be advantageous (§ 12). Let us suppose that Patna and Allahabad are opposed on a point of law to Bombay and Madras. Which is right? It may be fifty years before the point comes before the Supreme Court, but either one of these lines will be taken and the other overruled, or a third position may be adopted and both the previous lines overruled. One can safely get students to study cases of Full Benches of different High Courts in which the judges respectfully decline to follow each other, if they will speculate, with reasons, why the Supreme Court will follow one rather than the other. Like most topics of Indian law, Hindu law is a mine for moot problems. Britain and the United States, for example, can offer nothing comparable. As a result the textbook-writer may not only make abundant use of recent citations which are not in themselves any novelty, but also indicate where the differences lie between the High Courts and suggest the most harmonious resolution of them, for some at least are certainly potentially wrong. If the student fails to look up cases in such situations he is missing the really enthralling aspects of this gentlemanly, but relentless, battle. It is a free-for-all, and much of great importance turns upon the speed with which uncertainties are resolved.

Naturally much fuel has been fed to the flames, quite unintentionally, by the 'Hindu Code'. Intended to put an end to uncertainty, it has been the cause, up to the present, of increased litigation. Some parts of the Code are not yet authoritatively construed, and about some any student's guess is as good as any textbook-writer's. The armoury of rules of construction of statutes is rather like the *Mimamsa*: anyone can employ it in some of our difficulties to achieve almost any result. Here the disagreements between the High Courts are more irritating than amusing, but there is no solution until the Supreme Court has the time, and opportunity, to cope with such cases. In matrimonial causes, for example, few clients have enough means to fight all the way up the judicial ladder.

Meanwhile the unfortunate student has to learn both the Code and the Anglo-Hindu law. The latter, though it does

not always figure largely in examination-syllabuses where it has been superseded by the Code, must be understood, or the young practitioner will be utterly at sea when he comes to review the history of a family's property, which is usually complicated beyond the dreams of an English lawyer. I have marked with a marginal line the passages which are descriptive of the current law; unmarked passages relate to the former law, operative in India prior to 1955-6 and still applicable in Pakistan and Burma. With regard to East Africa and Malaya care will have to be exercised in removing from such paragraphs references to Indian statutes later than the operative date. The position in Malaya is still too obscure for anything to be said of it with confidence: apparently Hindu law must be administered to Hindus as it was when British courts first obtained jurisdiction to administer law to Asiatic residents. As for East Africa I have attempted, for the first time, to outline the position there in chapter 11. Throughout the book I have used considerable compression in the passages relating to the 'former' law. I have taken advantage of the likelihood that the reader will have read the prior paragraphs relating to the current system. The book has been designed to be read continuously. In many cases where the Hindu law is doubtful, courts outside India will prefer to apply a rule consistent with the Code, and it would be madness to attempt to learn Hindu law today without approaching it from the side of the Code, from which the earlier law must be regarded as differing. The other method of teaching, namely to start with *sastra* (§ 2), passing to Anglo-Indian case-law and statutes, and moving thence to the Code, will probably die out, if it survives anywhere.

I have omitted details of procedural law, which differ in some respects from State to State; the law of taxation; the law of customary land-tenures; the law of preemption except in so far as we are directly concerned with it; the statutory law relating to public trusts; the law of wills, though I have felt it desirable to enlarge sufficiently to show where Hindus may fall into traps in drafting their own wills; and naturally I have done no more than refer in passing to negotiable instruments and insolvency, places where the general law impinges somewhat violently upon Hindu law. Readers used to conventional arrangements will wonder what has happened to the topic 'Maintenance'.

I believe that it is harmful for the student to think of maintenance in the abstract. The duty to maintain a wife, a widow, or a daughter, or a widowed daughter-in-law, or a deceased person's dependants is not always the same in each case. It is better, to my mind, to deal with maintenance of a wife, maintenance of children, parents and so on in the appropriate chapters. Others may have other views, but one must follow one's own path.

I have stated my objects fully. What of the future? In twenty years' time one who intends to write about modern Hindu law will have a very different task. The joint-family law, for example, will be simplified and more consistent. Topics will have become of purely historical interest and will be able to be left to practitioners' books. The Hindu Women's Rights to Property Act, 1937, and all the problems to which it gave birth, will have been forgotten. Yet we shall know much more about our Hindu Code. The uncertainties will have been settled. The effects of the penetration of non-Indian law into the Hindu system will have been experienced. The public will have given themselves loyally to the task of making it work as a whole. Inspired and constructive judgments will make it possible to compile a genuine Hindu law case-book. Hindus outside India will have made up their minds whether or not to follow the mother country. The coming of the Indian Civil Code will be, if not actually discernible, at least more within contemplation. I hope fresh hands will have been brought to the task.

It remains for me to make acknowledgements to those who have taught me, and those who have encouraged me to pursue these studies. Contrast Hindu law with, say, the Anglo-Saxon or Civil-law systems of family law. A student of either or both of the last has literally hundreds of teachers. Numerous practitioners and scholars have poured out textbooks and articles from every quarter of the globe. Yet between them those systems do not control many more lives, much more happiness, or more money than the presently isolated and poorly-served Hindu law. It is no small honour to make any contribution to the better understanding and development of such a system in such circumstances. I am conscious of the honour, and grateful to those who have enabled me to assume it.

Towards the making of this book information was supplied by Messrs M. R. Vakil, M. C. Mathew, and K. Sankaranarayanan in India and by Messrs A. St. J. Hannigan and V. M. Mathew in East Africa. Sir John Gray enlightened me on the laws of Zanzibar. I am much obliged to them for their kind help. My colleagues Dr A. N. Allott and Mr J. S. Read directed my attention to material, or allowed me to see some unreported cases from East Africa, which have proved most useful. Dr T. E. James and Mr E. H. Scamell, both of the University of London, gave up their scanty spare time to read through parts of the typescript. This generosity on their part, which could hardly be supposed to be within the scope of their normal duties, gave me much pleasure, and I have been able to profit from their comments.

The publication of any legal textbook, the subject-matter of which shifts and grows unpredictably with statute and case-law, is peculiarly difficult. The Oxford University Press deserve my warmest thanks for their patience and skill in matters of detail.

J. D. M. D.

Lee Common,
Great Missenden,
Bucks., England
July, 1963

The law as stated in this book corresponds to that reported up to 1 March 1963.

Select Glossary

Words occurring seldom, whose meaning is sufficiently evident from the context, or accompanied by explanations, are not included. It will be a sufficient guide to the pronunciation to note the following: vowels marked long in the transliterated form are sounded as in Italian, thus *ā* is as the *a* in *father*; the *r* is always sounded; *ṛ* is like the *re* in *pretty*; *c* is the *ch* in *church*; unmarked vowels are short, *i* as the *i* in *sit*, *a* as the *u* in *butter*, *u* as the *u* in *push*; *ś* is like the *ssi* in *passion*, while *sh* or *ṣ* is the *sh* in *push*. The *zh* in *tavazhi* is a peculiar *r* sound for which there is no European equivalent. Dotted consonants have a somewhat nasal sound, the corresponding undotted consonants a dental quality, neither of which is present in English.

aliyasantana, अलि-सन्तान

Succession (in Kanara) by the sister's offspring instead of one's own

anuloma, अनुलोमः, anuloma

Union in which the male is of higher caste

atma-bandhu, आत्मबन्धुः, ātma-bandhu

Cognate in the *propositus's* own circle, e.g. a cousin and a second-cousin

aurasa, औरसः, aurasa

Legitimate son of the body

avyavaharika, अव्यावहारिकः, avyāvahārika

Not legally enforcible (because immoral or illegal)

bandhu, बन्धुः, bandhu

Cognate

dasiputra, दासीपुत्रः, dāsiputra

Son of kept concubine

dattaka, दत्तकः, dattaka

Son *given* in adoption

devadasi, देवदासी, deva-dāsī

Female attendant of an idol

dharmā, धर्म, dharmam

Righteousness, law, duty, merit (of an individual)

dharmasastra, धर्मशास्त्र, dharmā-śāstram

Science of dharmā, jurisprudence

gotra, गोत्रः, gotra

Agnatic lineage

illatam (or illatom), illatam

Son-in-law resident in the father-in-law's house

karnavan, kāraṇavan

Manager

karta, कर्ता, kartā

Manager

kritrima, कृत्रिमः, kṛtrima

Son adopted with his consent

kulachara, कुलाचारः, kulācāra

Usage of the family, traditional occupation

mahant (or mohunt), महन्त्, mahant

Head of a math

makkattayam (or makkathayam), makkattāyam

Agnatic succession

marumakkattayam (or marumakkathayam), marumakkattāyam

Succession (in Kerala generally) by the sister's offspring

math (or mutt), मठ, maṭham

College or religious educational establishment

matri-bandhu, मातृबन्धुः, mātṛ-bandhu

Cognate descended from mother's grandparent, etc.

misrattayam (or misrathayam), misrattāyam

Succession by issue and by marumakkattayam heirs

nibandha, निबन्धः, nibandha

Digest

pinda, पिण्डः, piṇḍa

Rice-ball

pitri-bandhu, पितृबन्धुः, pitṛ-bandhu

Cognate descended from father's grandparent, etc.

pratiloma, प्रतिलोमः, pratiloma

Union in which the female is of higher caste

pujari, पूजारी, pūjārī

Priest

sagotra, सगोत्रः, sagotra

Member of same gotra

sakulya, सकुल्यः, sakulya

Member of same family

samanodaka, समानोदकः, samānodaka

Agnate sharing duty to give water-oblation to ancestors beyond the eighth degree

santana, सन्तानः, santāna

Issue

sanyasa (for sannyasa), संन्यासः, saṁnyāsa

Renunciation of the world

sanyasi, संन्यासी, saṁnyāsī

One who has made sanyasa

sapinda, सपिण्डः, sapinḍa

Agnate or cognate who shares in piṇḍa, defined differently in the two schools

sastra, शास्त्रं, śāstram

See dharmasastra

saudayika, सौदायिकं, saudāyikam

Category of stridhanam at woman's absolute disposal

shebait (Beng. sevāī, sevāit)

Trustee or manager of an idol's property

smṛiti, स्मृतिः, smṛti

Text embodying traditional (legal) learning

sraddha, श्राद्धं, śrāddham

Offering to the gods and deceased ancestors

sthanam, स्थानं, sthānam

Dignity and property attached thereto

stridhanam, स्त्रीधनं, strī-dhanam

Female's property

tarwad, taravād

House or family

tavazhi, tāvarī

Female's descendants and herself, within a tarwad

varna, वर्णः, varṇa

Caste (one of the four classes of Hindu caste society)

vyavahara, व्यवहारः, vyavahāra

Actual practice, legal transactions

CHAPTER ONE

History, Sources and Application of Hindu Law

HISTORY

1. The Hindu law when Europeans first undertook to administer it to Indians, that is to say in the mid-eighteenth century,¹ was already at least two thousand years old. The *Arthashastra* of Kautilya, written in its original form (it is commonly agreed) in Mauryan times, contains rules of law not noticeably inharmonious with the *smritis* (§ 4) that were still the ultimate authorities in and about 1750. No one supposes that Kautilya had no *smriti* material before him, even if it was not in the identical form in which we now find it; and early editions, not now extant, of Manu, Gautama and other, now fragmentary, authors must have existed anterior to 500 B.C. If texts of a recognizably *smriti* character existed, the rules and customs that formed the raw material for such treatises must have been far older. There are ample evidences in the *Rig-Veda* and other Vedic texts, in the *Brahmanas* and *Aranyakas*, which are commonly dated about the end of the second millennium B.C., that the Indians who were subsequently called Hindus followed customs identifiable amongst the materials presented in our current editions of Manu and the other *smritikaras*, or authors of continuous *smritis*. At all stages, however, modification and development of the rules of law have taken place: those which occurred during the British period and under the French-Indian administration are better documented and more controversial than others, but they were not the first. The partial abolition of what we call the Anglo-Hindu law during the codification of 1955-6 was yet a further stage in the process whereby the system was adapted to suit current needs, and it will not be the last. The genius of the traditional Hindu intellect lies in its tolerance and powers of absorption. Indeed the problem has always been

¹ Instances of its administration on Bombay Island at an earlier date may be neglected as untypical.

where to draw the line. For example, polyandry was slowly and by no means completely eliminated under the force of growing moral concepts; crude customary preliminaries to marriage were deprived of their legal effect; casual and informal methods of adoption were declared obsolete; but as fast as growing orthodoxy removed elements that began to seem incongruous, customary usages which had not gained the *smṛitikaras'* approval undermined the attempts to classify, regularize, and fix what was lawful. The general rule that the judge must apply equity (*nyaya*, or *yukti*) as well as law inevitably led to wholesale modifications of textbook law in practice. When new problems arose in the foreign possessions or as a result of foreign government, and new solutions gave rise to fresh problems in their turn, Indians who had not actively devised the inevitable departures received them *de facto* with relatively little discomfort, and in no time at all had made the resulting amalgam their own. The movement from *dharmasastra* to Anglo-Hindu law was more gradual than that from the latter to the Modern Hindu law, which after all emerged in the space of two years, but there is no reason to believe that the first was a more truly *Hindu* system than the second. Traditional perhaps, but tradition is an active and not a passive process, and when India has a Civil Code, in which all trace of the personal laws as such will be lost, the system now current will be regarded as 'traditional'.

2. The *dharmasastra* is the Indian classical 'science of righteousness'. In spite of its character it is, in so far as it deals with law, no less characteristically jurisprudential than its coevals, the Roman and the Jewish law; and it would be a great mistake to suppose that it was founded or rooted in theology or philosophy, much as a truly religious way of life inspired its best teachers, and much as wide concepts of duty and humility before the divine guided their choice between customs with equal claims to recognition on practical grounds. One need not know much about 'Hinduism' (whatever that tantalizing word means) in order to be able to handle any stage of Hindu law. The system did not, originally, require any formal courts. It was a rationalized and systematized body of customary law and observances, a collection of (for the most part) carefully justified 'oughts' and 'should nots'. When it was expressed

in written form the reasons for the majority of the rules were omitted: the oral tradition could safely be left to supply them. As with many primitive or 'underdeveloped' peoples who still survive, the ancient Hindus saw the 'after-life', or '-lives', as of one piece with this life, the transient with the substantial, and the individual did not exist apart from the needs, prejudices, and claims of his family, clan, occupational class, and ethnic group. Claims conflicted, duties cut across each other, and out of these conflicts juridical thought emerged. Invasions, upheavals, migrations, mingling of races, each in turn gave rise to new fears and doubts, new customs, new demands for the way to orthodoxy. The view that everything could be right, and yet that some ways were more right than others, led to the proliferation of compositions on the subject of righteousness; and the comparison, explanation, and digesting of such texts, which were at first oral, became a science. As a science it was not different in kind from *nrityasastra*, 'the science of music and dance', or *asvasastra*, 'the science of farriery', but its majesty as the queen of all sciences was never disputed. To be a *dharmasastrī*, or qualified exponent of *dharmasastra*, one must have mastered not only the *smritis* and their traditional glosses, but also the Vedas. This was no mean task, and it marked out the Brahman caste as the only source of jurists. Vedic study as a preliminary to legal study was as essential for the *sastra* as knowledge of the 'Prophets' and 'Writings' as well as of the Pentateuch for the Jewish exponent of the *halachah*, or rabbinical law, or a knowledge of the *Corpus Juris* of Justinian to the doctors of canon law — and for the same reasons. Without the technique of Vedic textual interpretation, and knowledge of the cruxes of Vedic practical application, the words of the *smritis*, which were believed to reproduce the gist of the Vedas, would be so much dead matter. The spirit counted no less than the letter, and the spirit was not acquired by reading alone.

3. The formal, that is to say conventional, sources of our *sastra* commenced with the Vedic texts. These were called *sruti*, 'that which, emanating from the Self-existent, is, or was, heard'. They were consulted for illustration and interpretation of *smriti* material, which was believed to be based ultimately upon *sruti*. The historical authenticity and

origins of the texts were not debated. Those whose minds contained the Vedas, like living libraries, were of necessity Brahmans, since only those who were Brahmans by caste and had retained their ritual purity and sacerdotal qualifications could recite the texts at the appropriate sacrifices or for purposes of practice and instruction. The exclusion of the Sudras, the lowest but most numerous of the Hindu castes (§ 27), from Vedic learning and so from juridical thought, was not based upon evil-minded professional jealousy as has been supposed but upon the fact that only Brahmans were able to perform the hereditary function of priesthood (though, as a caste, they soon invaded other occupations) and were willing to suffer the considerable inconveniences of that way of life.

4. Since no Vedic texts were designed for juridical purposes, the authorities for the application of law by any gathering sitting with judicial powers were the *smritis*. The word *smṛiti* is traditionally explained as the material which the sages (*rishis*) 'remembered' after the Self-existent had explained the science of righteousness to them in all possible elaboration. In fact *smṛiti* means the remembered wisdom of the generations of ancestors; hence its raw material was custom. Since the Brahmans were the teachers of the nation, their ancestors must have been the first to learn the customs and standards by which so many Hindus lived, and they must have obtained, it was imagined, the instruction wherewith to give detailed guidance to non-Brahmans. Consequently all our surviving *smritis* are attributed to sages, many of whom figure also as the remote, perhaps quite mythical, ancestors of the Brahmanical *gotras* (§ 249). The word *smṛiti* does not in fact tell us the form in which this traditional learning was handed down, but its nature. The aphoristic and laconic, maxim-like, scraps of digested juridical information used in the schools of ancient teachers have the same *sūtra* form as all very early Indian texts: notions, trapped by a few words, are strung apparently inconsequentially as if on a thread. The teachers knew what commentary provided the necessary links between the items and gave the whole coherence and meaning. The loss of this traditional learning, and the lack of detailed information, led to the development of continuous verse, or mixed verse and prose, texts which are the characteristic

form of our principal *smritis*, such as Manu, Brihaspati, Narada, Katyayana, Yajnavalkya and the rest. Most of these did not attain their present shape earlier than about 200 B.C. or later than about A.D. 200. When these in turn proved inadequate, when their tone was thought insufficiently sectarian, when the possibilities of quietly amending and adapting them faded with the growth of written digests (§ 5), fresh verse authority was sought and concocted from the 4th to the 9th centuries and even later, and fathered on ancient sages or even deities, and lent a sanctity and importance which was warranted only by the sincerity of purpose and the width of learning of their real authors. The last (so-called 'spurious') texts generally pass under the names, or as a part, of *puranas* or *tantras*.¹

5. Conflicts between *smritis* or between *smritis* and the assumed *smriti* origin of widespread usages led to a need for digests and commentaries on the most important or convenient *smritis* in the form of digests. The digest (*nibandha*) was popular amongst pandits and administrators, but it was costly and could be used only by the expert. The pure digest form did not last and comprehensive commentaries tended to take its place. Some will be mentioned below (§§ 24, 25). The technique of the authors was to arrange the *smriti* material in such a way as to produce the meaning intended, eliminating embarrassing texts as irrelevant or even spurious, and where necessary altering the readings. It is beyond the scope of this book to illustrate the jurists' maxims and methods. The last type of juridical composition was the *mula-grantha* or independent work, in which a particular topic or institution was treated independently and authorities were inserted entirely at the author's option, woven, as it were, into his arguments.

6. This range of material was only gradually made available to foreign judges during the period from 1772 onwards. At first very few books were available in translation. If we neglect Halhed's *Gentoo Code*, which was to be used with some caution, the translations of Manu by Sir William

¹ For the nature of these compositions see A. B. Keith, *History of Sanskrit Literature*, Oxford 1920; M. Winternitz, *History of Indian Literature*, I, Calcutta 1927, sec. 11; M. Krishnamachariar, *History of Classical Sanskrit Literature*, Madras 1937.

Jones and of those few texts taken up, soon afterwards, by H. T. Colebrooke and H. C. Sutherland were the only resources open to the judge in his study — and very obscure and confusing he usually found them : for there was for the most part no oral tradition to guide him. But until 1864 pandits were attached to the courts to enable the law to be expounded by experts in answer to specific questions. By then so large a body of precedent had accumulated, and so many able works in English (notably those by the Macnaghtens and Strange) had appeared purporting to explain the Hindu law, that it was felt desirable to proceed as if the court had full judicial knowledge of the system. The publication of further translations of texts helped significantly to strengthen the European and European-trained judge's confidence in handling this intricate subject. But the want of adequate oral explanations led to many a false start, and a surprising amount of 19th-century case-law is only partly competent, or even, frankly, bad. The student should not look at any pre-1930 case in Hindu law which is not mentioned in this book ; and even where one is cited he should approach it with reserve.

7. Dissatisfaction with the results, and consciousness that some sections of the Hindu community had developed beyond the reach of many faithfully-interpreted *sastric* principles, led in the same direction : statutory amendment. The principal statutes amending the Hindu law in the former British India (and some others) are set out in Appendix III below. Dissatisfaction with the pace of reform and the bewildering effects of piecemeal amendment led to the process which we conventionally, but inaccurately, call 'codification' in 1955-6. The so-called Hindu Code in its current form is set out in Appendix I.

THE SCOPE OF THE HINDU LAW

8. Hindu law is a personal law, that is to say, it is applied to Hindus in certain countries (§ 16) by virtue of their membership of a community. Within certain limits it is true to say that they take it with them wherever they go.¹ Their power of entering into transactions, their capacity to

¹ *State v. Narayandas* (1957) 59 Bom. L.R. 901 (FB).

acquire and lose status, are largely governed by this system, for the countries concerned have no Civil Code applying a national law in the contexts in question. Originally Hindu law was equipped with every branch of jurisprudence. From the subject-index and table of contents of the present book it is possible to see what remains of Hindu law in practice today. From 1772 the East India Company's courts applied the system as a matter of obligation in 'all suits regarding inheritance, marriage, caste, and other religious usages or institutions'.¹ This automatically included adoption, maintenance, and the joint family. In other topics, excluding the criminal law, but including evidence and procedure, the judge could at that period refer to the Hindu law as a matter of justice, equity and good conscience.² In many cases the Hindu law was abolished by statute or absorbed and refashioned by the application of rules of English law, but not in all. In the old Supreme Courts, whose jurisdiction survives on the original sides of our former Presidency High Courts and those which have split off from them, Hindu law was to be applied in suits concerning 'inheritance and succession to land rent and goods and all matters of contract and dealing between party and party'.³ The Hindu law of contract and quasi-contract was abolished almost entirely by statute: *damdupat* and those parts of the law of the Mitakshara joint family which relate to debts being the sole remaining portions of it. Ultimately the differences between the jurisdictions of the old Supreme Courts and the old Company's courts (since 1861 the appellate side of the High Courts and their inferior courts in the districts) have turned out to be negligible, and the student of the current law is not concerned with these matters of history.

SOURCES OF HINDU LAW

9. The sources of Hindu law are (1) the Hindu Code, (2) the decisions of the courts construing the Code with the aid of the canons of construction of statutes, (3) in

¹ Reg. of 11 Ap. 1780, s. 27; Adm. of Justice Reg., 1781, s. 93.

² *Sibnarain v. R. Chunder* (1842) Fult. 36, 66, 1 I.D. (O.S.) 683 (S.C., Cal.).

³ Regulating Act, 1781, s. 17; 5 & 6 Geo. 5, c. 61, s. 112.

residual matters not affected by the Code, the Anglo-Hindu law. The sources of the Anglo-Hindu law are the *dharmasastra* (§ 2) so far as it has not been abolished or modified by statute or by judicial decisions and those latter.

10. The sources of that element of Anglo-Hindu law which derives from judicial decisions were (i) the court's view of the *sastric* authorities and their applicability derived from an Anglo-American 'common law' outlook, (ii) the operation of principles of selection and approbation evolved by the courts out of the practical needs of administration, (iii) the judicial maxims which require special attention individually here, and finally (iv) the importation into an institution *prima facie* governed by Hindu law of English principles, or principles of universal application, or principles for which authority is to be traced in a developed system of law not incongruous with the institution in question, under the residual source of law known as 'justice, equity and good conscience'.

This is not the place to attempt an account of the principles which guided the courts in their selection and approbation of the *sastric* authorities. It must suffice to explain (i) that the commentators, where not totally ignored by the public of the locality, must be preferred to their *smriti* authorities' verbal meanings;¹ (ii) the *smritis* are to be relied upon against later writers where the latter deviate from the plain intention of the *smriti*;² (iii) commentators or digest-writers who speculate, or proceed upon analogy, without *smriti* foundation may be ignored;³ (iv) it is too late in the day to disturb the settled law by adducing new, if genuine, *smriti* or other *sastric* material;⁴ (v) many genuine *sastric* rules were never intended to operate as mandatory, but only as recommendatory principles, and great care must be exercised not to fasten upon the public as a matter of law

¹ *Collector of Madura v. Moottoo* (1868) 12 M.I.A. 397, 436; *Atmaram v. Bajirao* (1935) 62 I.A. 139, AIR 1935 P.C. 57.

² *Thakoor v. Baluk* (1866) 11 M.I.A. 139, 172-4; *Ramalakshmi v. Sivanantha* (1872) 14 M.I.A. 570, 591; *Kastoori v. Chiranjii*, AIR 1960 All. 446, 449.

³ *Puttu v. Parbati* AIR 1915 P.C. 15, 17. Where other *nibandhas* are unanimous even the *Mitakshara* cannot prevail against the *smriti*: *Kamani v. Kameshwar* AIR 1946 Pat. 316, 322.

⁴ *Thakoorain v. Mohun* (1866) 11 M.I.A. 386, 403; *Rao Kurun v. Mahomed* (1871) 14 M.I.A. 187, 196; *Arunachala v. Arumugha* AIR 1953 Mad. 550, [1952] 2 M.L.J. 280.

rules which their teachers intended only for their guidance (§ 12).¹

11. The importance of justice, equity and good conscience in the building of Anglo-Hindu law cannot be overstressed. The Privy Council laid down, or confirmed, many lines of decision in which English principles were blended with or engrafted upon Hindu principles. In particular where the texts were silent, the principles of that system did not give clear, or any, guidance, and it was necessary to prolong the indigenous material in its Anglo-Indian dress in order that it might be effective and operative in new situations, it was natural that English law, or some other system, should have been drawn upon. 'Justice, equity and good conscience' does not, in spite of dicta to the contrary,² mean English law as a matter of course. Other systems have been turned to for aid.³ In many contexts there are nearer and more obviously suitable sources of law.⁴ When English law is turned to, as it properly may be where the institution has an English origin (as, for example, nullity of marriage) or the English law has long since ruled the field (as, for example, in the law of guardianship and charities), it is not permissible to consult English, Commonwealth, or American *statutes* where the pre-statutory law was already a source of Anglo-Hindu law long ago.⁵ But to suggest that justice, equity and good conscience must invariably be English

¹ *Balwant v. Baji* (1920) 47 I.A. 213, 48 Cal. 30; *Sri Balusu v. Sri Balusu* (1899) 26 I.A. 113, 22 Mad. 398, 21 All. 460; compare *T. Hanumi v. T. Guthya* (1946) 26 Mys. L.J. 8.

² *Waghela v. Shekh* (1887) 14 I.A. 89, 96. See *Satish v. Ram* (1920) 48 Cal. 388, 407-9 (SB), per Mookerjee, A.C.J.

³ *Mayna v. Uttaram* (1864) 2 M.H.C.R. 196; *Gatha v. Moolhita* (1875) 23 W.R. 179, 181, 182. But observe *Kalgavda v. Somappa* (1909) 33 Bom. 669, 680, per Chandavarkar, J.

⁴ *Raj v. Bishen* (1882) 4 All. 343, 349-51; *Vistwanatha v. Doraiswami* (1925) 48 Mad. 944; *Venkata v. Cheekati* [1953] 1 M.L.J. 358; *Iravi v. Mathevan* AIR 1955 T.C. 55 (FB).

⁵ Statutes relieving wills from the possibility of the voidness of bequests to charity which cannot take effect under the normal rules of construction ('validation of imperfect trust provisions', see for example *Re Harpur's Will Trusts* [1961] 3 All E.R. 588 (CA) and § 777) cannot be consulted under 'justice, equity and good conscience'. Nor, one would think, statutes recognizing the validity of, and giving effect to, foreign adoptions: see § 193 below.

*common law*¹ is to go too far,² and to betray an ignorance of the origin and purpose of that famous phrase, which was in fact to exclude common law as the residual law of the East India Company's courts. Modern scholarship often throws doubts upon the accuracy of old Privy Council judgments. But though the Supreme Court of India would, if it were faced with the problems as cases of first impression, decide them differently, and though the reasonings adopted in the old cases will not always command agreement, it is too late in the day to depart from lines of authority which were founded upon this blending of Hindu and English, or other non-Hindu, principles. Where the Privy Council went beyond the law as established in decided cases it is another matter, and there is an instance of a Privy Council case being partly overruled.³ But the Supreme Court does not encourage speculative attacks on Privy Council decisions.⁴

12. The judicial maxims referred to above deserve separate attention. The maxim *communis error facit ius*, 'a common mistake of law may serve as a foundation for a legal rule', historically established many a faulty line of authority.⁵ Ignorance of the *sastra*, and misunderstandings of the significance of texts, caused blunders which have remained permanent. Where the public for a long time proceed upon the assumption that the law is so, when subsequently it is discovered to have been otherwise, that long course of conduct in reliance upon a mistaken view of the law may justify refusal to put the matter straight upon academic grounds. Yet the maxim has not been followed invariably, and there is at least one glaring instance where, because a statute was believed to have abolished a rule of Hindu law (the public having long acted upon the reverse assumption), that rule was declared obsolete judicially.⁶ The maxim *quod fieri non debuit factum valet* (known familiarly as *Factum Valet*),

¹ *Philomena v. Dara* [1943] Bom. 428; *Cheriyia v. Ouseph* AIR 1955 T.C. 255 (FB); *Manni v. Paru* AIR 1960 Ker. 195.

² *Secretary of State v. Rukhminibai* AIR 1937 Nag. 354; *Kotah v. Jhalawar* AIR 1960 Raj. 224, 231.

³ *Shrinivas v. Narayan* AIR 1954 S.C. 379, [1954] S.C.J. 408, 57 Bom. L.R. 678.

⁴ *Dolgobinda v. Nimai* [1960] S.C.J. 879, 891.

⁵ *Bhagwan v. Bhagwan* (1899) 26 I.A. 153, 166; *Jagdish v. Sheo* (1901) 28 I.A. 101, 109.

⁶ *T. Annaji v. Ragubai* (1871) 6 M.H.C.R. 400.

'what ought not to have been done may well be legally binding when done', is of Hindu as well as European origin. The courts apply it with reference to textual law and customary law alike¹ in order to allow to be valid (a) what is objected to on moral or religious grounds or as a matter of expediency,² and (b) what is prohibited, but not rendered void by text or enactment.³ The importance of this maxim is very great, and we shall frequently refer to it below. A fine field for observing its operation and non-operation is the recent Dowry Prohibition Act (App. I).

The maxim *stare decisis* is well known, and indeed characterizes the Anglo-Indian system of law by contrast with its predecessors. Its function in Hindu law must be carefully understood. A judicial decision binds courts of concurrent jurisdiction in the same State, unless it can be distinguished or there is grave reason to suspect that the law enunciated is wrong. It is a healthy practice to follow decisions even of a single judge, wherever this is possible. So a division bench should follow a division bench, and where it is suspected that a judgment of a division bench is not correct the problem should be referred to a Full Bench of three judges, in order that guidance for the future may be supplied to all courts of the State, and incorrect decisions may be overruled.⁴ It is most undesirable that single judges should differ even from single judges of other States,⁵ and it is only where genuine lines of authority have developed independently in different States that there can be an excuse for deviation between High Courts. Unfortunately the habit of independent development has long since obtained an unhealthy hold on Hindu law, and problems are far too seldom referred to Full Benches in most of the High Courts, with the result that the public is obliged to follow conceptions of the law, some of which are bound ultimately to be overruled by the Supreme Court as wrong. Wherever a decision of a High Court or a dictum or decision

¹ *Sri Balusu* (below); *Rao Balwant v. Rani Kishori* (1898) 25 I.A. 54, 20 All. 267; *Data v. Teja* AIR 1959 Punj. 428, 434.

² *Sri Balusu v. Sri Balusu* (1899) 26 I.A. 113, 144, 22 Mad. 398, 21 All. 460; *Budansa v. Fatima* (1914) 26 M.L.J. 260, 22 I.C. 697.

³ *Brindaban v. Chundra* (1886) 12 Cal. 140; *Ram v. Jagannath* (1931) 53 All. 815.

⁴ *G. Seshamma v. K. Venkata*, AIR 1940 Mad. 356, 362; *Jaisri v. Rajdeewan* [1962] S.C.J. 578, [1962] 1 An. W.R. 258 (SC).

⁵ *State of Gujarat v. Gordhandas* AIR 1962 Guj. 128 (FB).

in the Supreme Court is delivered *per incuriam*, a misfortune from which even the highest tribunal is not immune,¹ it is the duty of the lower courts to detect, isolate, and neutralize it. A decision given *per incuriam*, that is to say where the points have been insufficiently argued and counsel have shirked their duty to the public, if not to their clients and the court, can be ignored by the supreme tribunal and is therefore to be distinguished in lower courts.² We shall not infrequently have to point to this feature even in decisions of benches. Even a decision of the Privy Council may be held to be of no authority if it was obtained by concessions of counsel in matters of law, or a fair picture of the Indian case-law was not placed before their Lordships' Board.³ But assuming that the decision in question is not vitiated by any such fault, is it likely that it can be overruled if it has stood for a long time? The principle *stare decisis* ensures that even a wrong decision must be taken for law if it has held the field unquestioned for half a century or so. But the Supreme Court will not hesitate to overrule a course of decisions if they are shown to have been based upon an erroneous interpretation of law, if there is little danger that titles will be disturbed, and if in its view the harm resulting from a refashioning of the law will be less than the advantages in the way of accuracy and harmony.⁴ The law has after all to be learnt, and there are no advantages in anomalous and discordant decisions.

THE ROLE OF CUSTOM

13. Despite the solecism in the Hindu Code,⁵ custom is (with very few exceptions, such as marriage-ceremonies) not *part* of the Hindu law at all. It has not been so since about 1790. Custom is pleaded, if at all, in derogation

¹ *Young v. Bristol Aeroplane Co.* [1944] K.B. 718; *Grubb v. Bristol United Press Ltd* [1962] 2 All E.R. 380, 383, 390.

² *Parappa v. Mallappa* (1955) 58 Bom. L.R. 404, 415, AIR 1956 Bom. 332 (FB — a case not to be followed, see § 496 below) commenting on *Sakarchand v. Narayan* (1950) 52 Bom. L.R. 888 (FB). *Lalu Jela v. State* AIR 1962 Guj. 250 shows that even Full Bench answers may have to be ignored where S.C. dicta are decisive.

³ *Venkanna v. Laxmi* AIR 1951 Bom. 57.

⁴ *Maktul v. Manbhari* AIR 1958 S.C. 918, [1958] S.C.J. 1268.

⁵ HMA, s. 2 (1) (c); HMA, s. 4 (a); and elsewhere.

from the Hindu law, and thus must be visualized as its opponent, not component. We have seen that custom helped to make *smṛiti* (§ 4); it certainly influenced the compilers of *nibandhas* and the commentators. But that function is long since dead. The courts occasionally use custom as a means of construing *smṛiti*,¹ and occasionally declare the meaning of a proved custom by reference to *dharmaśāstra*,² but these curiosities of law are beyond the scope of this book. The operation of custom in the modern Hindu law of India is very restricted. The prohibited degrees for marriage (§ 246), the right of a child of 15 or over or of a married man to be adopted (§ 159), the right to a dissolution by a caste tribunal of one's marriage (§ 274), the right to be a *sanyasi* (§ 374), the right to maintenance out of impartible estates (§ 844) and other rights recognized in the field of the joint-family law and other chapters preserved intact from codification: these appear to be the topics in which custom may properly be pleaded today. In all other respects custom is abrogated by the Code.³

14. Formerly in every field of Hindu law custom might be pleaded in derogation from a rule of the personal law. Clear proof of usage will outweigh the written text of the law.⁴ In the Punjab the local custom, provable by him who asserts it in the first instance from the *rivaj-i-am*, the local record of general rights and customs, which was presumed to be binding upon residents,⁵ was to be applied in preference to the personal law, which remained, however, the residual law.⁶ In order that a custom might be proved otherwise than from a *rivaj-i-am*, in other words in most districts other than the Punjab and some parts of Uttar Pradesh, it must be either (a) a custom of which, by long

¹ *Vallabhdas v. Sakarbai* (1901) 25 Bom. 281, 286.

² *Maktul v. Manbhari* AIR 1958 S.C. 918, [1958] S.C.J. 1268. In *Vallabhalalji v. Mahalaxmi* (1961) 64 Bom. L.R. 433, 436 (SC), AIR 1962 S.C. 356 the *sastra* was inspected to determine if the alleged custom was *prima facie* likely.

³ *Taro v. Darshan* AIR 1960 Punj. 145 (dictum regarding reversioners' selection is wrong).

⁴ *Coll. of Madura v. Moottoo* (1868) 12 M.I.A. 397, 436.

⁵ *Gokal v. Parvin* AIR 1952 S.C. 231, [1952] SCR 825, [1953] Pun. 1, but see *Salig v. Munshi* AIR 1961 S.C. 1374.

⁶ *Ujagar v. Jeo* AIR 1959 S.C. 1041, [1960] S.C.J. 16.

usage, the court will take judicial notice¹ — such as the custom to adopt a sister's son in Madras, or the custom of *illatom* adoption, or the custom of the *tarwad* — or (b) a custom which complies with the legal requirements of a valid custom. Customs are construed with extreme strictness.² It is most particularly to be observed that custom cannot be extended, when proved, by analogy;³ though when the nature and extent of the custom is in doubt and, as in the Punjab, it is usual to seek light from an authoritative digest such as that of Rattigan, it may be permissible to interpret and apply the written record by analogy, or to supplement the oral and documentary evidence of custom by rational extensions, cautiously applied.⁴

A custom was proved amongst Amethia Thakurs of Oudh whereby daughters were excluded from succession. It is established that at the time when the customs must have grown the daughter's daughter could not be an heir according to the Benares school of Hindu law (§ 609). A daughter's daughter claimed an estate as heir. It was held that though the daughter's son was excluded according to the alleged customary law and the daughter herself, the allegation that daughters' daughters were also excluded had not been sustained.⁵

Amongst Arab Sauads of the Rohtak district the daughter of a deceased brother claimed to exclude the son of a sister. No instance of succession by a brother's daughter could be proved. By a judicial decision it had been settled that by custom a son represented his deceased father in a succession. There were proved instances of a widow (for example a son's widow) representing her deceased husband, and of an uncle's daughter representing her deceased father in a succession. Sex was evidently no bar to representation as such. It was held that it would be anomalous and arbitrary to deny a brother's daughter the right of succession in representation of her deceased father.⁶

It is not essential to prove a custom from actual instances — though this is the best method. General evidence, as for example proof of conduct by members of the caste which

¹ *Allah v. Sona* AIR 1942 All. 331, [1942] All. L.J. 443; *Munnalal v. Rajkumar* AIR 1962 S.C. 1493.

² *Allah* (cited above).

³ *T. Saraswathi v. Jagadambal* AIR 1953 S.C. 201, [1953] SCR 939.

⁴ *Narayan v. Niranjana* AIR 1924 P.C. 5, 51 I.A. 37, 3 Pat. 183. *Salig v. Munshi* AIR 1961 S.C. 1374; *Madhavrao v. Raghavendrarao* [1946] Bom. 375, AIR 1946 Bom. 377.

⁵ *Vikarna v. Parbati* AIR 1961 All. 97. Similarly *Nirodhini v. Nanda* AIR 1945 Cal. 213, [1944] 1 Cal. 552.

⁶ *Hashmat v. Nasib-ul-Nisa* (1924) 52 I.A. 172, 6 Lah. 117, 123.

could be explained upon the basis of the custom will often suffice.¹

15. The requirements of a valid custom are set out fairly adequately in s. 3 (a) of the Hindu Marriage Act (which will be cited hereafter as HMA).² It must be (i) a rule which has been continuously and uniformly observed for a long time. The words 'long time' must be construed, it is submitted, in accordance with the Anglo-Hindu law on the subject: a custom may be binding in point of antiquity if it extends as far back as memory suffices, so that a custom proved to have prevailed for the last 40 years or so may well be 'ancient', or have been observed for a 'long time' for our purpose.³ (ii) It must have obtained the force of law among Hindus in any area, tribe, community, group, or even family, that is to say it must be regarded by them as binding, even if it is only a permissive or facultative custom,⁴ by virtue of law.⁵ (iii) It must be certain. The burden of proof lies on the one asserting that a custom is applicable and it is his duty to show exactly what the custom is, and how it relates to the issue. A vague assertion that females never inherit would illustrate an uncertain custom; so also that a share is given to daughters, without proof of what proportion is in fact to be allowed. (iv) It must not be unreasonable or immoral,⁶ nor opposed to statute⁷ or public policy. An alleged custom that one may take soil from another's land would be unreasonable and void.⁸ An alleged

¹ *Ahmad v. Channi* (1925) 52 I.A. 379, 6 Lah. 502; *Vaishno v. Rameshri* (1928) 55 I.A. 407, 10 Lah. 86; but compare *Sardar v. Fatima* (1941) 68 I.A. 104, AIR 1941 P.C. 62.

² *N. Venkata v. T. Bhujangayya* AIR 1960 An. P. 412, [1960] 1 An. W.R. 215; *Gigi v. Panna* AIR 1956 Ass. 100. See also *Kirpal v. Bachan* [1958] S.C.J. 438, AIR 1958 S.C. 199.

³ *Gokal* (cited above); *N. Venkata* (cited above).

⁴ *Madhavrao* (cited above); *Motiram v. Sukma* AIR 1960 M.P. 46.

⁵ For two examples of alleged customs held not proved to be binding as if they were law see *Chidambaram v. Subramanian* AIR 1953 Mad. 492, [1952] 2 M.L.J. 524.

⁶ *Chinna v. Tegarai* (1876) 1 Mad. 168 (*devadasis*).

⁷ *P. Latchamma v. M. Appalaswamy* AIR 1961 An. P. 55.

⁸ Compare *K. Venkadu v. G. Subbaramiah* [1954] 2 M.L.J. (Andh.) 24; *Shibnarain v. Bhutnath* (1917) 45 Cal. 475, 479-80; *Saladur v. Oajaddin* (1936) 63 Cal. 851.

custom to marry the granddaughter would be void.¹ So also an alleged custom of sale of a religious office of trust, such as that of a *mahant* (§817).² But a custom to allow the remarriage of a woman whose divorce had taken place without formality, the custom allowing informal divorces, would not necessarily be invalid for immorality.³ Since a family may abandon or discontinue a custom in favour of the general law, which discontinuance could be proved by conduct and not necessarily from an overt agreement, it is naturally required (v) that the alleged custom shall not in such cases have been discontinued. Discontinuance or non-user of a custom by a caste or sub-caste will not have the effect of abrogating the custom, even if it is of a permissive character, unless the court has declared it obsolete, a step the court would naturally be reluctant to take except upon the clearest evidence. Failure to comply with a valid custom can no more abrogate that custom than breaches of the law abolish the law. The Code strangely omits to deal with the discontinuance or mutation of a custom of groups larger than a family, where the spirit of the times may be held to have modified the custom in the direction of the personal law. The fluidity of Punjab Customary Law was adverted to in *Ujagar v. Jeeo*,⁴ and there is no doubt but that for several years it has been accepted that developments in Hindu general social opinion may have the effect of nullifying the custom recorded in the *riwaj-i-am*.⁵ What has been detected in the case of the Punjab may apply in principle to other regions. It is possible to rebut allegations of invariability by proof of instances where the reverse was done, and done without question. It is now also possible to allege that a well-established custom is no longer applicable because the public have reacted in favour of the personal law in its modern dress. This is a subject which demands closer scrutiny, but as we have seen, the scope of custom is now so small in India that it can hardly be agitated as an urgent problem.

¹ *Balusami v. Balkrishna* AIR 1957 Mad. 97, [1956] 2 M.L.J. 357.

² *Rajah v. Ravi* (1876) 4 I.A. 76, 1 Mad. 235.

³ *Puyam v. Moiranthem* AIR 1956 Man. 18. Compare *Uji v. Hathi* (1870) 7 B.H.C.R. ACJ 133; *Rambhabai v. Kanji* AIR 1953 Sau. 88.

⁴ AIR 1959 S.C. 1041, 1046, [1960] S.C.J. 16.

⁵ *Data v. Teja* AIR 1959 Punj. 428.

APPLICATION OF HINDU LAW

16. There is no reason to suppose that Hindu law, whether by this expression the Anglo-Hindu law is meant or the modern Hindu law, is repugnant to the Indian Constitution. Even if the rules appear to interfere with religious belief, or discriminate between residents in different regions, between castes, or between the sexes, the personal laws are retained intact by the provisions of the Constitution,¹ and cannot be cut down otherwise than by legislation. Legislation reforming Hindu law will be valid² provided it conforms to the directive principles set out in the Constitution, for the policy and direction of such reform was undoubtedly envisaged in general terms by the founders.

The Hindu Code applies to all India except the former French and Portuguese possessions to which it has not yet been applied, and excepting the State of Jammu and Kashmir, which has a code of its own agreeing verbally with the Hindu Code but differing from it in minutiae such as the numbering of sections.³ In French India the Franco-Hindu law applies,⁴ together with the rule, common in former French colonies, that a 'native' may opt to be governed by the law of the governing power in civil matters, that is to say opt to become as if he were a Frenchman to whom all the articles of the French Civil Code would be applied. Particulars of Franco-Hindu law are beyond the scope of this book. In the former Portuguese India vestiges of Hindu law were still applicable to the Hindus who were nominally governed, in the main, by the Portuguese Civil Law. In matters not covered by the Hindu Code there applies in the former State of Baroda a codified system based on the *Hindu Nibandha* (Hindu Act, 1937); and in Kolhapur a system based on an old edition of Mulla's textbook.⁵ The particulars are beyond our scope. The Anglo-Hindu law still applies in Pakistan and Burma. As the personal law of Hindus it still has to be taken into account as a matter of custom in Malaya. It is not clear whether it

¹ *State of Bombay v. Narasu* AIR 1952 Bom. 84.

² *Srinivasa v. Saraswathi* AIR 1952 Mad. 193; *Ram v. State* AIR 1957 All. 411; *Chennamma v. Dyana* AIR 1953 Mys. 136.

³ The (Kashmir) Ladakh Budhists [*sic*] Succession to Property Act (18 of 2000) is beyond our scope.

⁴ See Act 49 of 1962, ss. 4, 10.

⁵ *Bhalchandra v. Balkrishna* (1951) 54 Bom. L.R. 52.

is to be applied in Hong Kong: probably it is.¹ In East Africa the position is somewhat peculiar. The system is undoubtedly in force, but subject to conditions including statutory modifications which would be too lengthy to set out here and which have been relegated to chapter 11.

Whenever it is necessary to refer to the law of a Hindu's domicile (§§ 228, 394) it must be borne in mind that the Hindu Code may be amended by State statutes. The Hindu Marriage (Uttar Pradesh Sanshodan Adhiniyam), Act 13 of 1962, provided e.g., for divorce in cases of cruelty. This amendment, which may be copied or improved upon elsewhere, applies to Hindus domiciled in the State or to the marriage of parties one of whom was a Hindu domiciled in that State.

17. The vast majority of persons to whom Hindu law applies are Hindus, and to the definition of Hindu one must give attention. It is so notoriously difficult that in practice the courts are likely to apply today the definition set out in the Hindu Code even in respect of cases where the cause of action arose before 1955-6. A Hindu is one or other of two classes of persons shown below as 'A' or 'B'. (A) A Hindu is a person, irrespective of sex, age, mental condition or religious belief, who is not a Muslim, Christian, Parsi or Jew by religion provided (i) that he is domiciled in India (see § 21), and (ii) that he could have been governed by Hindu law or by any custom derogating from Hindu law if the Code had not been passed.² Proof of being a Muslim, Christian, Parsi or Jew by religion is fortunately not likely to be a matter of difficulty in most cases. The court is not interested in the subtleties of religious faith in this context, but rather in formal manifestations of membership of religious communities, which is a very different matter. A Hindu may also be (B) a person, whether domiciled in India or not, who is a Hindu by religion.³ For this purpose

¹ S. 5 of the Supreme Court Ordinance, 1873 (*Laws of Hong Kong*, 1950, Cap. 4) provides that the laws of England (specified) shall be in force except so far as the said laws are inapplicable to the local circumstances of the Colony or of its inhabitants. Similar provisions of the Singapore Charters have let in customary laws of marriage, adoption, and succession (*inter alia*), and it is submitted that as 'inhabitants' Hindus, however few, rank *pari passu* with the predominant Chinese population.

² HMA, s. 2 (1) (c). Chinese Confucianists are amongst those excluded.

³ HMA, s. 2 (1) (a).

all sects and 'developments' of Hinduism, even those which are regarded as non-Hindu in some respects, such as Lingayats¹ or Brahmos, are Hindus. Buddhists, Jains and Sikhs are Hindus for this purpose.² Wherever the word 'Hindu' occurs we are to understand a person to whom the Hindu Code applies even though he may not be in fact a Hindu by religion according to any theological definition.³ Thus one who renounces all deities and rites may be a Hindu, as is one who is outcasted. But a member of a community whose ancestors were once Hindus but who have long been cut off from Hinduism and traditionally conform to the practices of non-Hindus would not be Hindus by religion⁴ even if they came within (A) above and so qualified for the application to them of Hindu law. A convert to,⁵ or a reconvert to,⁶ the Hindu, Buddhist, Jaina or Sikh religion is a Hindu. The court will not be concerned with the sincerity of⁷ or motives for conversion or reconversion but with its actuality and social implications. A mere declaration of relapse or reconversion, for example, might not be sufficient evidence of change of community for the purpose of applying a different personal law,⁸ but there is no question of the reconvert having to undergo any particular ceremony unless this is proved to be customary.⁹ A legitimate or illegitimate child one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and is brought up as a member of the group or family to which

¹ See *Sangannagouda v. Kalkangouda* AIR 1960 Mys. 147.

² HMA, s. 2 (1) (b). The former law agreed: *Bhikubai v. Manilal* (1930) 54 Bom. 780, AIR 1930 Bom. 517; *Gigi v. Panna* AIR 1956 Ass. 100; *Bhagwan v. Jogendra* (1903) 30 I.A. 249, 31 Cal. 11.

³ HMA, s. 2(3). *Bhagwan* (cited above); *Nalinaksha v. Rajanikanta* (1931) 58 Cal. 1392, AIR 1931 Cal. 741; *Raghunath v. Shyam* AIR 1961 Or. 157.

⁴ *Ma Tait v. Maung* (1921) 48 I.A. 553, 49 Cal. 310.

⁵ *Morarji v. Adm. Gen.* AIR 1928 Mad. 1279, 52 Mad. 160. A formal conversion is not essential: *Ramayya v. Josephine* AIR 1937 Mad. 172, but see n. 9 below.

⁶ HMA, s. 2 (1) expl. (c).

⁷ *Abdool v. Aga* (1894) 21 I.A. 56, 64, 21 Cal. 666; *Rakeya v. Anil* (1947) 52 C.W.N. 142 (SB). See G.W. Bartholomew at (1952) 1 *Int. Comp. L.Q.* 342ff.

⁸ *Ramayya* (cited above); *A. Marthamma v. A. Munuswamy* AIR 1951 Mad. 888, [1951] 1 M.L.J. 694.

⁹ *G. Durgaprasada v. G. Sudarsanaswami* AIR 1940 Mad. 513, [1940] Mad. 653. But see *Adm. Gen. v. Anandachari* (1886) 9 Mad. 466, 470 (dictum: a case of Brahmans).

that parent belongs or belonged is a Hindu within category (B).¹ A child abandoned by his parents, or whose parentage is unknown, is a Hindu for purposes of adoption and maintenance if he is brought up as a Hindu.² Naturally if both parents are Hindus, etc., or one is a Hindu and another a Sikh, etc., the child will be a Hindu.

18. Formerly anyone might be a Hindu if his way of life, however unorthodox, conformed to a pattern derived traditionally from a Hindu background. The admixture of Muslim beliefs and habits and even membership of a sect comprising both Hindus and Muslims would not deprive him of his right to be classed as a Hindu.³ But a group might fall between two stools and be neither Hindu nor Muslim.⁴ On the other hand insufficiently Hinduized tribes, who follow some Hindu institutions by custom, remain non-Hindus and cannot have the entire Hindu law applied to them as a matter of course as their personal law.⁵ A non-Hindu tribe might, however, be Hinduized as to law, and be presumed to be entitled to have the entire personal law applied to them exactly as if they were Hindus, subject to custom derogating therefrom in particular matters in the usual way.⁶ It was often a difficult question of fact whether a group were Hindus or non-Hindus, and whether the process of Hinduization had progressed so that they were Hindus at law. Illegitimate children were Hindus if their mothers were Hindus.⁷ There is a presumption that persons bearing recognizable Hindu names, employing Brahmans in their ceremonies, recognizing the *samskaras* (§ 208) or even following Hindu customs and ceremonies without adopting Brahmanical rituals, are Hindus.⁸ Belief in the transmigration of the soul, the caste system, and the sacred character of the cow have also been suggested as tests, but they seem old-fashioned today.

¹ HMA, s. 2 (1) expl. (b). ² HAMA, s. 1, expl. (bb).

³ *State v. Yagna* (1958) 61 Bom. L.R. 700.

⁴ *Raj v. Bishen* (1882) 4 All. 343, 349-51.

⁵ *Fanindra v. Rajeswar* (1885) 12 I.A. 72, 11 Cal. 463; *Sahdeo v. Kusum* AIR 1923 P.C. 21, 50 I.A. 58, 27 C.W.N. 901; *Miran v. Hanslal* AIR 1930 Nag. 57.

⁶ *Chattar v. Roshan* AIR 1946 Nag. 277, 294-6, [1946] Nag. 159.

⁷ *Lingappa v. Esudasan* (1904) 27 Mad. 13.

⁸ *Chunku v. Bhabani* AIR 1946 Pat. 218, 24 Pat. 727; *Nagi v. Rajkunwar* AIR 1956 Nag. 138, [1956] Nag. 181; *Budhu v. Dukhan* AIR 1956 Pat. 123.

Perhaps the best test is whether people claim to be Hindus and are acknowledged as Hindus by their immediately contiguous society.¹

19. Members of a Scheduled Tribe within the meaning of Art. 366 (25) of the Constitution are for the present exempted from the Code until such time as the Central Government notifies otherwise in the *Government of India Gazette*.²

20. On the other hand Christians descended from Hindus and resident in former Princely States, retaining their former law of the joint family unaffected by the application of local or central statutes,³ and also certain Muslim communities (not Cutchi Memons) similarly placed, continue to be governed by Hindu law as their customary law.⁴ Although the Indian Succession Act has been extended to Mysore, therefore, Christians there may adopt, and their adopted sons may have rights in joint-family property (though not succession) as if they were Hindus, if the ancestors of those Christians were Hindus and the family system (apart from polygamy and divorce) had not been abandoned.⁵ In the case of Muslims, statutes attempting to subject them to the Muhammadan law⁶ have not applied to all classes of property, nor to all the institutions of the personal law, with the curious result that in some areas and with regard to some property, particularly joint-family property and interests in agricultural land in some States, Hindu law may be applied to Muslims. The details of this situation are too specialized for this book.⁷ Outside India, as for example in Burma and East Africa, Khojas and certain other Muslim communities of Indian origin are governed by Hindu law in matters of joint family and succession.

¹ *Rafail v. Baiha* AIR 1957 Pat. 70, 72.

² HMA, s. 2 (2).

³ *Chinnaswamy v. Anthonyswamy* AIR 1961 Ker. 161. Compare: *Kamawati v. Digbijai* AIR 1922 P.C. 14, 48 I.A. 381, 43 All. 525.

⁴ *Muhammad v. Gnana* AIR 1934 Mad. 327, 66 M.L.J. 671

⁵ *Kiritappa v. Aralappa* (1935) 13 Mys. L.J. 302.

⁶ The Shariat Act, 1937 (note that under s. 3 (1) a declaration has to be made by the individual); the Cutchi Memons Act, 1938, does not affect the community in respect of joint-family property in the States of Madras and Andhra (*Siddick v. Ebrahim* AIR 1921 Mad. 571, and compare *Abdul v. Provident* AIR 1954 Mad. 961, 965).

⁷ Gupte, *Hindu Law* (1947), ch. 30.

21. A problem has been created by HMA, s. 1 (2). Though s. 2 of the same Act shows that it applies to Hindus generally ('any person who . . .') the subsection referred to applies the Act to Hindus domiciled in India (except Jammu and Kashmir) who may be outside the said territories. It has been suggested with some cogency¹ that these provisions make an exception to the normal Anglo-American principles of Conflict of Laws. It may be preferable to construe the provisions otherwise. S. 1 should be read as if the normal Conflict rules were included, that is to say that matters of form must be governed by the *lex loci celebrationis*, capacity to marry by the *lex domicilii* (§ 288), and so on, with the result that a Kenya-domiciled Hindu's capacity to marry will still be governed by the Kenya law (§ 851) and not the HMA, but if he seeks matrimonial relief while in India the HMA may apply.² If this is correct s. 1 (2) merely incorporates the Conflict rule that an Indian-domiciled Hindu resident in Pakistan or Burma has only that capacity to marry which he would have in the land of his domicile. In that respect he carries his law with him. So we read s. 1 (2) as if it were 'and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories to the extent that private international law permits' and s. 2 as if it read 'This Act applies . . . to any person who is a Hindu . . . who would be subject to it under the rules of private international law'.³

SCHOOLS OF LAW

22. The modern Hindu law is concerned with the schools and sub-schools of law in the realm of the joint family. The Hindu Code was intended to abolish reference to schools of law and to substitute a single common statutory standard for all Hindus in India. In the former law, and still in regard to the important subject which has been touched only marginally by codification, it is essential to know to which school the party, or his family, belongs. To know that he is governed by Hindu law is not enough. The personal law is

¹ Gupte, *Hindu Law of Marriage* (1961), p. 71.

² If *Sunil v. Alo* [1962] 2 All. 715, 726 is correct.

³ *Bloxam v. Favre* (1883) 9 P.D. 130; *Re Lyne's Settlement Trusts* [1919] 1 Ch. 80; *Re Simpson* [1916] 1 Ch. 502; *Re Lloyd Generale* (1885) 29 Ch. D. 219.

not really 'Hindu law', but, for example, 'Hindu law of the Mitakshara school'. The main schools are the Mitakshara and the Dayabhaga. They take their names from Vijñanesvara's *Mitakshara* (written about A.D. 1125), a commentary on the *smṛiti* of Yajñavalkya and a product of the juridical scholarship of the Deccan, and the somewhat earlier work of Jimutavahana, the *Dayabhaga*, an independent treatise on the subject of partition and succession and the chief textbook of the rich school of jurists fostered by Bengal. It is important to realize that these works, treated by the British as the chief textbooks on law (and therefore translated by Colebrooke in part, as to the Mitakshara, and wholly in respect of the companion work) were roughly contemporary. The notion current at one time that Jimutavahana lived some centuries later than Vijñanesvara has been conclusively disproved. Vijñanesvara had notice of the essence of his senior colleague's theories and rejected them. The British however utilized ideas learnt from the Dayabhaga and current in Bengal in interpreting problems arising under the Mitakshara—an unfortunate mistake which cannot now be undone, but which has introduced complexities into the law which could not easily be accounted for if we did not know the depth of the ignorance of the early Anglo-Hindu legal administration.

23. The Bengal school is regarded as dissident from the so-called Benares (Varanasi) or majority school. Attempts to reconcile as much of Bengali doctrine as possible with the characteristic views of the Benares school led to late productions which have been of no little influence, though they have maintained a general character which is true to the majority school in matters of succession, where the greatest practical discrepancies arose. The chief example is the *Viramitrodaya*, a digest by Mitra Misra (about 1630). Having regard to the topics with which we are most concerned in this book the Benares school utilizes particularly Vijñanesvara, Mitra Misra, to some extent Kamalakara Bhatta, the author of the *Nirnayasindhu* and *Vivadatanḍava*, and Balam Bhatta, a pandit who worked for Colebrooke.

24. Sub-schools of the Benares school exist. The Southern, sometimes called Dravida, sub-school follows the Mitakshara as interpreted, or the general law as understood, by Devanna

Bhatta, author of the magnificent *Smritichandrika* (about 1250), Madhavacharya, author of the *Parasaramadhaviya* (about 1350), and Pratapa Rudra, author or patron of the vast *Sarasvativilasa* (about 1525) only part of which has been published. In Kerala the last-named has no special authority. In Maharashtra and Gujarat the Mitakshara was in vigour at three levels. In that part of Maharashtra which was formerly the Central Provinces (later part of the former Madhya Pradesh) the school presumed to apply was the Benares school and the specifically 'Bombay' school was applied only to the numerous immigrant Maharashtrian population.¹ The so-called 'Bombay' or Maharashtrian sub-school reconciles the Mitakshara with the *Vyavaharamayukha* of Nilakantha Bhatta, a part of a huge digest compiled about 1630. In regard however to families belonging to Gujarat, North Konkan and Bombay Island itself the Mayukha, as it is usually known, takes precedence over the Mitakshara where they differ. Thus the nominally Mitakshara school as applied by the High Courts of Maharashtra, Gujarat and Mysore (in respect of the districts which were formerly in the Bombay Karnatak) appears in two guises, Mitakshara contaminated by Mayukha doctrines, and Mayukha with a residual Mitakshara element. In Mithila, a part of the State of Bihar,² a further sub-school is in vogue, but very few rules diverging from the Benares school are accepted (see for example § 148). The chief books of the sub-school are the *Vivada-ratnakara* of Chandesvara, the *Vivada-chandra* of Misaru Misra, and the *Vivada-chintamani* of the jurist-logician Vachaspati Misra. Apart altogether from questions of school, the works on adoption which first attracted attention in the Anglo-Indian courts have not been uniformly followed. The academic *Dattaka-mimamsa* of Nanda Pandita and the *Dattaka-chandrika* of Kubera Bhatta were consulted all over India, but where they differed the High Courts of Madras and Calcutta favoured the *Chandrika*, while the rest followed the other authority.

25. In Bengal, where there are no sub-schools, the works of authority were the *Dayabhaga* itself and the works of

¹ *Udebhan v. Vikram* AIR 1957 M.P. 175, 177; compare *Shankarrao v. Annapurnabai* AIR 1961 Bom. 266; *Keshao v. Sadasheo* AIR 1938 Nag. 163, [1938] Nag. 469.

² V. Mishra, 'Ancient Mithila . . .', *Ind. Hist. Q.* xxxv (1959), 151-65.

Sulapani, the *Daya-tattva* of Raghunandana, the *Daya-kramasangraha* of Sri Krishna Tarkalankara, and, subject to occasional reservations, the Digest of Jagannatha called *Vivada-bhangamava* and always referred to as Colebrooke's Digest because Colebrooke made it available in translation. In regard to all the schools the courts have followed in general the practice of not allowing the pupils to modify the law as stated by their masters. The basic rule, as we have seen, was that the *sastric* law should be applied according to the commentaries that had been received in the various districts, and not according to the *smritis* themselves. The parties were not in fact put to the proof that any particular commentary had been received in their region,¹ and it was inevitable that certain books should become primarily the resort of particular High Courts. Discoveries of a historical character are continually being made in the *sastric* material; but it is much too late in the day to upset established courses of authority merely to make way for a rule based upon academic and perhaps even speculative foundations.²

26. Residents of a district are presumed to be governed by the school of the district. Bengal and Assam follow the Dayabhaga school, the rest the Benares school or one of its sub-schools. The presumption is rebutted if it is shown that the person, family, or the family's ancestors moved or migrated into the district from another region where another school or sub-school *prima facie* applied.³ In such a case the original school is applicable. The burden of proof that the original school, and not the local school, is *not* applicable lies upon him who asserts that the local school is to be applied. It is not an easy burden to discharge.⁴ The only position open to him is to prove that the newcomers or their descendants adopted the local law,

¹ *Bhagwan v. Bhagwan* (1899) 26 I.A. 153, 21 All. 412, 1 Bom. L.R. 311.

² *Himoti v. Manoharsingh* AIR 1945 Nag. 71, 72; *Perumal v. Madras* AIR 1955 Mad. 382; *M. R. Radhakrishnan v. Union of India* AIR 1959 Mad. 71; *Madanvali v. Balu* AIR 1960 Mys. 299, 302-3; *Arunachala v. Arumugha* AIR 1953 Mad. 550, 551.

³ *Balwant v. Baji* AIR 1921 P.C. 59, 47 I.A. 213, 48 Cal. 30; *Chandrakanto v. Ram* AIR 1956 Cal. 577, 60 C.W.N. 1006; *Kanyalal v. Cont. E. D.* AIR 1961 An. P. 333.

⁴ *Parbati v. Jagadis* (1902) 29 I.A. 82, 29 Cal. 433; *Sonabai v. Lakhmibai* AIR 1957 Nag. 76, [1956] Nag. 580.

conforming to the manners, customs, and usages of the people amongst whom they came to dwell.¹ Normally migrating groups retain most tenaciously their school as they retain their dialect or regional language. We have seen that a man carries his school of personal law with him wherever he goes within the countries where Hindu law is applied. Changes effected in the law of the school applicable in the district of origin are reflected in the law applied to the migrating family if those changes have emerged through judicial decisions,² for the law was what it now is, according to accepted common law doctrine. But statutory amendments do not have this effect, for local statutes cannot be given extraterritorial effect for this purpose. Local statutes naturally affect all residents, whatever their school, unless the statute otherwise provides; but they may affect the devolution of land in the States in question wherever the owner might happen to be domiciled and whatever his school.³

All Hindus domiciled in India have an Indian and not a State domicile:⁴ hence a Bengali dying in 1955 in Kerala and owning lands in Benares and Bombay would be succeeded in respect of all those lands by the heir selected according to the Dayabhaga school as administered in the High Courts of Allahabad and Bombay. Any difference in the law applied will result from the divergences between the High Courts (§ 12) and not from any question relating to the school of law. The situation of the land is relevant in that the High Court of the State in which it is situated will in most cases be the forum for any dispute regarding succession thereto, and it is quite possible, indeed in some cases certain, that if heirs of a person who died before codification litigate regarding lands owned by the *propositus* in West Bengal and Bihar, and also about his moveable estate, the *propositus* being governed by the Dayabhaga

¹ *Sarada v. Umakanta* AIR 1923 Cal. 485, 50 Cal. 370.

² *Lachham v. Jhagar* AIR 1939 All. 437, [1939] All. 406.

³ *Keshava v. Rama* (1946) 25 Mys. L.J. 94. The student will profit from a close attention to my discussion of *Ratan v. Sunder* AIR 1959 Cal. 787 at (1960) *Int. and Comp. L. Q.*, 510ff., and § 196 below.

⁴ The dicta of Venkatarama Ayyar, J., to the contrary in *D. P. Joshi v. State* [1955] S.C.J. 298, 302-3, AIR 1955 S.C. 334 are not only obiter but directed to another point. Compare *State v. Narayandas* (1957) 59 Bom. L.R. 901, 906. *Kamlabai v. Devram* AIR 1955 Bom. 300 may require reconsideration. See Sri T. S. Rama Rao at (1955) 4 I.Y.B.I.A., 227-34.

school or by the Mitakshara school, a different heir will be selected for the lands in each State, for those High Courts frequently differ in their interpretation of the identical school: whether different heirs would take the moveables would depend upon the procedure adopted, particularly if those who possess the estate are subject to the jurisdictions of different High Courts. The procedural aspect is beyond the scope of this book.

It remains to add the important principle that when a region is transferred, as for example by reorganization of States, from the jurisdiction of one High Court to that of another the personal law does not change. Acute differences exist between the interpretation of Mitakshara law by the High Court of Madras and that of Bombay, as we have seen. The Mitakshara law of Bombay would not be recognized as Mitakshara law in Madras. Territories transferred from Madras to Bombay as far back as 1861 gave rise to a decision which throws light on the transfers that took place after Independence and again in 1956. In *Somasekhara v. Mahadeva*¹ the Privy Council held, upon a concession by counsel in reference to North Kanara, that the transfer of a district for administrative reasons cannot affect the personal law of the residents. This must be correct on principle. But it was held in *Venkanna v. Laxmi*² that Hindus of North Kanara (the district transferred in 1861) were in fact governed by the Bombay school and not by the Madras school of Mitakshara law, and the division bench distinguished the Privy Council decision on the ground that it was not firmly grounded in history or law so far as North Kanara was concerned. But the principle as such remained undisturbed. If this is so, the residents of former Bombay territories now under the jurisdiction of the Mysore High Court have not ceased to be governed by the Bombay school in respect of matters where that school may properly be consulted, and it is understood that this is currently accepted as law.

THE CONCEPT OF CASTE

27. In law it is impossible to conceive of a Hindu without a caste, ardently as modern Hindus desire to see the caste

¹ AIR 1936 P.C. 18, 38 Bom. L.R. 377, 70 M.L.J. 159.

² AIR 1951 Bom. 57, 53 Bom. L.R. 192.

system eliminated. The Hindu Code aims to remove caste as a factor in determining the law applicable to a Hindu family. It has nearly succeeded. What follows applies to the very few marginal topics in which caste may still have to be consulted directly or indirectly, and to the former law. The law recognizes four *varnas*, or 'classes', usually called castes.¹ It also recognizes mixed *varnas*, classes due actually or fictionally to *anuloma* or *pratiloma* marriages in times past (§ 252). The four *varnas* are the Brahmans, Kshatriyas, and Vaisyas (originally 'priests', 'rulers', 'merchants'), who are entitled to wear the sacred thread indicating initiation into Vedic study, and so called the 'twice-born', and the Sudras, who should not wear the sacred thread and are excluded by any reference to twice-born. All mixed castes are by definition higher than Sudras, and so capable of being called twice-born,² though their actual position relative to the other twice-born castes is not important in most legal problems where the question can arise. Such a question could arise in a competition between sons by different wives of different *varnas* (§ 533), a problem such as would delight the old-fashioned practitioner of Hindu law, and might amuse the student, but would be an abuse of his limited time. Briefly, the son by a mother of mixed caste ought to take proportionately less than the son whose mother was of the same caste as the father, or of higher caste than his own mother, upon analogy with the rules for distribution amongst sons by mothers of pure *varna*. All such competing sons, one need hardly add, are themselves of mixed *varna* (except the son of the father's caste who takes the lion's share): but that is not the point of the problem. We need not worry with the sons of *pratiloma* unions as they are almost certainly illegitimate if the marriage took place before 1955 (§ 252).

28. Caste is obtained by birth, or by conversion. In law there are no untouchables as a fifth caste (compare popular speech), and therefore all untouchables and converts to Hinduism are in law Sudras. By his own will an individual cannot change or 'improve' his caste, even by

¹ *Manickam v. Poongavanammal* AIR 1934 Mad. 323, 66 M.L.J. 543.

² *Brindavana v. Radhamani* (1888) 12 Mad. 72; *Jwala v. Sardar* (1919)

41 All. 629.

adopting another religion,¹ provided, of course, that he does not embrace Islam or Christianity, which would take him out of the scope of Hindu law in modern times. The pathetic attempts of Harijans to change their status by becoming Buddhists may have had some effect socially, but not, it seems, at Hindu law. A man's endeavours, and efforts to change his status by living amongst twice-born and copying their habits, or even his merits as a public figure, cannot have any effect on his caste.² Apparently if an entire caste wish to be recognized as members of a higher caste and the latter do not, or cannot effectively, oppose them, change in caste-status may theoretically be effected by resolution. An instance is not known to me, though I believe such 'improvements' used to happen in pre-British periods. Such an alteration cannot, in any event, be effected by mere majority decision at a caste assembly or otherwise.³

29. A Hindu who is not a Brahman, Kshatriya, Vaisya or of legitimate mixed *varna*, must be a Sudra. The convert is bound to be a Sudra.⁴ Otherwise the chief test whether a person is a Sudra or a 'twice-born' is whether the sacred thread is traditionally worn,⁵ whether *mantras* are recited at the marriage-ceremonies, and whether the marriage ceremonies otherwise conform to patterns usual amongst twice-born. Affirmative answers will help to show that the group are twice-born. The practice of remarriage of widows, allowing shares in inheritance to illegitimate sons, and still more the practice of divorce by caste custom are almost decisive signs of Sudra status.⁶ A conclusive test is whether the family in question is received and accepted by persons of undoubtedly twice-born caste as a caste-equal, and the usual indicia are intermarriage and willingness to partake of cooked food together (called in Anglo-Indian speech 'interdining').

¹ *B. Shyamsunder v. Shankar* AIR 1960 Mys. 27; compare *Narayan v. Punjabrao* (1958) 60 Bom. L.R. 776.

² *V. V. Giri v. D. Suri* AIR 1959 S.C. 1318 (majority view).

³ *M. I. Sankaram v. M. I. Madhavan* AIR 1955 Mad. 579.

⁴ *Muthusami v. Masilamani* (1909) 33 Mad. 342, 346; *Morarji v. Adm. Gen.* AIR 1928 Mad. 1279, 52 Mad. 160.

⁵ *A. Pitchamma v. Battu* [1956] An. W.R. 314.

⁶ *Ishwari v. Rai* (1926) 6 Pat. 506, 517, 535; *A. Pitchamma v. Battu* [1956] An. W.R. 314; *Bhagwani v. Khushi* (1914) 24 I.C. 982; *Maharaja of Kolhapur v. S. Sundaram* AIR 1925 Mad. 497; *Subrao v. Radha* (1928) 52 Bom. 497.

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CHAPTER TWO

Legitimacy, and Rights and Duties arising from Birth

30. As soon as a Hindu child is born he or she has certain legal rights and a certain legal status. This may differ in some respects according to the school of law to which his parents were subject. We are concerned here with the status of the Hindu child, other than the child of Hindus married under either of the Special Marriage Acts (§ 209), but it must be remembered that the law entitles all minors, whatever their personal law, to the protection and to the benefit of legal institutions; and in respect of, for example, the child's right to bind the parent's property for necessities or to be admitted to the benefit of a partnership the relevant portions of the general law must be consulted. The peculiarities of Hindu law must be studied separately under the headings of guardianship (ch. 3), adoption (ch. 4), marriage (ch. 5) and the joint family and partition (ch. 6). In the last mentioned chapter and in this present rights of maintenance are dealt with. Most striking of these peculiarities is the Mitakshara birthright, or the right of a male child born alive¹ to an enjoyment of an interest in the property of a joint Hindu family governed by the Mitakshara school of law, an interest which relates back to the date of conception, so that improper alienations of the family property in the interval between conception and birth² can be upset by him or on his behalf (§ 473). In other contexts the rights of the male Hindu child arise for the first time at his birth, as where he seeks under the pre-1956 system to divest property in the hands of a provisional heir such as the widow;³ or from the date of the death of the *propositus* (the deceased owner of an estate passing by inheritance) in a case where the child claimant was in his mother's womb and thus in existence in the eye of the law at that time. For the law holds *nasciturus pro iam nato*, 'he who is about

¹ *Sooranna v. Venkataratnam* [1951] 2 M.L.J. 664.

² *K. Venkata v. K. Ramalingam* [1957] 1 An. W.R. 31.

³ *Hira v. Buta* (1919) 1 Lah. L.J. 36, 56 I.C. 256.

to be born alive is to be taken as already born'.¹ The place of this maxim in the Anglo-Hindu law was thoroughly discussed by that celebrated judge Sir Asutosh Mookerjee in *Kusum v. Dasarathi*,² a judgment of lasting value, wherefrom it appears that Hindu jurists and English and continental authorities were at one on this point. It has no place in fiscal contexts, where it is not sought to protect the rights of the child himself.³

31. So long as a child claims a right by virtue of *paternity*, this paternity must be established (i) by presumption, or in cases where the presumption cannot be relied upon, where, for example, the child is claiming maintenance, (ii) by cogent evidence. Entries in a register of births are seldom cogent by themselves. They are seldom relied upon without corroboration, even as to maternity, which is a much simpler question.⁴ Paternity is after all a concept *iure civili*, that is, established by the municipal law, whereas maternity is a matter of fact, a concept *iure naturali*, established by the very nature of things,⁵ so that claims from or through the mother need not be established with the aid of any presumption. The point can perhaps be clarified by a story taken out of legal history. Since an idiot cannot be a party to a contract or execute a deed or will it might be necessary to establish whether X was an idiot, or natural fool. Amongst the tests usually applied were questions directed to elicit whether X knew his name, his age, who his parents were, and the like. Jurists soon pointed out that although it was fair to ask the alleged idiot, 'Friend, who is thy mother?', it was quite improper to ask 'Friend, who is thy father?', since even a wise man cannot say with conviction who his father is. Therefore it was established that the form of

¹ A rule now incorporated in the HSA, s. 20. It may be applied also in construing bequests to individuals 'born in the lifetime' of a named person: *Re Stern's Will Trusts* [1961] 3 All E.R. 1129. The Hindu law fully accepts the fiction where the child is within the reason and motive of the gift, for this rule of English law enters under 'justice, equity and good conscience' (§ 11).

² AIR 1921 Cal. 487, 67 I.C. 210.

³ *T. S. Srinivasan v. Comm. I.T.* AIR 1962 Mad. 146.

⁴ *Paryanibai v. Bajirao* (1961) 64 Bom. L.R. 86, 90.

⁵ *Y. Venkanna v. N. Narayanamma* AIR 1954 Mad. 136, 137, [1953] Mad. 1235, per Mack, J.

question must be, 'Friend, who is reputed to be thy father?'¹

Whether a man is or was the father of a particular child cannot easily be proved or disproved, even though in maintenance cases it is usual to attempt to disprove paternity by the result of blood-grouping tests. Certain 'advanced' systems of law, for purposes of claims to property, treat on an equal footing both a substantiated claim to have been begotten by *A* and a claim by a child born during a valid marriage between *A* and the child's mother. Anglo-Hindu law however followed the common law in segregating the illegitimate children from the legitimate, i.e. those whose birth during a valid marriage or within a statutory period thereafter served to raise the presumption of legitimacy in their favour. The modern Hindu law provides adequately for illegitimate children,² whilst retaining the rule that only legitimate children may inherit property on intestacy from, or through, their fathers.³ At modern Hindu law all illegitimate children (§ 32) of a woman are related to her for purposes of inheritance indistinguishably from each other, whatever their sex, and whether or not they are legitimate children of their respective fathers: a careful distinction is maintained however as regards claims from collaterals. Illegitimate children inherit from each other, and the legitimate descendants of such children inherit from their illegitimate aunts and uncles and from each other; but there is *no* heritable link between legitimate children and their descendants on the one hand, and those legitimate children's mother's *illegitimate* issue and their descendants on the other.⁴ The illegitimate children of a man have no rights of inheritance collaterally (unless they have the same mother), that is to say from their illegitimate brothers or their legitimate brothers, or the issue of either: and vice versa.

Against the proposition stated above it might be urged that when the Act says, in the proviso referred to, 'any word expressing relationship . . . shall be construed accordingly', the word 'accordingly' would oblige us to read 'daughter's son' as including a daughter's illegitimate son

¹ H. Swinburn, *Brief Treatise of Testaments* (1590-1), fo. 39b, margin.

² HAMA, ss. 20 (2), 21 (viii), (ix).

³ HSA, s. 3 (1) (j).

⁴ HSA, s. 3 (1) (j) prov.

(which is not unlikely), and even 'brother' as including an illegitimate uterine brother of a legitimate child of the same mother (which would be a novelty in Hindu law). If the last suggestion were correct collateral and reciprocal succession by descendants of a woman, whether legitimate or illegitimate, would be established, with far-reaching implications. Logic does indeed urge that if the principle 'illegitimates shall be deemed to be related to their mother' is to be followed out 'accordingly', even collateral succession cannot be hampered by illegitimacy, so long as the relationship is uterine (and therefore, naturally, cognatic). But Parliament's intention would appear to have been principally to confirm the motives of the previous case-law, namely to acknowledge the reciprocal relationship of mother and child, and to recognize heritable right within a lineage of a matrilineal and partly or wholly illegitimate character. Descendants, not collaterals, appear to be within the contemplation of the law.¹

The definition of a legitimate child at Hindu law is that of the Anglo-Hindu law, which the 'Hindu Code' has not modified. *Pater est quem nuptiae demonstrant*, 'he is the father whom the marriage (itself) indicates'. A child born to a wife even a day after the marriage took place is the lawful child of the husband, and this presumption of paternity continues under the Indian Evidence Act, s. 112, for 280 days after the marriage is dissolved by death or divorce, provided that the mother did not remarry during that period. If she remarried the child would, since he was born during another marriage, be presumed the legitimate child of that marriage under the same section. The only method of rebutting the statutory presumption which that section provides is proof that the parties to the marriage had no access to each other at any time when the child could have been begotten. The husband's impotence is treated on the same footing. When the husband can be shown to have been in prison or at a distance so that there was no opportunity of intercourse the burden of proof of legitimacy is shifted,² and the otherwise conclusive presumption is rebutted. In the

¹ I have argued a less conservative construction elsewhere, pending judicial interpretation.

² *C. Venkateswarlu v. C. Venkatanarayana* AIR 1954 S.C. 176, [1954] SCR 424, [1954] S.C.J. 84.

interesting case of *Narayana v. Bharathi*¹ it was held as a fact (that is to say the conscience of the court was satisfied) that the husband did not have access, though he might well have had access had he wished, and the wife was living at all material times with an adulterer. In such circumstances the presumption was rebutted; but it is submitted that in such cases, wherever there is the slightest scintilla of doubt whether the husband ever visited the wife during the material period, the presumption must hold good. In view of the provisions of the Evidence Act, which is a codifying, defining, and amending statute, it is not open to adduce other means of rebutting the presumption, as, for example, by showing that a decree of judicial separation had been passed anterior to the time when conception must have taken place, or the duty to cohabit had otherwise been terminated. In practice the presumption is very rarely rebutted.

A was born to *W* who was married to *H* during the period when *A* must have been conceived. *W* admitted an adulterous association with *X* at or about the time of *A*'s conception in which contraceptives were not used. *W* and *H* gave evidence that during the same period they had intercourse using contraceptives on each occasion. *A* was held to be the legitimate child of *H*, for the burden of proving that he could not have been begotten by *H* was not discharged.²

A was born to *W* who was married to *H* at the time of his conception. *W* and *H* belonged to a caste in which polyandry was once customary. *B*, *H*'s younger brother, habitually cohabited with *W*, and recognized *A* as his son. After the death of *B* leaving separate properties *A* sought to succeed to them as *B*'s son. It was held that as he was presumed to be the son of *H* he had no claim to any filial relationship with *B*.³

W, a friend of *X*, filed a suit for divorce from her husband, *H*, in February 1961. In early March 1961 *H* visited *W* in an attempt to effect reconciliation, and intercourse took place 290 and 275 days respectively before *A*'s birth in December 1961. *W*'s marriage to *H* was dissolved by decree 281 days before *A*'s birth. *A* would not be presumed to be the child of *H*. To establish his legitimacy it will be necessary to prove that he must have been conceived on the earlier occasion.⁴ Whether or not *W* was committing adultery with *X* would not alter this position.

A was born to *W* 279 days after January 10th, 1919, the day her husband died. He was born during the continuance of *W*'s marriage

¹ [1962] K.L.T. 138. The learned judge relies upon *Sreenivasan v. Kirubai* AIR 1957 Mad. 160. But *semble*, this was not sufficient authority?

² *Francis v. Francis* [1959] 3 All E.R. 206.

³ *Bhagavathi v. Ayyappan* AIR 1953 T.C. 470, [1952] T.C. 930.

⁴ English law seems to be otherwise: *Knowles v. Knowles* [1962] 1 All E.R. 659.

to X, which was solemnized on February 25th, 1919. A was the legitimate child of X.¹

Where a child is born more than 280 days after the termination of the mother's marriage there is no presumption in favour of his legitimacy, other than the interest of the State in preserving the status of its citizens and the law's presumption against a mother's having led an immoral life. Births up to 349 days after the last intercourse have been held by the courts not to be illegitimate.² Certainly such late births are not evidence against the mother's honour without additional evidence.³

No subsequent change in the law can turn a person presumed legitimate into an illegitimate person.⁴

32. Any child who is not legitimate is illegitimate. In India there is no legitimation by subsequent marriage of the parents. The common law notion of the *filius nullius*, 'child of no one', the child who had no legal heritable connexion (anomalously) with either parent has been adopted to this extent that, whatever the *sastra* may have implied on the subject, a child born illegitimately of a mother was not allowed a legal relationship with his legitimate brothers or sisters (except in the case of the Sudra's *dasiputra* ('concubine's son') on which see § 526) nor with his mother's parents or collaterals, unless the family was matrilineal (as in the legal systems peculiar to Kerala) or governed by a customary law in this regard, as in particular the communities of *devadasis* or temple prostitutes. It was believed that for heritable relationship there must be 'legitimate kinship', an expression which excludes mere blood relationship that is unfortified by the presumption of legitimacy (§ 31). A misunderstanding obtained currency, for it has been asserted that sapindaship (§ 606) cannot exist without a valid marriage between the parents of the person who claims, or who is claimed, to be a sapinda (§ 242) for the purpose of tracing a claim. As a result collaterals undoubtedly connected by blood have been held to be without heritable

¹ *Pal v. Jagir* (1926) 7 Lah. 368.

² *Gaskill v. Gaskill* [1921] P. 425; *Hadlum v. Hadlum* [1949] P. 197; *Uttamrao v. Sitaram* (1962) 64 Bom. L.R. 752, 757, 758-61.

³ As happened in *M.-T. v. M.-T.* [1949] P. 331; cf. *Preston-Jones v. Preston-Jones* [1951] 1 All E.R. 124 (HL). See dicta at *Uttamrao* (cited above), 761-2.

⁴ *Arokyathammal v. Mokayee* [1959] Mad. 449.

connexion, because a link was an illegitimate child of a female, herself the next link in the chain of relationship. Dicta and decisions pointing in another direction take occasional and perhaps improper aid from decisions dealing with the, decidedly exceptional, *devadasi* families.¹ Whether the Anglo-Hindu law allowed an illegitimate son of a daughter to claim equally with a legitimate son of a daughter (a proposition towards which the *sastra* may well have been favourably inclined) is still unknown. The case of *State of Madras v. Ramanatha Rao*² is an authority for this and related propositions, in that an illegitimate son of a daughter of a daughter of a woman whose legitimate descendants were claiming his estate was held to be their heritable collateral. But decisions based upon a contrary view of the requirements of heritable relationship, in particular the decision of the Bombay High Court in *Pandurang v. Adm. Gen.*,³ where Chagla, C.J., refused to allow the relationship in very similar circumstances, were inadequately distinguished, and the reasoning itself is somewhat confused. Since the decision in *State of Madras* accords with the policy of the HSA, s. 3 (1) (j), it is very probable, however, that it will be followed in India, whatever its value as an authority outside India.⁴ Formerly illegitimate children might inherit from their *mother*,⁵ and vice versa.⁶ The illegitimate child might not succeed on intestacy to the mother's mother.⁷ Where legitimate and illegitimate children competed the correct position was, it is submitted,⁸ that an illegitimate daughter would share equally with a legitimate daughter (except that the unmarried daughter would have a preference),⁹

¹ On the *devadasis* and the liberal view of relationship in their families now in vogue see *Krishna v. Marimuthu* (1939) 50 L.W. 282, [1939] 2 M.L.J. 424; *Viswanatha v. Doraiswami* (1925) 48 Mad. 944, AIR 1926 Mad. 289; *Venkata v. Cheekati* [1953] 1 M.L.J. 358. Cf. *Meenakshi v. Murugayya* AIR 1940 Mad. 463, [1940] Mad. 739.

² AIR 1960 Mad. 436, [1960] Mad. 800.

³ [1953] Bom. 436, (1952) 54 Bom. L.R. 892.

⁴ The case is criticized by Sri T. P. Gopalakrishnan at (1959) 3 Y.B. Leg. St. (Mad.) 122ff; and also at [1963] 1 M.L.J. (Jour.) 13-18.

⁵ *Y. Venkanna v. Narayanamma* AIR 1954 Mad. 136, [1953] Mad. 1235.

⁶ *Jagannath v. Sher* (1934) 57 All. 85, AIR 1935 All. 329.

⁷ *Meenakshi v. Murugayya* AIR 1940 Mad. 463, [1940] Mad. 739, followed by *Gangamma v. Veerappa* (1947) 26 Mys. L.J. 50, and differing from *Angammal v. Venkata* (1902) 26 Mad. 509.

⁸ See the law relating to *stridhanam* (§ 629).

⁹ As in *Venkata v. Cheekati* (cited above) approved for non-*devadasis* in *State of Madras* (cited above); and see *Sunder v. Jhaboo* AIR 1957 All. 215.

but would exclude a son. There are decisions in which the illegitimate son and daughter have been allowed to succeed to their mother together,¹ and the legitimate son has been allowed to exclude the illegitimate daughter.² Still worse, the husband has been allowed to exclude the illegitimate child. Illegitimate children of a woman were long ago held capable of inheriting from each other.³

33. The special position of the Sudra's *dasiputra* is noticed elsewhere (§ 526), but it is of interest to note here that he was entitled to inherit from his father but from no other member of the family, except by survivorship from a brother; that his father was allowed to succeed to him,⁴ and that he was, perhaps in error, allowed to succeed in representation of his deceased father to the property of his father's father.⁵ This authority is now too old to dispute. Needless to say, the modern Hindu law countenances no such position.

34. Special attention must be given to the status of children of dissolved marriages and marriages annulled on a ground which had rendered them voidable. The legitimacy of children of dissolved marriages is in any case unaffected by the dissolution, and statutory provision to 'relieve' them is merely declaratory. But the children of voidable marriages are, according to common law,⁶ bastardized by the decree of nullity, which operates retrospectively to the commencement of the marriage and so removes the presumption of legitimacy. Statutory relief (§ 302) enables these children (if the marriage took place after 18 May 1955) to hold a qualification approaching legitimacy so as to enable them to inherit from their parents, or obtain a birthright through the father in Mitakshara coparcenary property. They cannot

¹ *Sudarshan v. Suresh* AIR 1960 Pat. 45, ignoring *Dattatraya v. Matha* (1933) 58 Bom. 119, 35 Bom. L.R. 1131.

² *Meenakshi v. Muniandi* (1914) 38 Mad. 1144.

³ *Mayna Bai v. Uttaram* (1864) 2 M.H.C.R. 196.

⁴ *V. Subramania v. Rathnavelu* (1917) 41 Mad. 44 (FB), AIR 1918 Mad. 1346.

⁵ *Ramalinga v. Pavadai* (1901) 25 Mad. 519.

⁶ *R. E. L. v. E. L.* [1949] P. 211. Jackson, *Formation and Annulment of Marriage*, 36f, 75; the discussion at pp. 76-8 is too technical for a student of modern Hindu law, in which many of the distinctions do not apply.

inherit from other relations, except under a will if they would have been so entitled if the statutory relief had not been available to them.¹

P bequeaths Rs. 1,000 to each son of *A. X*, born of *A*'s marriage with *B* which is annulled before or after the death of *P*, cannot take or retain (as the case may be) the legacy.

P bequeaths Rs. 1,000 to *X*, the son of *A. A*'s marriage with *X*'s mother is annulled. *X* can nevertheless take the legacy.

These children are not within the contemplation of the Hindu Succession Act, 1956 (hereafter referred to as HSA), s. 3 (1) (j), and cannot take advantage of the statutory relationship through their mothers to their mother's blood kindred (§ 31), for *generalia specialibus non derogant*,² the HSA being later in date than the HMA.

35. Under s. 20 (1) and (2) of the Hindu Adoptions and Maintenance Act, 1956 (hereafter referred to as HAMA) both parents are liable to maintain minor legitimate and illegitimate children, provided the latter are not converted from Hinduism — for from the moment of their conversion the liability of the former ceases (s. 24).³ In the case of illegitimate children paternity must be established. The right at Hindu law is in addition to the right to apply under s. 488 of the Criminal Procedure Code. The child is not obliged to sue the father first. Where the parents are separated he can sue either or both at his option. It is doubtful whether under s. 20 (3) (which gives an *unmarried* daughter the right to be maintained) a *major* unmarried daughter is entitled to maintenance. No doubt her rights against joint-family property, if any, remain intact, for though the HAMA is a codifying statute it does not, as we shall see, destroy rights under the Anglo-Hindu law unless it expressly so provides or makes provision for the question; and the joint family is, by and large, outside the scope of the HAMA except to the extent that an interest in Mitakshara joint-family property has passed by succession under the HSA.

¹ HMA, s. 16.

² Maxwell, *Interp. of Statutes*, 10th edn, 176-85. A general provision, promulgated later than a special provision within the same field, does not repeal the latter without express words or necessary intendment and is deemed to have been made with the intention of retaining the earlier rule as an exception.

³ On the effect of conversion on the right to *arrears* of maintenance see [1963] 1 M.L.J. (Jour.) 18-20.

Since the major unmarried daughter's rights to maintenance under the old law have not been abrogated by the HAMA it appears that they still subsist.¹

36. Formerly the legitimate minor child and major unmarried daughter were entitled to maintenance from the father, and the right extended to his separate property (except impartible estates, unless custom permitted)² and to his interest in joint-family property.³ The illegitimate son, even if not a *dasiputra* (that is to say, a son by a kept concubine), was entitled in all castes to be maintained by the father or out of the father's estate until majority;⁴ the *dasiputra* of a Sudra was alone entitled to maintenance for his life,⁵ or until he obtained a share in his father's estate. The progressive extension of the right of maintenance to all illegitimate sons,⁶ even, it seems better to hold⁷ (despite a decision⁸ and innumerable dicta to the contrary⁹), adulterine and incestuous bastards, was not reproduced to the advantage of illegitimate daughters, for whom no specific text could be found.¹⁰ The illegitimate daughter was confined to her remedy under the Criminal Procedure Code. This prevented her from enjoying the ampler rights available at Hindu law to the major unmarried daughter, for under the Code the putative father is not liable to maintain a child beyond majority nor has the daughter any right, through the father, against his joint-family property for any purpose, including marriage expenses or dowry. The children's right

¹ *Sundarambal v. Suppiah* AIR 1961 Mad. 323 does not settle the question.

² *Chelladorai v. Varagunarama* AIR 1961 Mad. 42.

³ § 550 (vi).

⁴ *Muniappa v. Kuppuswami* [1942] 1 M.L.J. 181, AIR 1942 Mad. 419 (2).

⁵ *Vellaiyappa v. Natarajan* (1931) 58 I.A. 402, AIR 1931 P.C. 294, 33 Bom. L.R. 1526.

⁶ *Rahi v. Govind* (1875) 1 Bom. 97.

⁷ *Subramania v. Valu* (1910) 34 Mad. 68; *Chamava v. Iraya* AIR 1931 Bom. 492, 33 Bom. L.R. 1082. Since a married woman can be a concubine; and since no one tells us how to define an incestuous union at Hindu law. Is intercourse with a cousin less 'incestuous' (a purely non-Indian term) than intercourse with a sister? If so, why?

⁸ *Vencatachella v. Parvatham* (1875) 8 M.H.C.R. 134.

⁹ *Manorama v. Rama* AIR 1957 Mad. 269, 290b, note b.

¹⁰ *Mukta v. Kamalaksha* AIR 1960 Mys. 182; *Padmavati v. Ramchandra* AIR 1951 Or. 248.

against their mother for maintenance seems never to have been judicially investigated.

37. Under s. 20 (3) of the HAMA a minor unmarried daughter is entitled to maintenance only to the extent that she is not able to support herself out of her own earnings or other property. The illegitimate son is not so handicapped: we shall revert to him presently. It appears that if she has been given valuable jewellery, the sale-proceeds of which would, if invested, maintain her, she would not be entitled to claim maintenance from her father, if he were already overburdened with claims from unendowed children. This problem is unlikely to arise in so acute a form, since in cases liable to lead to estrangements, such as a second marriage of the parent, provision for the children of the earlier marriage is usually made. But illegitimate daughters may well be put up to make extravagant claims from which the putative father may need to defend himself and his legitimate family.

38. It is generally true now, as previously, that an illegitimate son claiming maintenance will succeed only if he can show that he is in real need. Where he is earning his livelihood he may still obtain out of the funds available what is reasonable in the circumstances in recognition of his being, though illegitimate, a son.¹ On the other hand there is no warrant for the opinion that an illegitimate child is entitled only to compassionate maintenance. He is not to be treated in a niggardly fashion; regard must be had to his existing mode of life, provided that his claims do not put the family to hardship.²

39. To secure the payment of future maintenance, and even (in its discretion) of arrears of maintenance, the court may create a charge over the parent's property, whether in specific terms, or generally.³ So long as a charge has not been created the parent is free to transfer the property

¹ *Yenumula v. State* AIR 1959 An. P. 487, 491; *Tikaram v. Narayan-singh* AIR 1958 Ma. P. 231, [1958] 1 An. W.R. 71.

² *Mothey v. Koney* AIR 1953 S.C. 433, [1952] S.C.J. 507, [1952] 2 M.L.J. 342. *Rathinasabapathy v. Gopala* AIR 1929 Mad. 545, 56 M.L.J. 673.

³ *Chamava* (cited above).

without risk of encumbering it with the right of maintenance if certain precautions are followed, which will be outlined in another connexion (§ 663).

40. From legitimate birth alone arises the obligation to maintain the parents. The obligation is personal and does not depend on the inheritance of any property.¹ The same was the position under the former system. Nor is it affected by agreements between any children or step-children under this liability. Even an unchaste mother may have to be maintained by her son, for the statute lays down no conditions, and the former law insisted upon none. But the mother's conduct will be reflected in the amount decreed to her.² The illegitimate child's estate after his or her death is not liable to support even the mother, with whom, as we have seen, the relationship is one of fact and not mere presumption. It is true that s. 21 of the HAMA provides that 'father' and 'mother' are 'dependants' of a deceased person, but the normal rule of interpretation applies, and while illegitimate children are dependants (s. 21 (viii), (ix)), illegitimate parents are not. It is provided however that the childless step-mother is included in the word 'parent' (of a legitimate child). There is a superadded condition (s. 20 (3)) that the parents must be unable to maintain themselves out of their earnings or other property respectively. The former law appears to have been identical,³ though it is very doubtful whether an illegitimate child could escape his natural liability to support his aged, infirm, and needy mother. The court will, as under the former law, refuse maintenance to a mother or a step-mother who has already inherited a son's share or taken such a share at a partition (§ 532),⁴ and step-mothers are not entitled to be maintained by step-sons where their own sons are capable of maintaining them.⁵ But where provision has been made for maintenance and it has been lost or squandered there seems to be no rule of law which would prevent the parent having

¹ HAMA, s. 20 (1); *Subbarayana v. Subbaka* (1884) 8 Mad. 236; *Satyanarayanamurthy v. Ramasubamma* [1961] 2 An. W.R. (NRC) 11.

² *Valu v. Ganga* (1883) 7 Bom. 84.

³ There is no authority for the proposition that a well-to-do aged or infirm parent may demand maintenance from his or her child.

⁴ *Samu v. Shahji* AIR 1961 Raj. 207 (dictum).

⁵ *Hemangini v. Kedar* (1889) 16 I.A. 115, 16 Cal. 758.

recourse to the child for maintenance, and all agreements are open to review under s. 25 of the HAMA, if there has been a material change of circumstances.

41. In the case of the legitimate child the father, and after him the mother, and in the case of the illegitimate child the mother only, has the right to take the earnings, if any, lawfully acquired by the child during minority and set them off against the cost of the child's keep and education (if any). The parent is not, however, entitled as such to sue an employer on contracts entered into by the latter whereby wages are due to the child. Yet the minor child, though frequently excused remunerative employment by the parent, stands always to the parent as a servant for limited purposes in the eye of the law. The parent has an action against a third party who interferes with the child's capacity to earn. Thus a seducer who imposes upon a father the costs and inconvenience of his minor daughter's pregnancy is liable to him in damages exactly as at common law *quod servitium amisit*, 'because he lost the services (of the daughter)'.¹

FURTHER READING

Modern Hindu Law

- D. H. Chaudhari, *Hindu Adoptions and Maintenance Act*, Calcutta, 1957.
 R. N. Tewary, *Commentaries on the Hindu Adoptions and Maintenance Act*, Allahabad, 1957.
 N. R. Raghavachariar, *Hindu Law*, 4th edn, Madras (M.L.J. Office), 1960, pp. 207, 1065.
 D. F. Mulla, *Principles and Precedents*, ed. S. T. Desai, 12th edn, Bombay (Tripathi), 1959, pp. 1045ff.
 E. Guttmann, 'Presumptions of legitimacy and paternity arising out of birth in lawful wedlock,' (1956) *Inter. and Comp. L.Q.*, pp. 217-44.
 G. K. Dabke, 'Legitimacy of children of void and voidable marriages,' (1956) 58 Bom. L.R. (J.), pp. 148ff.
 N. Parameswaran Moothath, 'Presumption of legitimacy,' [1961] K.L.T. (J.), pp. 26-32.
 J. D. M. Derrett, 'Illegitimates: a test for modern Hindu family law,' (1961) 8 *J. Am. Or. Soc.*, pp. 251-61.

¹ *Baboo v. Subarshi* [1942] Nag. 650, AIR 1942 Nag. 99.

Anglo-Hindu Law

- J. D. Mayne, *Treatise on Hindu Law and Usage*, ed. N. Chandra-sekhara Aiyar, 11th edn, Madras (Higginbothams), 1950, pp. 66-83, 527-9, 682.
- N. R. Raghavachariar, *op. cit.*, ch. 4.
- J. D. M. Derrett, 'Inheritance By, From and Through Illegitimates at Hindu Law,' 57 Bom. L.R. (J.), pp. 1-22, 25-39.
- J. D. M. Derrett, 'More about Illegitimacy at Hindu Law,' 57 Bom. L.R. (J.), pp. 89-98.
- J. D. M. Derrett, 'Kamalakara on Illegitimates,' (1956) 58 Bom. L.R. (J.), pp. 177-87.

The Historical Background

- P. V. Kane, *History of Dharmasastra*, III, pp. 601-3, 803-5.
- N. C. Sen-Gupta, *Evolution of Ancient Indian Law*, ch. 7.

CHAPTER THREE

Minority and Guardianship

THE NATURE AND PURPOSE OF GUARDIANSHIP

42. The guardianship with which we are concerned is the guardianship of minors. Apart from provisions in lunacy, which do not form part of the personal law, there are no guardians of adults, and the *de facto* guardian of an idiot or lunatic adult or of an adult deaf-mute has no power at law, and his dealings with the adult's property are void.¹

43. Hindus of both sexes remain minors until they complete their 18th year.²

44. Formerly the date when they reached majority was governed by the personal law for purposes of marriage, divorce, and adoption,³ but the anomaly was swept away by the Hindu Minority and Guardianship Act. Where a guardian is appointed under the Guardians and Wards Act (referred to below as GWA), a statute which is to be read together with the HMGA as a composite legislative provision,⁴ or under any Court of Wards statute, the attainment of majority is postponed until the completion of the 21st year. The general terms of HMGA, s. 4 (a) do not affect the provisions of the earlier statutes, and in any case *generalia specialibus non derogant*.

45. The common law allowed minors to appoint agents and to nominate their own guardians. The former provision is not expressed in modern Indian law,⁵ though it may in fact survive by virtue of justice, equity and good conscience; the same would appear to be the case with the latter.⁶ We must

¹ *Narayan v. Ramchandra* AIR 1957 Bom. 146 (FB), [1957] Bom. 724 (FB); *Karuppa v. Periaswami* [1960] 1 M.L.J. 360.

² HMGA, s. 4 (a).

³ Indian Majority Act, 1875, ss. 2, 3.

⁴ HMGA, s. 2. *Rattan v. Kamaljit* AIR 1961 Pun. 51.

⁵ Contract Act, 1872, s. 183.

⁶ Contract Act, 1872, s. 183.

postpone consideration of the powers of persons invited by minors to handle their affairs until we deal with the controversial figure of Anglo-Hindu law, the *de facto* guardian of a minor (§§ 52, 110). Contracts by minors of every description are void at Indian law,¹ but for necessities the person who gives them credit *bona fide* will have a right of reimbursement against their property, if any.² A minor is however bound by contracts validly entered into on his behalf by his guardian, and a great part of this chapter will be concerned with the requirements of valid contracts. An example of a contract which is personally binding upon the minor (and therefore an example of a very restricted class of contracts) is the betrothal contract.³ An example of an agreement which binds his future expectations rather than present proprietary rights is the rule that for the furtherance of a minor's education the guardian may enter into an agreement on his behalf that he may receive an advance from the joint-family funds on condition that it shall be repaid out of the share which the minor will take at a partition after he attains majority.⁴

46. The guardianship of minors is traditionally viewed as a right, and not seldom as a right which can be profitable. The law, however, regards guardianship as a duty, which may be exercised only for the benefit of the minor. The Hindu law anciently left with the King the duty of protecting the property of minors, but very little beyond the general principles of minority and guardianship found its way into the textbooks. Since the commencement of the British period it is established law that the court is the ultimate guardian of all minors, and that other guardians are delegates from the State as previously from the King. There is no difference in spirit between the medieval and modern laws on the subject (so far as we can tell), and English principles of guardianship have been freely introduced into India under the authority of justice, equity and good conscience. The tendency of the Anglo-Hindu law was

¹ *Balwant v. Glancy* (1912) 39 I.A. 109, 120-1, 34 All. 296; *G. Latcharao v. Viswanadham* [1956] An. W.R. 535, AIR 1956 And. 182.

² Contract Act, 1872, ss. 11, 68. *Phalram v. Aiyubkhan* AIR 1927 All. 55, 49 All. 52.

³ § 211.

⁴ *Shridhar v. Martand* AIR 1954 Nag. 361, 365, [1954] Nag. 479.

to give to those properly interested in the minor's welfare wide powers, when acting in their own names, to bind the minor's estate for purposes which were justified by the minor's necessity or for the protection and proper management of the minor's property. The test of justification was not merely the honest appraisal of the circumstances by the guardian, but the objective existence of necessity or a prospect of benefit which the court could approve. As we shall see, however, equitable considerations might in suitable circumstances protect the third party who had given valuable consideration, even where the objective tests would condemn the transaction. The modern Hindu law, while not entirely abolishing the former system, seeks to impose upon those who would bind the minor's property or diminish its value or extent the general requirement of obtaining the court's prior consent. This is a protection offered still more generally to Christian, Parsi and Jewish minors under the general law of India.

47. It should be recollected that legal guardianship and custody are distinct concepts: the guardian may well not have custody and yet by virtue of his guardianship he may still exercise powers regarding marriage and education, and move the court, if need be, to re-consign to him custody, or to make other appropriate orders.¹ There is a difference, even, between custody and guardianship of the person, for 'custody' is a right to keep and maintain the minor as distinct from the liability to pay for his or her maintenance, with or without a right of access being permitted to the other parent or any other person. Custody is granted specifically by the court on terms, usually as a concomitant to matrimonial relief decreed to a parent. Guardianship of the person of the minor exists at law, though it can be conferred by the court in guardianship proceedings under certain conditions.

48. Guardianship of the person and guardianship of the property of the minor by no means necessarily go together. The manager of a Mitakshara joint family is guardian of the minor coparcener's interest in the joint-family property though if he is, for example, an uncle, grandfather, or elder

¹ *M. D. T. Kumaraswami v. M. D. Rajammal* AIR 1957 Mad. 563, 567, [1957] 2 M.L.J. 211.

brother, he would normally have no right of guardianship in respect of the minor's person or of his other property (§ 51). A further exception is that of the minor husband or parent, who has guardianship of the person of his wife or child, but cannot act as guardian of her or his property in dealings with third parties: his predicament is like that of a minor manager of a joint Hindu family.¹ Guardianship for marriage is likewise a concept distinct from both custody and legal guardianship (§ 212).

49. Wardship of court is a still further concept or institution of law. A minor may, by appropriate action, be made a ward of court under the provisions of the relevant State statute. His freedom of action within the scope allowed by the personal law will be hampered, and the guardian appointed by the court and acting under the court's authority may alone deal with the property of the minor. Similarly action may be taken under the GWA, according to which application may be made by any person interested in the minor for the removal of an existing legal guardian, the appointment of a guardian, or the removal of an appointed guardian. One may also apply for a declaration as guardian, if one is a person entitled to act as guardian under the personal law, whether as natural or testamentary guardian. The authority, powers, and liabilities of such guardians are set out in the statute or established at common law (for example, the guardian's liability to render accounts at the termination of the guardianship) and so are part of the general law of India. Many of these are beyond the scope of this book. It is important to note, however, that guardianship under the modern Hindu law approaches the general system closely. The court must now intervene far more often than was required under the former law.

50. This title of Hindu law is less notably founded upon case-law than any other. Every case is considered upon its own facts; the merits of the guardian or applicant for guardianship, the circumstances of the family or families in question and all relevant details are reviewed by the court with the intention of providing for the minor's welfare, and for this reason the force of individual precedents is bound to be weak. The fundamental propositions, which are common

¹ § 423. GWA, s. 21.

to the modern and the former systems, are set out in s. 13 of the HMGA, and as their importance cannot be overrated they may be set out here *in extenso*:

13 (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

It is well to remember that, though in all cases of custody and guardianship the welfare of the minor is the *paramount* consideration, it is not the only consideration: the claims of an unimpeachable parent, for example, must be given due weight.¹

WHO MAY BE GUARDIAN?

51. There are four classes of legal guardian: natural, testamentary, and appointed guardians, and guardians by virtue of affinity. Each class must be dealt with separately, but an introductory explanation of the fourfold division may be helpful. The natural guardians are in order of priority the father and the mother. These include the adoptive parents, if we assume that the mother is not an adoptive step-mother — for no step-parent is a natural guardian. Somewhat strangely the husband as guardian of his minor wife is also called a natural guardian. Testamentary guardians are those appointed validly by will in respect of the ward's person, property or both by the parent entitled so to appoint them. Guardians by virtue of affinity are the deceased husband's parents or brothers in respect of the person and property of the minor widow (§ 71). Appointed guardians are those appointed for the minor by the court under the GWA or under the inherent jurisdiction of a High Court. Persons empowered to act as guardians under the provisions of Courts of Wards statutes form a sub-category of appointed guardians, with whom we are not concerned here. There are guardians who are not strictly 'legal guardians'. The 'next friend' who commences

¹ *Re O. (Infants)* [1962] 2 All E.R. 10. In *Re L.* [1962] 3 All E.R. 1 (CA) the adulterous mother failed to obtain custody of her two young daughters.

litigation on the minor's behalf, and the guardian *ad litem* appointed by the court to defend suits in his name, form a distinct class of guardians whose guardianship is bounded by the function in question.¹

A further class of 'lawful guardians' exists, which is relevant in cases of abduction. It is a crime² to take a minor out of the keeping of the 'lawful guardian'. Since this expression includes any person lawfully entrusted with the care or custody of a minor, it is wide enough to cover both legal and *de facto* guardians at Hindu law.

52. The *de facto* manager or *de facto* guardian (as he is more usually, if less correctly, called) is a person (such as the putative father of an illegitimate child or the natural father of an adopted son) whose existence and functions as guardian are explicitly recognized in the HMGA. There is some debate as to the extent and character of his powers, but the terms of both s. 4 (b) and s. 11 are consistent with the continuance after 25 August 1956 of *de facto* guardianship. He is not a legal guardian, but is continuously interested in the minor's welfare and has assumed the responsibility of intermeddling with the minor's affairs.³ His liabilities as trustee in respect of any monies that he collects for the minor cannot be affected by the prohibition contained in s. 11 of the HMGA (§§ 53, 117).⁴ And no one doubts but that a *de facto* guardian may validly give a discharge for a debt due to the minor in the absence of a legal guardian.⁵ If he is recognized by those interested in the minor before any act of intermeddling has been accomplished, the court may regard even the first act of intermeddling as binding on the minor, provided, of course, that it is not unauthorized by law.⁶ The court looks very narrowly at the *de facto* manager's proceedings.

¹ Thus a guardian *ad litem* must obtain the court's permission when agreeing or compromising claims by the minor, whereas a manager receiving a share on behalf of a minor in partition proceedings is not obliged to seek such permission. *Sarda v. L. Junma* AIR 1961 S.C. 1074.

² Indian Penal Code, ss. 359, 361-3. *Nageshwar v. State* AIR 1962 Pat. 121.

³ *K. Sriramulu v. M. Pundarikakshayya* [1949] FCR 65, 158, AIR 1949 F.C. 218.

⁴ *Syed v. Oosman* [1943] Mad. 654, AIR 1943 Mad. 254.

⁵ *M. Hanumayamma v. Lakshmidevamma* AIR 1938 Mad. 950, [1938]

⁶ M.L.J. 632.

⁶ *M. Hanumayamma* (cited above).

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53. The HMGA, like the GWA, defines 'guardian' as a person having the care of the person of a minor or of his property or of both his person and property. Thus although a person may not be a *de facto* guardian as above he may be a guardian within the meaning of the statutes merely by, for example, holding a part or parts of the minor's property by virtue of a claim at law, although the claim itself might afterwards be negatived by the court.¹ In other words, when we speak of *powers* the scope of the right to be counted as guardians is fairly narrow; but when we determine *liabilities* many may be accounted guardians who would fall outside that scope altogether. We may now consider each class of guardian more closely.

Natural guardians

54. The natural guardians in respect of the person as well as property (excluding the undivided interest in joint-family property, if any) are in the case of a legitimate boy (including an adopted son)² and a legitimate unmarried girl (including, it seems,³ an adopted daughter) is the father, and after him the mother.⁴ Custody would normally be with the mother until the minor reaches the age of five, yet, if she neglects the child, custody will be given to the father at his application.⁵ In the case of an illegitimate (unadopted) boy or an illegitimate (unadopted) girl the mother is the natural guardian,⁶ and after her the father, assuming that his paternity can be established.⁷ In the case of a married minor girl, the husband.⁸ If it would be against usage and the welfare of the girl that her husband should have custody of her before puberty (which surely must often be the case), it will be refused, notwithstanding his undoubted guardianship.⁹ The husband cannot act as guardian of his wife's

¹ *Narsingh v. Hem* AIR 1934 Lah. 323, 155 I.C. 710.

² HMGA, s. 7. ³ § 172.

⁴ HMGA, s. 6 (a). Contrary provisions in Kerala statutes were overridden by this provision, and matrilineal families are equally bound by the rule: *Raghavan v. Lekshmikutty* AIR 1961 Ker. 193.

⁵ *Vasudevan v. R. Viswalakshmi* AIR 1959 Ker. 403, [1959] K.L.T. 132.

⁶ *Kanwal v. N. K. Singh* AIR 1961 Pun. 331. ⁷ HMGA, s. 6 (b).

⁸ HMGA, s. 6 (c). For the former law, which was similar, see *Ethilavulu v. Pethakkal* AIR 1950 Mad. 390, [1950] 1 M.L.J. 76.

⁹ *Nathusingh v. Crown* [1942] Nag. 34, 39, AIR 1941 Nag. 66.

property, and the father or mother are themselves equally incapacitated, if they are below the age of majority.¹

A aged 17 has a child *M* by his wife *W*, aged 15. *W* has custody of *M*, and *A* is guardian of the persons of *W* and *M*. Neither *A* nor *W* is guardian of *M*'s property, nor is *A* the guardian of *W*'s property. *W*'s pre-marital guardian continues to be guardian of *W*'s property notwithstanding her marriage, until *A* reaches majority. During the same period there is no legal guardian of *M*'s property, and receipts for rents due to *M* must be signed and other dealings with *M*'s assets must be controlled by the legal guardian of *A*, if any, or by a guardian appointed by the court at the instance of *M*'s next friend, or in the last resort by a *de facto* manager.

55. Neither a step-father (including an adoptive step-father) nor a step-mother may be a natural guardian,² even though, where the mother remarries, the step-father might be a suitable person, in the absence of an existing family of his own, to be appointed guardian of the minor step-child's property.

56. Disqualifications from becoming or continuing as natural guardians are (i) ceasing to be a Hindu, or (ii) completely and finally renouncing the world by becoming a hermit (*vanaprastha*) or ascetic (*yati* or *sanyasi*).³ The latter arouses no comment: a man or woman who has abandoned the world is no fit person to look after the affairs of a minor. Even outside the Hindu legal system a change of religion by a guardian may disqualify him in cases where the choice of guardian turned significantly on the individual's fitness to supervise education and association.⁴ Naturally a guardian who is or becomes insane is disqualified. Any test of insanity must relate to the responsibilities of guardianship — perhaps a higher standard than that required to be met by a party to a marriage (§ 235). No guardian can be appointed who resides outside India and if a guardian of property ceases to reside in India, the minor continuing to reside in India, the guardian becomes disqualified, for the court must retain control over the guardian of a minor's property.⁵

¹ HMGA, s. 10.

² HMGA, s. 6, expl.

³ HMGA, s. 6, prov.

⁴ *F. v. F.* [1902] 1 Ch. 688.

⁵ *Subbarathnammal v. Seshachalam* (1931) 54 Mad. 758, AIR 1931 Mad. 478.

57. The right to be natural guardian is neither constitutional¹ nor absolute. The father however cannot be deprived of his guardianship so long as his conduct does not positively unfit him for the responsibility.² And while he is not unfit no guardian can be appointed in his place. That he married again or speculated with his self-acquired property, or even acted imprudently with regard to ancestral or joint-family property, is not sufficient to render him unfit. The statute places the mother, in the absence of the father, in a similar position.³ Even her remarriage will not *ipso facto* serve to make her unfit for natural guardianship.⁴ Unduly harsh treatment of the minor, gross neglect of his interests, or dishonesty with regard to the minor's property and even persistent cruelty to the minor's mother or brothers or sisters might justify the court in removing the father, or as the case might be, the mother, and appointing another guardian. Loss of custody on such grounds is a lesser relief, but is often equally effective in the minor's interest, and is dealt with below. A husband may be deprived of the custody⁵ and even guardianship of his minor wife for conduct unfitting him to be guardian. The court has discretion to determine whether the conduct of the individual is so bad as to justify either of these drastic remedies.⁶ A decree of judicial separation must be understood to terminate the husband's right to custody, but it is not clear whether his guardianship is affected: certainly a decree of divorce will terminate both.

58. Formerly there were no natural guardians of a legitimate child but the parents, the father excluding the mother.⁷ A child of tender years was normally consigned to the custody of the mother.⁸ The mother could not act as natural guardian as long as the testamentary guardian appointed by the father was able to act. There was some doubt as to

¹ *Sahibzada v. State* AIR 1960 S.C. 768, [1960] 3 SCR 138, [1960] S.C.J. 713.

² *K. Atchayya v. K. Narahari* AIR 1929 Mad. 81, 120 I.C. 747; *Vasudevan v. R. Viswalakshmi* AIR 1959 Ker. 403; *M. D. T. Kumaraswami v. M. D. Rajammal* AIR 1957 Mad. 563, [1957] 2 M.L.J. 211.

³ HMGA, s. 6 (a).

⁴ *Bakshi v. Shila* AIR 1960 Pun. 304.

⁵ *Shyama v. Shankar* AIR 1935 All. 840, 158 I.C. 421.

⁶ *In re Muhammad* AIR 1939 Sind 311 (irresponsible, indecent, spendthrift); *Basanti v. Mohanlal* AIR 1958 Raj. 267, 269, (1958) 8 Raj. 233.

⁷ *K. Chennappa v. K. Onkarappa* AIR 1940 Mad. 33 (FB), [1940] Mad. 358 (FB).

⁸ *Saraswatibai v. Shripad* [1941] Bom. 455, AIR 1941 Bom. 103.

whether the mother or the putative father had a preferential right to custody or guardianship of an illegitimate child.¹ It would seem that the former was in normal circumstances more suitable to have custody unless she was leading an immoral life.² Where both the mother and the person having custody are living immoral lives the mother's claim may well prevail, if it is consistent with the child's welfare.³ Claims were frowned upon which were made by a putative father who relied upon the allegation that the child was born to him by casual intercourse.⁴ Where the mother was a concubine of the father and his duty to maintain the child was admitted, his claim to guardianship whether as natural or appointed guardian would be given preference, subject to the welfare of the minor.⁵ Of the husband's so-called 'natural guardianship' of his minor wife there is nothing to add to what was said at § 54 and § 57.

59. Guardianship might be lost outside British India by the loss of caste or change of religion of the guardian. But under the Caste Disabilities Removal Act, 1850 (or similar more recent State statutes) it has been held that neither loss of caste nor conversion could deprive a guardian of the guardianship.⁶ If tension were created between the parents, however, and this adversely affected the child, the court might, it appears, assign custody to a suitable relation, even though eventually the child, if too young to express an intelligent preference, might be ordered to be brought up in the religion of the guardian who had been converted.⁷ Fortunately this precise problem can no longer arise in India. Where a widowed mother might remarry by custom irrespective of the Hindu Widows' Remarriage Act, 1856, it was held that the mother did not by her remarriage forfeit the guardianship of her children,⁸ but all remarriages

¹ *Prem v. Banarsi* (1933) 15 Lah. 630, 635, AIR 1934 Lah. 1003.

² *Kooverji v. Motibai* AIR 1936 Sind 63; *Lalita v. Paramatma* AIR 1940 All. 329, 330-1, [1940] All. 269.

³ *Gohar v. Suggi* AIR 1960 S.C. 93.

⁴ *Mahabir v. Raghubar* AIR 1933 Oudh 312, 144 I.C. 382.

⁵ *Prem* (cited above).

⁶ *Kaulesra v. Jorai* (1906) 28 All. 233; *Muchoo v. Arzoon* (1866) 5 W.R. CR 235.

⁷ *J. Ganesh v. Ratan* AIR 1937 Mad. 976; *Skinner v. Orde* (1870) 14 M.I.A. 309, 17 W.R. 77, 10 Ben. L.R. 125.

⁸ *Prem v. Harnam* AIR 1939 Lah. 125, 183 I.C. 513.

authorized by that Act deprived mothers of their natural guardianships,¹ although they might be proper persons to be appointed guardians.² Section 3 of that Act names relations of the child in order, from whom the court might at its discretion select a proper person to appoint. Where the widowed mother married a man of another religion, the court did not think her a proper person.³

60. Even though the parents have given their child from birth to others to be looked after, and five years or so have passed before they apply to the court to order him to be restored to them, it is still presumed to be for the child's welfare to make the order for restoration, notwithstanding the fact that the child considers his foster-parents to be his real parents.⁴ The position would be different if the true parents had abandoned the child, or otherwise forfeited the right to guardianship or custody, and the application were not *bona fide*.

61. The burden of proof lies heavily on him who asserts that the legal guardian is unfit to have custody of the child.⁵ Instances where father or mother have failed to obtain or retain custody are numerous,⁶ and in each case the interests of the child were consulted and, where he was old enough, his preferences. For this purpose the judge may hear the child *in camera* and at his discretion confront him in turn with the relations competing for his custody.⁷

F was estranged from his wife, *M*, and she and their child, *S*, lived at a considerable distance from him. *M* obtained employment and obtained *S*'s entry to a good school, where she supported him and he was receiving a good education. *F*, who had not contributed towards *S*'s maintenance since 1949, applied in 1960 for custody. It was clear that he intended to remove *S* from the school. It was held that the father's

¹ *Fakirappa v. Savitrewa* AIR 1921 Bom. 1, 23 Bom. L.R. 482 (FB) (adoption case).

² *Kelanbai v. Udhavdas* AIR 1942 Sind 121.

³ *J. Ganesh* (cited above).

⁴ See *Brejendra v. Chinta* AIR 1961 M.P. 173, also *Re Thain* [1926] Ch. 676.

⁵ *Raman v. Ayyappan* AIR 1959 Ker. 396, [1959] K.L.T. 280.

⁶ *M. D. T. Kumaraswami* (cited above: § 57), where custody was given to the mother until further order: § 50.

⁷ *Vasudevan* (§ 57); *Raman* (cited above); *B. R. Bulliraju v. K. Surya* AIR 1959 An. P. 670.

right to custody was not absolute, and could not be enforced in this case.¹

In *Munnibai v. Dhanush*² *H* allowed *W* a divorce by caste custom on condition that their daughter *D* stayed with him. When *D* was nearly 6 *W* applied to be appointed guardian and to have custody. *H* had by then married again and had a son of 2½. Custody was granted to *W* on condition that *H* had free access to *D*.

In determining the child's interests the court is entitled to have regard to the parents' religion and community, even though distinctions on the ground of caste are out of harmony with the spirit of the times.³

62. The father's right to custody may be lost where, after the death of the mother, and without any fault on the father's part, the step-mother is found to be ill-treating the child. The court may then assign custody to one of the mother's relations. Cruelty to the minor is sufficient to deprive a guardian of custody, but not apparently the guardian's leading an immoral life, unless the court is persuaded that the immoral environment is contrary to the welfare of the child.⁴ It is by no means the case that an immoral parent has just as good a right to the custody of his children as a parent who is beyond reproach;⁵ but it must be remembered that it will be many decades, if not centuries, before one pattern of respectability can reasonably be applied throughout India, and the child will normally have to live his life in the environment into which he was born. Custody may be lost where the guardian is bringing up the child in a religion other than that of the father, and it may be continued subject to an order conditional on the upbringing conforming to that religion.⁶ Application for removal from custody on such grounds must be prompt to be effective.⁷ Custody may be lost where the father allowed his child to reside indefinitely with the latter's maternal grandparents, took little interest in him,

¹ *Rattan v. Kamaljit* AIR 1961 Pun. 51.

² (1958) 60 Bom. L.R. 1351, AIR 1959 Bom. 243.

³ *Jaswant v. Charan* AIR 1962 Man. 60, 64b.

⁴ As was the case in *Venkatamma v. Savitramma* (1889) 12 Mad. 67, 69.

⁵ *K. Atchayya v. K. Narahari* AIR 1929 Mad. 81, 83, 120 I.C. 747.

⁶ *Nadir v. Munni* (1931) 6 Luck. 350; *Dwijapada v. Baileau* AIR 1916 Cal. 859 (2), 20 C.W.N. 608. See §§ 81 f.

⁷ *Abdul v. Jagannath* AIR 1930 All. 86, 118 I.C. 707.

and subsequently remarried;¹ but remarriage alone is not a sufficient ground for depriving a father of custody if the child has lived with him continuously, and has not been ill-treated.²

Testamentary guardians

63. The father, if not disqualified as guardian, may appoint by will (but not in India by *deed*) a guardian for his legitimate child in respect of his person or separate property or both.³ He may not appoint by testament a guardian of the minor's interest in joint-family property where an adult (male or, exceptionally, female: see § 424) is managing the property. The former law is confirmed in this respect by s. 12 of the HMGA. The powers of such a guardian do not differ from those of a natural guardian, unless restrictions have been placed on them by the will itself.⁴ Such testamentary guardianship does not commence during the lifetime of the mother (so long, it would seem, as she is not disqualified),⁵ but may operate after her death, provided she herself made no valid testamentary appointment of a guardian in respect of the same child.⁶ If she made such an appointment it seems that the father's appointment is extinguished. Testamentary guardianship of a girl ceases in any case when she marries, even if she is widowed during her minority.⁷ That in respect of a boy is unaffected by his marriage.⁸

64. The mother, if not disqualified, has the right to appoint a guardian by will in respect of the child's person, property, or both if (i) the child is her legitimate child and she is a widow or (ii) the child is her legitimate child and the father is disqualified from acting as guardian, or (iii) if the child is her illegitimate child.⁹

¹ *Bindo v. Sham* (1906) 29 All. 210; *Shushila v. Kunwar* AIR 1948 Oudh 266.

² *S. Soora v. S. Chenna* AIR 1950 Mad. 306, [1950] 1 M.L.J. 33.

³ HMGA, s. 9 (1).

⁴ HMGA, s. 9 (5).

⁵ The statute's silence must be made good by reference to the intention appearing from the section as a whole.

⁶ HMGA, s. 9 (2).

⁷ HMGA, s. 9 (6).

⁸ *Eyre v. Countess of Shaftesbury* (1725) 2 P. Wms. 102, 107 = 24 E.R. 659, 660.

⁹ HMGA, s. 9 (3), (4).

65. The statute refers to a will, but if the appointment is by any other valid testamentary document, even if unprobated, or containing no dispositions of property which are capable of taking effect, it is valid,¹ for the previous law on the subject is preserved by s. 5 (the overriding section) of the HMGA. A mere bequest of land in trust for the maintenance and education of a minor does not, however, create a testamentary guardianship.² Since a will may be used to appoint guardians in respect of children not yet conceived, it is fortunate from this point of view that in India a testament is not revoked by subsequent marriage. Testamentary guardianship commences when the guardian accepts the appointment. He may disclaim in exactly the same manner as he might disclaim a legacy,³ but once he has accepted he cannot resign except with the court's permission.⁴

66. Testamentary guardians can be removed by the court like natural guardians, but the GWA lays down (s. 39) that such a guardian may be removed for abuse of trust, continued failure to perform his duties, incapacity, contumacy (i.e. neglect to obey the court's orders), conviction of an offence implying defect of character unfitting him to be a guardian, bankruptcy, ceasing to reside within the local limits of the court's jurisdiction if in the opinion of the court his residence renders it impracticable to discharge the functions of guardian, or if after the appointing parent's death he acquired an interest adverse to the faithful performance of his duties, or acquired such an interest in the lifetime of that parent, but the latter made or maintained the appointment in ignorance of it. It is to be noted that where the testator specially provides for this, the testamentary guardian may lawfully profit from his ward's property.

67. Formerly appointment by oral will was possible, before 1927 in British India (§ 704) and elsewhere so long as oral wills were valid. A testamentary guardian of a minor girl

¹ *Sarala v. Hazari* (1915) 42 Cal. 953. The GWA, s. 39, says, 'will or other instrument'.

² *Bedell v. Constable* (1668) Vaugh. 177, 184 = 124 E.R. 1026, 1029.

³ *Re Grays (Minors)* (1891) 27 L.R. Ir. 609.

⁴ *Ex p. Champney* (1762) Dick. 350 = 21 E.R. 304.

did not lose on her marriage his guardianship over her property.¹ The right to appoint a testamentary guardian was not lost by a change of religion.² The father might exclude the mother totally by his testamentary appointment,³ and the mother had in no circumstances a right of appointment of a guardian by her will, though the court in making an appointment would take her wishes, if ascertainable, into account.⁴ A father could not appoint a guardian by his will in respect of property over which, at the time of his death, he had not a complete power of disposition: therefore where he left no son of his own a direction concerning the guardianship of the property of a son whom he proposed his widow should adopt was held valid, but where a testator governed by Mitakshara law left undivided sons of his own the appointment was invalid.⁵

Appointed guardians

68. The chartered High Courts (and others that have been invested with their powers in this regard) have inherent jurisdiction and District Courts have under the GWA jurisdiction to appoint guardians of minors who have no guardian, or whose guardians are removed. Normally an interest in joint-family property cannot be made the object of guardianship (other than that of the manager), as in the case of property in which the minor has a beneficial interest under a trust. But where all coparceners are minors the court may under either jurisdiction appoint a guardian of the joint-family property until a coparcener reaches majority (and thus becomes the manager).⁶ Certain High Courts have power to appoint the managing member of the family guardian of the interests of the minors in Mitakshara joint-family property. The manager will already be the guardian, but circumstances may justify his particular

¹ *Rajarajeswari v. S. Sankaranarayana* [1948] Mad. 351, AIR 1948 Mad. 155.

² *Albrecht v. Bathu* (1912) 22 M.L.J. 247, 250.

³ *Deba v. Anandmani* (1920) 43 All. 213, AIR 1921 All. 346.

⁴ *Venkayya v. Venkata* (1897) 21 Mad. 401.

⁵ *Jagannadha v. Ramayamma* AIR 1921 Mad. 132, 133, 44 Mad. 189, 192; *S. A. Ramanathan v. M. P. Palaniappa* AIR 1939 Mad. 531, 534-5, [1939] Mad. 776, 784; *Brijbhukandas v. Ghashiram* [1935] 59 Bom. 316, 335, AIR 1935 Bom. 124 (FB).

⁶ *Seethabai v. Narasimha* AIR 1945 Mad. 306, [1945] 1 M.L.J. 60.

appointment.¹ The rule of Anglo-Hindu law has been confirmed by the HMGA.² The reason for this apparently curious provision is that alienations are more readily made by the manager under the authorization of the court, for the burden of proof of propriety may shift from the alienee (upon whom it normally lies, see § 470) so that the burden of proof of impropriety may fall on the minor himself. The court will sanction the alienation on statements by the manager (the minor being represented by his guardian *ad litem*), on condition that the minor's share of the proceeds is properly invested.³ As a result the manager-guardian may have wider powers of alienation accorded to him than a manager has at Hindu law.

In *In the matter of A. T. Vasudevan*⁴ a manager who had two adult sons and five minor sons applied under cl. 17 of the Letters Patent of the Madras High Court to be appointed guardian of the family property and for sanction of the sale of that property on the ground that sale would benefit the minor sons. The judge found that the proposed sale of unprofitable land would be highly advantageous to the entire family and gave sanction subject to safeguards of the minors' 'share' of the purchase money. Their presumed share was to be invested in government securities which should themselves be deposited with the Registrar of the High Court. This case was distinguished in *Sengoda v. Muthuvellappa*,⁵ where unproductive land was sold, but the proceeds were not invested suitably, and it was held that the manager had exceeded his powers, for the sale was without necessity or benefit to the family.

For the different view taken of the powers of a *natural* guardian appointed guardian by the court and authorized to alienate the minor's property see § 96 below. It is submitted that the apparent conflict should be resolved in favour of the latter view.

69. The powers of the appointed guardian are circumscribed by the GWA, where the appointment is made under that Act, and are otherwise similar to those of natural guardians. Certificated guardians are those whose guardianship is recognized or created under the provisions of that Act, their powers being set out in the same statute.

¹ *Shamrao v. Shashikant* AIR 1948 Bom. 15, 49 Bom. L.R. 498 (see also note 3 below).

² HMGA, s. 12, prov.

³ *In the matter of Ratanji* AIR 1941 Bom. 397, [1942] Bom. 39, 54-5 (SB); *In the matter of A. T. Vasudevan* AIR 1949 Mad. 260, [1948] 2 M.L.J. 47; *Manilal v. Kalidas* AIR 1961 Guj. 7.

⁴ Cited above.

⁵ AIR 1955 Mad. 531, [1955] 2 M.L.J. 331.

70. In appointing guardians the court must satisfy itself of their capabilities and fitness for the trust involved. The mere appointment of a guardian puts an end to all guardianships except those exempted by the court or those created under s. 12 of the HMGA (§ 68). Though the court is free to employ its discretion in making appointments the preference established according to the personal law (that is to say in the case of Hindu law the few *smṛiti* texts bearing on the matter) should be followed wherever possible. Thus in a competition for guardianship between paternal and maternal relatives the paternal should, all other things being equal, that is, even if the ground for preference is slight, be given priority.¹

Guardians by virtue of affinity

71. The relations of a deceased husband in order of proximity are entitled to be the guardians of his widow until her remarriage in preference to her own parents or parents' relations,² but where the only surviving husband's relation is distant there may be adequate reason to prefer the parent³ or another blood relation on the ground that the relation by affinity may be not only less suitable as a guardian of a minor widow but also less entitled from the standpoint of the personal law.

THE RIGHTS OF GUARDIANS

Possession, custody and control

72. The guardian is entitled to exclusive possession of the minor's property, and custody of his person, which he may vindicate by application under s. 25 of the GWA⁴ or by writ of *habeas corpus* (Crim. Proc. Code, s. 491),⁵ unless the law or the court have provided otherwise. Thus the father may

¹ *Re Gulbai* (1908) 32 Bom. 50; *K. Chennappa v. K. Onkarappa* AIR 1940 Mad. 33, 35, [1939] 2 M.L.J. 884 (FB); *Haliman v. Ahmadi* [1950] All. 124, 131 (Muslims: general principles).

² *Chinna v. Vinayagathammal* AIR 1929 Mad. 110, 55 M.L.J. 861; *Ganga v. Narshing* AIR 1935 Lah. 25.

³ As in *Tota v. Ram* (1911) 33 All. 222.

⁴ *Sathi v. Ramandi* (1919) 42 Mad. 647, AIR 1920 Mad. 937.

⁵ *Gohar v. Suggi* (1959) 62 Bom. L.R. 54 (SC), AIR 1960 S.C. 93, [1960] S.C.J. 31.

exclude the mother from custody of the child if he is over 5 years of age, but irrespective of the HMGA's provision in that regard the mother may obtain exclusive custody if it is desirable in the minor's interest (§§ 58-62).¹ The minor cannot exclude his guardian in these respects, and the only remedy for a dissatisfied minor is to file an application through his 'next friend' for the removal of the existing guardian, and the appointment of one agreeable to himself. If the court agrees that the existing guardian has mis-conducted himself and is satisfied with the minor's choice, the latter will be respected. A guardian of the person of a minor is entitled to control the minor's conduct and activities (§§ 80ff). Where he entrusts custody to others this delegated authority is ordinarily revocable. The exception seems to occur in those very rare cases where associations have been created in the minor's mind or expectations have been encouraged, which it would be against the minor's interest to disturb.² In matrimonial proceedings, as we have seen (§ 47), custody may be severed from guardianship.

Representation

73. The guardian is entitled to represent the minor in all litigation and will normally issue notices and commence actions or file applications in the minor's name as his next friend. He will usually be appointed guardian *ad litem* to defend actions commenced against the minor, unless he is unfit or disqualified *pro tanto* by an adverse interest in the proceedings.

74. A question of some difficulty arises where the guardian is grossly negligent (as distinguished from guilty of fraud or collusion) in the conduct of the minor's litigation, as a result of which a decree is passed against the minor. The circumstances contemplated are such that the minor was virtually unrepresented.³ The negligence must be such that the minor has lost a right which might have been successfully asserted if the suit had been prosecuted or defended with ordinary care. It would not be gross negligence to fail to appear at

¹ *Kaliappa v. Valliammal* [1950] Mad. 83, AIR 1949 Mad. 608.

² *Besant v. G. Narayaniah* (1914) 41 I.A. 314, 38 Mad. 807 (dicta).

³ *C. Sriramamurthi v. Off. Rec.* [1957] 1 An. W.R. 216, AIR 1957 An. P. 692.

the trial if no good defence could have been put forward on the minor's behalf,¹ or to fail to appeal where the decree was not manifestly unreasonable. A distinction exists, however, between gross negligence on the part of a *manager* representing the entire joint-family, including minors, and a guardian of the minor's *separate* estate. In the former case, if each minor had a right to reopen the litigation on the ground of gross negligence, there would be no end (it was feared) to litigation, for it is difficult to distinguish the position of the minor from that of the major coparcener, who certainly has no such right to reopen litigation in the absence of fraud or collusion. The authorities are not all beyond question, but the situation seems established.² Where, on the other hand, the negligence is that of a guardian, his powers of representation are less wide. Hence in the more widely accepted view, including some early Bombay cases, gross negligence on the part of a guardian suffices to enable the minor to set aside the decree passed against him, including an execution decree.³ The view expressed later by a Bombay Full Bench⁴ that the plaintiff should not be deprived of the fruit of his judgment rests upon a conception of the provisions of English law on the subject which is not unchallenged. In Bombay it is believed that the minor should be left to his (possibly infructuous) remedy against the guardian; but this is no longer accepted anywhere else.

75. A guardian may refer disputes to arbitration and is not incompetent to compromise claims against the minor if this tends to save the minor avoidable expense or otherwise operates to his advantage.⁵ Compromises of existing litigation do not bind minors unless they are in the latter's interest and are approved by the court. A compromise is

¹ *C. Punnayyah v. Rajam* (1921) 45 Mad. 425; *Kamalambal v. Rajamanickam* [1961] Mad. 730.

² *C. K. S. Krishnamurthi v. Chidambaram* [1946] Mad. 670. *Jankilal v. Jabarsingh* [1956] Nag. 121, 130-1 is not reliable, as the effect of previous decisions was not understood.

³ *Egappa v. Ramanathan* [1942] Mad. 526, AIR 1942 Mad. 384; *Marudamuthu v. Arunachalam* [1957] Mad. 584, AIR 1957 Mad. 395; *Narayanan v. Gopalan* AIR 1960 Ker. 367, [1960] K.L.T. 546.

⁴ *Krishnadas v. Vithoba* [1939] Bom. 340, AIR 1939 Bom. 66 (FB).

⁵ *Debi v. Keshava* [1946] All. 67, AIR 1945 All. 423; *Karam v. Chuni* AIR 1933 Lah. 419, 144 I.C. 465.

deemed to be beneficial to the minor if it secures to him some demonstrable advantage or averts some obvious mischief. The powers of a manager of a Mitakshara joint-family to enter into compromises (§ 430) are not greater than those of other legal guardians.

Family arrangements will validly bind minor members of the family even without the consent of the court if they possess the characteristics of a valid 'family arrangement'. These must be observed, as the importance of the family arrangement in India cannot be overestimated. Firstly the minors must be properly represented, and their interests must be attended to *bona fide*. Secondly the parties to the arrangement must be the persons entitled to the property which is the subject of the arrangement or those to whom the remainder are making dispositions which will be to the latter's advantage. Thirdly there must exist some doubt as to the legal rights of the parties, each of whom must have an actual interest at stake, and the arrangement must be made fairly in order to avert wasteful litigation, and must compose finally the differences between the parties.¹ A minor may enforce in his own right a contract intended to secure a benefit to him as a beneficiary under a family arrangement.²

76. A decree obtained or lost, a compromise obtained, or a family arrangement entered into by the guardian fraudulently or in collusion with a party hostile to the minor's interest are voidable, and may be set aside at the suit of the minor.

REIMBURSEMENT

77. The guardian, as a trustee, is not entitled to recompense for his work or care, and he may not even, without the

¹ *Bishambhar v. Amar* AIR 1937 P.C. 105, 167 I.C. 561, 41 C.W.N. 651; *M. Ramayya v. U. Lakshmayya* AIR 1942 P.C. 54, [1942] 2 M.L.J. 249 (PC); *Sahu v. Mukand* AIR 1955 S.C. 481, 490, [1955] S.C.J. 417, 428; *Rukn v. R. Vishwanathan* AIR 1950 Mys. 33 (FB); *Gangabai v. Punau* AIR 1956 Nag. 261; *Shivamurteppa v. Fakirappa* (1953) 56 Bom. L.R. 354; *Shrinivas v. Chandrabhagabai* (1957) 60 Bom. L.R. 570; *Tarkeshwar v. Nanhku* AIR 1959 Pat. 523; *Kapila v. P. Venkata* AIR 1959 An. P. 40. Contrast *Partap v. Sant* AIR 1938 P.C. 181, 65 I.A. 213, 40 Bom. L.R. 1065. H. S. Gour, *Hindu Code*, 4th edn, § 173.

² *Khwoja v. Husaini* (1910) 37 I.A. 152, 32 All. 410 (PC); *Dan Kuer v. Sarla* AIR 1947 P.C. 8. See Indian Contract Act, s. 2 (d).

court's consent, pay himself, out of property inherited by his ward, a sum owed to him by the deceased owner. However he is entitled to be indemnified out of the minor's estate for any expenses he incurs properly on the minor's behalf, and has the right, when sued as representative of the minor, to claim that the minor's estate shall bear the cost of the litigation and that, just as the third party's rights against the guardian reach the ward's property by the operation of the doctrine of subrogation, so the guardian himself shall by subrogation enjoy all the rights and immunities of the ward in litigation with third parties. These provisions are essential: otherwise those who are competent to sue and to be sued on a minor's behalf would hesitate before they assumed the responsibility.

78. A guardian advancing money to his ward may reimburse himself out of the minor's property or may sue the minor until the lapse of the period of limitation applicable after the guardianship has ceased and the guardian has accounted to the ward and handed over the assets. A *de facto* manager is in a different position, and may sue the minor for reimbursement of expenses only within the period of limitation after the advance itself was made.¹

In *Radhi v. Namdeo*² the legal guardian, whose ward attained majority in 1933, had a claim on his ward for reimbursement of monies he had spent for the benefit of the ward at times when the income of the latter's property was insufficient, and retained some of the property for the purpose of reimbursing himself. The ward obtained an order for delivery of possession of the property to him, and recovered possession in 1935. Later the former guardian sued the former ward for his expenses. It was held that his suit was in time, as Art. 120 and not Art. 61 applied, and the cause of action accrued when the guardian lost possession of the former ward's property.

79. Once a guardian has been discharged by his ward, who was in full possession of the facts of the guardian's management, no inquiry can be held into the latter.³ The position is otherwise where the minor, recently come of age, has

¹ *Piare v. Lajja* AIR 1935 Lah. 437, 17 Lah. 78 (Art. 61 of the Limitation Act applies).

² AIR 1939 Bom. 394, 41 Bom. L.R. 585.

³ *S. A. Ramanatha v. M. P. Palaniappa* AIR 1939 Mad. 531, [1939] Mad. 776.

lacked independent advice and has discharged his former guardian under undue influence (§ 117).

THE POWERS OF A GUARDIAN OF THE PERSON

80. The powers of the guardian of the person are not regulated by the HMGA, and the former law applies. The guardian, though he may not have custody, is entitled to regulate the child's education and, in broad terms, his movements. He is entitled, for example, to require that the child shall not be taken out of the jurisdiction, that he shall not live out of the custody of the person entitled to custody, or in circumstances dangerous to his physical or moral welfare.

81. The problem of education occasionally arises, especially where the guardian's religious persuasion has altered, that of the father (not being guardian) has altered, or that of the child has altered. The court will have regard to the wishes of the minor if he has reached an age at which discrimination is possible,¹ and will provide for his education to be commenced or (as is more usual) continued accordingly. Where the child has not reached the age of discretion but the change of religion or sect on the part of the guardian or father would involve undue strain on the child, the court will enable the child's education to be pursued along the lines familiar to him by changing the guardian if this should be necessary.² In all other cases it is presumed to be for the child's welfare to be educated in the religion of the father (or, it seems, in the case of an illegitimate child, of the mother) unless the parent has abandoned the child or neglected it, or the child has been brought up in another religion and expresses a desire to remain in that community, in which case the parent's own attempt to influence the course of the child's education may well fail.³

¹ *Sarat v. Forman* (1890) 12 All. 213 (boy of 16); *In re Muhammad* AIR 1939 Sind 311 (girl over 15: court will consider whether a conversion really took place).

² *Abdul v. Jagannath* AIR 1930 All. 86; *Albrecht v. Bathu* (1912) 22 M.L.J. 247.

³ *Mokoond v. Nobodip* (1898) 25 Cal. 881.

82. A decision of the Madras High Court in *Reade v. Krishna*¹ that a child of 16 (who was a major according to the personal law but a minor under the provisions of the Indian Majority Act) who voluntarily left his parents and changed his religion must return to the custody of his parents, the prospect being that he would be forced to relapse into the faith he abandoned, may no longer be a binding authority. Yet the general principle is undoubted, that an undisqualified natural guardian is entitled to enforce the right to custody and control of his minor child, and the child is a minor so long as he is under 18 years of age. The HMGA in fact applies only to *Hindu* minors, and the guardian of a Hindu minor loses his right to enforce the right of custody under the personal law when the child changes his religion so as to cease to be a Hindu. It is beyond question that a child of 16, for example, is competent to change his religion.² The natural guardian must therefore apply for appointment as guardian, a step which will give the child's new associates an opportunity to contest this application. More recent authorities take the sound view that custody should be awarded to the person who is best able to consult the welfare of the child: and this may not always be the parent.³ The longer the former guardian's application is postponed, the less likelihood there is that the application will be granted if the child is happy within his new environment and faith.

83. Where the minor is a coparcener in a Mitakshara joint family and the manager, who is guardian of the minor's interest (§ 68), is not attending to his duty in this regard, is squandering the assets or prejudicing the rights of the minor, more particularly when the father is ill-treating the minor and favouring the minor's step-brothers and -sisters, then the question may arise whether it would not be in the minor's interest to be severed from the joint family.⁴ The natural guardian, testamentary guardian, or mother or other close relative acting as next friend in the absence of a legal guardian, may issue to the manager a notice of

¹ (1886) 9 Mad. 391, 397.

² *Reade* (cited above) at p. 398.

³ *In the matter of Saithri* (1892) 16 Bom. 307; *In the matter of Joshy* (1896) 23 Cal. 290.

⁴ As in *Nagappa v. Subramanian* AIR 1945 Mad. 270, [1946] Mad. 103.

partition and file in the minor's name a suit for partition against the other coparceners. If the court, which is alive to fraudulent notices by intermeddlers acting more in their own interests than those of minors, ultimately finds that the notice was served in the minor's interest the partition becomes effective for all purposes from the date of the notice.¹ Otherwise the notice and suit are not effective to alter the minor's status.² It is not clear whether, if no suit is filed, or the suit is compromised without an expression of opinion on the court's part as to the validity of the guardian's act, the notice of partition would be valid and binding upon the minor, if it was issued in circumstances which would attract the court's approval. It is clear that the question whether there was an anterior division may be investigated, and so the issue whether division was in the minor's interest, in partition or any other proceedings in which it may pertinently be raised.³ In view of the rule that the minor's death does not cause the suit to abate, and that the issue of the validity of the notice (or suit, where no prior notice was served) may be tried with the minor's heirs on the record in his place,⁴ it would seem that the law looks at the appropriateness of the guardian's or next friend's act, and if this is not contentious it should be valid. It may be upset by action on the minor's part when he comes of age to secure his reinstatement as coparcener by a declaration of his interest in the remaining coparcenary property or by suit for the reopening of a partition between the former coparceners which will have ignored his claims on property acquired after his own alleged separation. Nevertheless in a dictum followed in several recent cases,⁵ the Supreme Court suggested⁶ that no notice would be valid unless confirmed by a successful suit. This is unfortunate since (i) the other coparceners can separate from the minor

¹ *Ramanathan v. Narayanan* AIR 1955 Mad. 629, [1956] Mad. 282.

² *K. Pedasubhayya v. K. Akkamma* AIR 1958 S.C. 1042, [1959] S.C.J. 138, [1959] 1 M.L.J. 60 (S.C.).

³ *P. M. Ramaswamy v. R. Kuppa* [1962] 1 M.L.J. 174, AIR 1962 Mad. 81.

⁴ *K. Pedasubhayya* (cited above).

⁵ *B. Ayyanna v. K. Kotayya* AIR 1960 An. P. 70, [1959] 2 An. W.R. 140; *S. R. Virabhadhrudu v. Suryanarayanamurthy* AIR 1960 An. P. 636, [1959] An. P. 409.

⁶ *K. Pedasubhayya* (cited above) at p. 1049a; see also a dictum in *Bammangouda v. Shankargouda* AIR 1944 Bom. 67, 72a.

without the court's consent; (ii) a father can separate his minor son along with himself when he separates, or separate a minor son from all the rest of the family including himself (§ 517) without the court's consent,¹ and (iii) the requirement of a suit in every case places a burden on guardians and next friends and an expense upon the shoulders of the minor which may operate adversely to his interests. The Madras High Court has held that it would be an undue restriction upon the minor's rights, and that he does *not* need to file a suit to effect his severance.² Where a minor comes of age pending the suit and elects to abandon a suit for partition, so that the issue whether it was filed for his welfare is not tried, the attempted partition, it has been suggested, is in any case ineffective.³ When he elects to continue the suit before trial the court must hold him divided from the date of the plaint.⁴ Yet it would seem that if in principle the guardian's act was justifiable when done, the minor's repudiation when he comes of age ought not retrospectively to invalidate it, nor his adopting it oust the court's jurisdiction to try the issue. However there is no doubt but that where the trial court has found that the attempted partition of the minor was *not* in his best interest and the minor appeals, it is not open to him to declare at that stage on reaching full age that he is separate, and to argue that his separation relates back to the filing of the suit, ousting the trial court's jurisdiction to try the issue.⁵ A decision in the opposite direction⁶ is contrary to principle and is hardly supported by earlier, less attractive, decisions.

84. Even in cases where the minor's interests are being jeopardized and the guardian or next friend is amply justified in serving the notice of partition, he cannot proceed further and deal with the minor's property-rights in the joint family, nor sever the minor from the other coparceners by metes and bounds. In *E. Subbarami v. E. Chenchuraghava*⁷

¹ *K. Pedasubhaya* (cited above) at p. 1048b.

² *P. M. Ramaswamy* (cited above), heartily disagreeing with *B. Ayyanna* (cited above).

³ *M. Rama v. M. Venkata* AIR 1937 Mad. 274, 277a, 173 I.C. 347.

⁴ *M. Rama* (cited above).

⁵ *S. R. Virabhadru* (cited above).

⁶ *Rukhmabai v. Ramratan* AIR 1951 Nag. 350, [1951] Nag. 367.

⁷ AIR 1944 Mad. 566, [1944] 2 M.L.J. 89; on appeal AIR 1945 Mad. 327, [1945] Mad. 714.

a paternal grandfather decided that his grandsons could not remain together as the women of the family could not live together amicably, and he divided the family property between the branches of the family and gave each minor his share with the consent of their maternal grandfathers, and one minor died leaving a full brother. It was held that while he could divide the brothers from himself and his son, their uncle, he could not sever them from one another (for this would have been the prerogative of their father), still less distribute the family property amongst them so as to destroy the surviving brother's right to take by survivorship the interest of the deceased brother. In *Shah Hiralal v. Shah Fulchand*¹ the guardian agreed to a partition proposed by the major coparceners and was prevailed upon to accept a smaller share on the minor's behalf than he was entitled to. She was held not to have acted freely and in the minor's best interest, and the minor was entitled to sue for partition as if no distribution had taken place, the guardian's act being treated as a nullity.

85. It seems to be established that a guardian cannot reunite a separated minor coparcener with himself or other former coparceners of the minor, since this would expose the minor to a risk at least as great as his chance of gain through the deaths of reunited coparceners (§ 561f).² Whether the *father* lacks the power to carry his minor sons with him into a reunion is not quite beyond doubt, though it was said in *Babu or Govinddoss v. Gokuldoss*³ that he does not. This appears to be so, even though it is presumed of an unseparated coparcener that it is not in his interest, in the absence of mismanagement or misconduct on the manager's part, to be separated and so to lose the possibility of benefiting from the operation of survivorship (§ 408). Similarly a guardian cannot express on the minor's behalf an intention to merge his self-acquired or separate property in the joint-family stock, even in order to obtain an enlarged share or specific items of joint-family property in consequence, and even when all major coparceners are merging their self-

¹ AIR 1956 Sau. 89.

² *Balabux v. Rukhmabai* (1903) 30 I.A. 130, 136, 5 Bom. L.R. 469, 7 C.W.N. 642; *Shivarudrapa v. Nanjundamma* (1943) 22 Mys. L.J. 64, 73.

³ AIR 1928 Mad. 1064, 55 M.L.J. 132. Mayne, § 468.

acquisitions at a time of separation from each other and from the minor.¹

86. The powers of a guardian of the person of a minor to bind him by incurring debts for his maintenance and education are dealt with in the next following sections, since they do not differ from the corresponding powers of a guardian of the minor's property in respect of the maintenance and improvement of the property.

THE POWERS OF A GUARDIAN OF THE PROPERTY OF A MINOR

The legal guardian

87. The powers of an appointed guardian are set out in the GWA. Those of a natural guardian, a testamentary guardian, and a guardian by virtue of affinity appear to be indistinguishable, except to the extent that a testamentary guardian's powers may be limited by the terms of the document appointing him. Section 8 of the HMGA sets out these general powers and explains the effect of an excess of his power by the guardian.

88. In general the guardian may do all acts which are *necessary or reasonable and proper* for the benefit of the minor or for the *realization, protection, or benefit* of the minor's estate.² This plainly excludes fraudulent, collusive, or colourable transactions. Likewise an act which is speculative is excluded, and one which is unnecessary, or unreasonable, in the sense that no reasonable man would do it in the interests of the minor in question. The court is the ultimate arbiter of what is for the benefit of the minor. The words 'realization, protection, or benefit of the minor's estate' would appear exhaustively to cover all types of motive, and when read with the words 'necessary or reasonable and proper' constitute a guardian's charter, which works for the advantage of third parties dealing with the guardian and thus indirectly for the minor himself.

¹ *A. Venkataramayya v. A. Gopala* AIR 1958 An. P. 690, [1957] An. P. 827.

² HMGA. s. 8 (1).

89. Since what is reasonable and proper must vary with the circumstances, it is impossible to define the powers of the guardian in any narrower terms. But it appears that Parliament in adopting these tests has followed the trend of more recent Anglo-Hindu case-law rather than earlier cases, which confined the guardian's acts to necessity and the defence of the minor's interests from positive loss. The result may be shown best by illustrations.

NG, the widowed mother of a male minor, *M*, aged 12, grants a lease of *M*'s property for four years at a premium to raise money for *M*'s marriage expenses. The lease is invalid, since though *M*'s marriage may be necessary or reasonable and proper from the point of view of the caste, from that of the law of India it is simply prohibited under the Hindu Marriage Act (§ 238).¹

NG, the widowed mother of a minor, *M*, pays, out of joint-family property, a debt binding on *M* under the Pious Obligation to *X*, a creditor of *M*'s father. *X* has not filed a suit to recover the sum, but he may do so at any time. The payment is valid, for it is reasonable to save *M* the costs involved in litigation in which *M* would be likely to be held liable to pay the debt.²

G, the legal guardian of *M*, a minor boy, spends out of his property, which was inherited by him from a maternal relation, in order to celebrate the marriage of *M*'s sister. It would be meritorious to celebrate the marriage, but such spending is beyond the powers of *G*, and the court cannot sanction such a payment either under the HMGA or under the GWA. The court will not be swayed by the nature of the object of the expense if it is not 'necessary' or 'reasonable' or 'proper' for the benefit of the minor or for the 'evident advantage' of the minor. Such social considerations do not amount to 'evident advantage'.³

TG, the testamentary guardian and maternal uncle of an orphan minor, *M*, sells *M*'s land to invest the proceeds in a limited company floated by himself and of doubtful prospects. The sale is not valid.

NG, the widowed mother of a minor, *M*, enters on *M*'s behalf a partnership with *X* to fulfil the same purposes as a former partnership of *M*'s father with *X*. The transaction is valid, unless the solvency of *X* and the prospects of the new partnership are in doubt.

90. The principal limitation upon the guardian's powers is set out in s. 8 (2). A natural (and thus also a testamentary) guardian is prohibited from entering into certain trans-

¹ *Mehnga Singh* [1956] Cutt. 362; *Ghulam v. Rustom* AIR 1949 E. Pun. 354; *Birupakshya v. Kunja* AIR 1961 Or. 104 (manager).

² *Nagammal v. Varada* AIR 1950 Mad. 606, [1950] 1 M.L.J. 505; *Dharmaraj v. Chandrashekhhar* [1942] Nag. 214, AIR 1942 Nag. 66 (where a majority out of three judges held the manager, not being the father, entitled to alienate to pay a debt binding upon a minor coparcener under the Pious Obligation, if there was no other reasonable course open).

³ *In the matter of Lalitha* [1961] Mad. 95.

actions without the previous permission of the court. He may not, without that permission, mortgage, charge or transfer (by sale, gift, exchange or otherwise) any immoveable property of the minor, or lease any of such property for a term exceeding five years or extending beyond a year from the date on which the minor attains majority. As we shall see by a comparison with the rules of the Anglo-Hindu law below, the greater scope allowed to the guardian under the general provisions is much reduced in connexion with that very important class of transaction, alienations of immoveable property. The court's permission may not be granted¹ except in case of necessity or for the evident advantage to the minor. How this jurisdiction will be exercised can be foretold in part from the Anglo-Hindu cases on the powers of the guardian. There is likely to be little reporting of decisions under this section since although appeals are available from an order refusing permission (s. 8 (5) (c)) they will very rarely be lodged. The court will accept no project of a speculative character, but the plan need not be confined to purely defensive and conservative objects.

NG applies for permission to give immoveable property of her minor sons to her daughter's husband in conformity with caste usage to effect betrothals with the aid of gifts of land belonging to the joint family.² Permission will be granted if the extent of land involved is reasonable in the circumstances of the family.

TG applies for permission to sell his minor orphan nephew's assets to raise money for a business he is thinking of starting, upon the footing that the minor would derive profits considerably above the present income of the assets. The court will refuse permission.³

NG applies for permission to sell land belonging to her minor son, which is distant and unproductive, in order to buy other land nearer home and producing a better income per acre, but no such land is as yet on the market. Permission may be refused, unless the application is for permission to sell, and invest the proceeds in a security producing an equal income, until such time as suitable land is available.

NG applies for permission to mortgage land belonging to her minor son in order to raise money for his education in a non-agricultural profession. If this project is reasonable and likely to be in the minor's interest permission will be granted.

NG enters into a family arrangement by which the property of the family including the separate property of her minor son, M, is shared out in such a manner as to put an end to actual or apprehended litigation for maintenance. M is bound, even though the consent of the

¹ HMGA, s. 8 (4).

² § 690. See *In the matter of Lalitha* (cited above), also § 95.

³ *Singh v. Kharak* (1928) 50 All. 776, AIR 1928 All. 403.

court was not obtained, since no transfer of the minor's property has occurred.¹ The correctness of this rule is not beyond question.

91. A testamentary guardian who is prohibited by the terms of his appointment from alienating the minor's immoveable property in cases other than those falling within s. 8 (2) of the HMGA may believe that an alienation is essential, none the less, for the minor's welfare. In such a case he may seek declaration as guardian under s. 28 of the GWA and apply for permission to alienate, whereupon the court may override *pro tanto* the parent's prohibition.

92. Where a guardian transfers in reliance upon the sanction of the court, which ultimately turns out (as may occasionally happen) to have been invalidly given, he is not liable in damages to the alienee if the latter is deprived of the whole or part of the property, unless the guardian has bound himself by a personal covenant, as is frequently the case in alienations by guardians on behalf of their wards.²

93. Formerly no alienation by the guardian would bind the minor unless it were either (i) supported by necessity (i.e. a necessary purpose and a need for funds to meet it) or the benefit of the estate or partly for necessity and partly for benefit, or (ii) the alienee were fully protected from the minor's suit by his having (a) given value, (b) made sufficient inquiry as to the existence of a cause justifying the alienation and (c) acted *bona fide*. To protect himself fully the alienee must show that he satisfied himself that the course proposed to be adopted by the guardian was necessary and proper and that no alternative which would involve less loss to the minor was open to the guardian. To go further, as in the controversial case of *Nathu v. Ganpat*,³ and assert that the alienee must 'show positively that the course which the natural guardian took was the only one open to her in the circumstances of the family', seems incorrect. Where the alienee was protected in the manner described above he need not prove that the money he advanced was actually used for the purposes alleged by the guardian,⁴ since his protection rested upon the equitable

¹ *Sultan v. Sirajul* AIR 1938 All. 170, [1938] All. 125, based upon *Khunni v. Kunwar* (1911) 38 I.A. 87, 33 All. 356.

² *Maida v. Kishan* AIR 1934 All. 645, 56 All. 997.

³ (1957) 59 Bom. L.R. 1121, AIR 1958 Bom. 25.

⁴ *Anil v. Prohabati* AIR 1940 Cal. 532, 536, 44 C.W.N. 1048.

claim of a *bona fide* purchaser for value without notice of the defect in the guardian's power.¹ Naturally equity will not assist an alienee who by his own misconduct caused or contributed to the necessity justifying the alienation.

94. The courts, after long holding that the guardian might not validly make an alienation unless it were purely defensive of the minor's property and interests,² have more recently taken the view that acts which are done *bona fide* and likely to enhance the value of the estate may be binding on the minor even if an alienation of land is involved, more particularly if the minor has in fact profited from the exchange of sources of income. An unsuccessful project may be upheld if its results, though disappointing, might have been favourably predicted by a prudent manager of property of which he was not sole owner.³ Similarly the earlier cases which denied that a guardian might exercise the wider and more comprehensive powers of the manager of a joint Hindu family, and which constrained certain courts to hold (wrongly) that a widow who had inherited under the Hindu Women's Rights to Property Act, 1937, might be manager of the family (§ 424), are beginning to give place to judgments which equate the powers of the two functionaries, allowing the guardian to incur debts and alienate property if in the opinion of a prudent man⁴ it would be for the benefit of the minor.⁵ The fact that the alienee has used proper care, though not strictly relevant (for if he is fully protected⁶ the question of the guardian's excess of power does not even arise), will help to show that the transaction was reasonable.⁷

95. The view that the guardian might not *sell* unless there was no alternative open to him,⁸ a view which left the

¹ *Hunooman v. Babooee* (1856) 6 M.I.A. 393, 18 W.R. 81.

² *Ragho v. Zaga* (1928) 53 Bom. 419, 424-5, AIR 1929 Bom. 251.

³ *Jagat v. Mathura* AIR 1928 All. 454, 457, 50 All. 969, 978-9 (FB) (dictum); *Vembu v. Srinivasa* (1912) 23 M.L.J. 638, 17 I.C. 609.

⁴ The test proposed in *Jagat* (above) is now more acceptable than the conservative dictum of Sir John Beaumont, C.J., in *Hemraj v. Nathu* (1935) 59 Bom. 525, 543, AIR 1935 Bom. 295, 298 (FB).

⁵ *Govinda v. Pathimunnissa* AIR 1958 Mad. 510, [1958] 2 M.L.J. 28.

⁶ As in *Anil v. Probhabati* (cited above).

⁷ *Firm Ramlochan v. Maikha* AIR 1960 Pat. 271.

⁸ *Tulsiram v. Narayan* [1950] Nag. 795, AIR 1950 Nag. 69.

prudent man's judgement very little room, was probably unsound.¹ The method to be followed was for the guardian to choose; and simple debts would bind the minor's estate (apart from questions of priority) as effectively as mortgages. But in each case the necessity must exist (or the creditor must honestly believe that it existed) both for the loan and for the rate of interest agreed upon.² But imprudent³ and speculative⁴ transactions remained invalid upon any view of the matter.

NG borrowed money on the security of a house belonging to a minor, *M*, for the purpose of enlarging and improving it, whereby the rent was increased. The transaction bound *M*.⁵

NG sold land belonging to her minor son, *M*, to pay private untainted debts of *M*'s deceased father, which had become barred by limitation. The alienation was not binding upon *M*.⁶

AG, appointed guardian of *M*, her late husband's nephew, a sole surviving coparcener, gave lands belonging to him to her sister-in-law in satisfaction of a promise made by her father at the time of the latter's marriage. If *M* had been of full age, or had *AG* been a male coparcener and manager, such a gift would have been valid in South India, where such promises are customary. In the circumstances the gift was not binding upon *M* or upon the joint family.⁷

96. At Anglo-Hindu law the consent of the court was not required to validate alienations by natural, testamentary or *de facto* guardians or guardians by virtue of affinity. The problem of alienations partly supported by justification is dealt with below (§§ 481f). The rights of the alienee from a guardian were in such circumstances similar to those of an alienee from a manager of joint-family property at Mitakshara law.⁸

What was the position where the guardian was appointed guardian of the minor's property and authorized under

¹ *S. Gopalakrishna v. C. V. Krishna* AIR 1961 Mad. 348 (dicta).

² *Annamalai v. S. Muthuswami* AIR 1939 Mad. 538, [1939] 1 M.L.J. 792.

³ As in *Ragho v. Zaga* (1928) 53 Bom. 419, 428, AIR 1929 Bom. 251.

⁴ *Nagammal v. Varada* AIR 1950 Mad. 606, [1950] 1 M.L.J. 505; *Bhagwan v. Mahadeo* (1923) 45 All. 390, AIR 1923 All. 298.

⁵ *Govinda* (cited above).

⁶ *Parasiva v. Rachaiah* AIR 1958 Mys. 125; *Sudhanya v. Haripada* AIR 1960 Cal. 34, 53 C.W.N. 677.

⁷ *Palaniammal v. Kothandarama* AIR 1944 Mad. 91, [1943] 2 M.L.J. 432.

⁸ *Raghubans v. Indarjit* (1923) 45 All. 77, 78-9, AIR 1922 All. 526; *Sundrabai v. Shivanarayana* (1908) 32 Bom. 81.

s. 31 of the Guardians and Wards Act to alienate the property, and it subsequently appeared that he suppressed information which might have precluded the authorization? The answer lies in the answer to a further question, did the alienee rely upon the court's order under s. 31, and otherwise satisfy himself *bona fide* that the alienation was for the minor's benefit? If he did he is safe.

In *Harikrishnan v. Jain Temple*¹ the widow mother suppressed the existence of the father's will, which in fact deprived her of all power of sale or mortgage. Upon the faith that the court's repeated authorizations of mortgages by her as appointed guardian were valid and sufficient the mortgagee advanced money. Since he had no knowledge of the guardian's misconduct, and had scarcely any means by which he might have obtained knowledge of it, it was held that he was protected as a *bona fide* purchaser for value.

It is incorrect to say that the order obliges the minor to undertake the burden of proof that there was no justification for the transfer;² rather the order protects only an alienee who relies upon it *bona fide*, and the burden of proof of this reliance properly rests upon him.³

97. We may proceed to the powers of the guardian in respect of incurring debts purporting to bind the minor. It is essential to realize that all acts by the guardian are done by him in his own name for the purposes of the minor: he cannot exempt himself from liability, although if the contract is specifically on behalf of the ward and there is no personal covenant binding the guardian himself he may not be liable on it.⁴ The concurrence or even signature of the minor adds nothing to the validity or effectiveness of the guardian's act. In this respect the former law and the law prevailing under the 'Hindu Code' are identical. Moreover an act of a guardian in respect of the minor's property can claim no validity whatever if the guardian purports to do it as full owner of the property. No question of ratification can possibly arise, whereby the act might be saved.⁵ The guardian may not in any event bind the minor by a personal covenant (s. 8 (1)), e.g. of indemnity, to grant a lease, and

¹ AIR 1962 Mad. 267, [1962] 2 M.L.J. 241 (FB).

² As in *Balaji v. Sadashiv* AIR 1936 Bom. 389, [1937] Bom. 1. § 68.

³ *Harikrishnan* (cited above).

⁴ *Maida v. Kishan* AIR 1934 All. 645, 56 All. 997.

⁵ *Gunduchi v. Balaram* AIR 1940 Pat. 661, 192 I.C. 196.

so on.¹ Yet the minor cannot 'approbate and reprobate', and he may be liable to refund consideration received for a contract that turns out not to be binding upon him.²

98. The guardian may not bind a minor by drawing or accepting a promissory note, because no contract which does not purport to charge the minor's estate is within a guardian's power,³ though a minor may sue upon it if it appears that the note was taken in the minor's name,⁴ and upon the debt incurred, though not upon the note itself, the minor is liable.⁵ After it had long been held that specific performance could never be decreed against a minor, for want of mutuality, it was held by the Andhra High Court that as a result of a Privy Council decision of 1948⁶ a contract entered into by a guardian properly for sale or purchase of immoveable property is specifically enforceable against the minor. But the liability that arises out of the guardian's contract is still that of the minor's estate only.⁷ Where the guardian acts properly the creditors can, by subrogation, avail themselves of the guardian's right to indemnity for liabilities properly incurred on the minor's behalf out of the assets of the minor,⁸ and it is therefore the practice for them to proceed directly against the latter. As a result of the terms of s. 21 of the Limitation Act a lawful guardian may prolong the life of a debt owed by the minor by acknowledging it or paying interest on it.

99. The position of guardians by virtue of affinity is somewhat anomalous. We have seen that the case of a minor bride of a minor husband is in the guardianship, so far as her property is concerned, not of her husband but of the legal guardian, if any, of her husband (§ 54). This will normally be her father-in-law. The father-in-law, as we

¹ *Ranmalsingji v. Vadilal* (1896) 20 Bom. 61.

² *K. Venkata v. Ravi* (1931) 54 Mad. 163, AIR 1931 Mad. 140.

³ *Shankar v. Nathu* AIR 1932 Bom. 480, 34 Bom. L.R. 1001.

⁴ *Pandharinath v. Ajankha* (1926) 50 Bom. 831, 26 Bom. L.R. 426.

⁵ *Annamalai v. S. Muthuswami* AIR 1939 Mad. 538, [1939] 1 M.L.J.

792.

⁶ *S. K. Subrahmanyam v. K. Subba* AIR 1948 P.C. 95, 97, 75 I.A. 115, [1948] 2 M.L.J. 22 (PC).

⁷ *V. Suryaprakasam v. A. Gangaraju* AIR 1956 Andhra 33, [1955] An. W.R. 818 (FB).

⁸ *Sanka v. Bank of Burma* (1912) 35 Mad. 692; *Natesa v. Manicka* AIR 1938 Mad. 398, [1938] 1 M.L.J. 181.

have seen (§§ 51, 71) is not a *natural* guardian of his minor daughter-in-law, either under the HMGA, which exhaustively enumerates natural guardians in s. 6, or under the former system. On the death of the husband, the minor widow comes into the guardianship of her deceased husband's nearest agnate, and this rule is likewise inconsistent with the 'natural' guardianship of the guardian by virtue of affinity. When, therefore, the HMGA provides, in s. 8 repeatedly, the powers of a *natural* guardian (with which the testamentary guardian is, as we have seen, classed by the operation of s. 9 (5)), the result is that the guardian by virtue of affinity retains the powers of a guardian that existed under the former system.

100. The minor's remedy if the legal guardian has exceeded his powers as to moveable property depends upon whether the alienation involved was fraudulent or an instance of misappropriation. A suit for accounts filed by the next friend is a suitable method of attempting to recover funds fraudulently made away with, or misappropriated by the guardian. After a *prima facie* case has been made out that the guardian had funds which he had not spent for proper purposes, the court may oblige the guardian to account for this expenditure or in default to account personally for all deficiencies. Since fraud, misappropriation and breach of trust enable the court to follow the funds, the alienees can themselves be made accountable. But the transferees who are *bona fide* purchasers for value without notice of the guardian's abuse of his powers are immune from such process, and the minor is confined to his remedy against the guardian in respect of the proceeds of the transfers. No gratuitous or colourable alienation is protected by any equity in the transferee's favour, and a mistake of law cannot avail the transferee.

101. Where the guardian has been negligent, even grossly negligent, the minor has no remedy, except in cases where the guardian can be forced to account personally (§ 116).

102. In the case of immoveable property the HMGA provides (s. 8 (3)) that if a natural (and so also a testamentary) guardian disposes of it otherwise than as provided in subsection (1) (acts which are necessary or reasonable and proper ...) or subsection (2) (alienations of immoveable

property subject to the prior approval of the court) the disposition is voidable at the instance of the minor and any person claiming under him. Thus during his minority (suing through his next friend) or within three years thereafter the minor may sue for a declaration that the alienation is not binding upon him, or for possession of the property if possession is with the alienee or his alienees,¹ or, where his possession has never been disturbed,² within 12 years of attaining majority he may treat the transaction as a nullity by notice or by conduct in relation to the property (for example, a sale) brought to the attention of the provisional holder. 'A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it. . . . *It is not necessary that he should bring a suit. . . .*'³ Consequently he can set up the invalidity of the alienation as a defence to a suit for possession or to enforce a mortgage against him even long after a suit by him to set aside the alienation would have been barred by the expiry of the three years from his attaining majority, and this is equally true whether the guardian was a natural or an appointed guardian.⁴ Where the minor repudiates, he is not (as he would be in suits for possession as such) automatically entitled to mesne profits if equity is entirely on his side (as is usually the case), whereas if his suit were to set aside a sale he might be entitled to mesne profits from the date of his dispossession by the guardian's transfer.⁵

¹ Limitation Act, 1908, sch. I, Art. 44. *Laxmava v. Rachappa* (1918) 42 Bom. 626, AIR 1918 Bom. 180; *Dip v. Munni* (1930) 52 All. 110, AIR 1929 All. 879; dicta in *Rangaswami v. Marappa* AIR 1953 Mad. 230, 231 are consistent with this view.

² *Muhammad v. Zahoor* (1930) 52 All. 979, AIR 1930 All. 858 (general principle). The view relied upon in *M. Subba v. M. Ramamurti* AIR 1958 An. P. 626 that a suit for possession may be filed within 12 years from the date when possession was lost, and that alienations by gift by natural guardians in excess of their powers are void, appears to be wrong.

³ Trevelyan on Minors, 5th edn, p. 202 (so 6th edn also), cited at *Lalit v. Nengendra* AIR 1940 Cal. 589, 591 (minor sold to another alienee of his own choice): ref. at *Sivanmalai v. Arunachala* AIR 1938 Mad. 822, 823, [1938] 2 M.L.J. 428, and *Jagdamba v. Anadi* AIR 1938 Pat. 337, 349, 17 Pat. 460.

⁴ *Jai v. Bechoo* AIR 1938 All. 369, [1938] All. 614; *Jagannath v. Churni* AIR 1940 All. 416, [1940] All. 580.

⁵ *Mallappa v. Anant* AIR 1936 Bom. 386, [1937] Bom. 59.

103. If the minor, knowing all the facts, ratifies a voidable transaction he cannot afterwards sue for it to be set aside, much less repudiate it. Communication to the alienee, however, is essential for ratification to operate.¹

104. If the minor dies without avoiding the alienation the general law (apart from the HMGA) provides that the alienation becomes as good as if it had never been subject to a defect, and the right of suit does not pass to the minor's legal representatives. If however he assigns his rights in the property when he reaches majority (for in one view the right is transferable), and then dies, his assignees may apparently sue to set aside the alienation within three years of the minor's attaining majority.² With this apparent exception it is the character of all voidable transactions, that they cannot be avoided by persons other than those having at the relevant time an interest in the property in dispute or their transferees of such interest.³ However our statute provides otherwise. The expression, 'any person claiming under him' is wide enough to include not only transferees or assignees of the property or of rights therein from the minor *inter vivos*, but, it seems, also his legatees and intestate heirs. The defect in the improper alienation is, in this view, not cured by the minor's death, though, where the minor is out of possession and a suit for possession is necessary, the law of limitation will operate to stay any claim by the minor after the relevant period is past, and his transferees, legatees or heirs thereafter can have no greater right to set aside the alienation than he himself would have.

105. Where the guardian alienates nominally on behalf of the minor the alienation is either valid and binding or, as we have seen, voidable. But if the alienation is a transfer in

¹ *Ganpat v. Ishwar* AIR 1938 Nag. 476, [1940] Nag. 20; *Comm. Agric. I.T. v. Jagadish* AIR 1960 Cal. 546, 64 C.W.N. 876. Despite dicta which are now unreliable, the decision in *Jhaverbhai v. Kabhai* AIR 1933 Bom. 42 was probably correct on this ground.

² Dicta in *Raja v. Govindammal* AIR 1929 Mad. 313, 321, and in *Thayammal v. Rangaswami* AIR 1956 Mad. 15, 19, [1956] Mad. 182. On principle these dicta are preferable to the decision in *Mon v. Bidhu* AIR 1939 Cal. 460, where it was concluded that rights in property improperly alienated are unassignable, which would be an anomaly.

³ *Hanmantappa v. Dundappa* AIR 1934 Bom. 234, 36 Bom. L.R. 474 (an alienation by a manager).

assertion of a hostile title, for example as if the property were his or her own, or where property in which the minor has an interest is alienated by the guardian otherwise than as guardian, or gratuitously or with a fictitious consideration, the transaction is *void*, this statute is not called into play, and the minor or his heirs may ignore it as an absolute nullity¹ until a title to it is perfected by adverse possession on the part of the possessor, who is, of course, a mere trespasser. Possession would be adverse to the minor and time would run in favour of the possessor from the moment when the alienee acquired the property from the guardian. If the circumstances are such that alienee and guardian are in collusion, so that a breach of trust taints the third party (as is frequently the case), no question of limitation arises and title can never be perfected by possession against the defrauded minor.

106. The question arises whether, when a minor is successful in setting aside an improper alienation by his guardian, he is under any obligation to the dispossessed or otherwise disappointed alienee. Under the GWA a sale without the prior consent of the court under ss. 29, 30 is voidable by suit, but the ward must refund to the alienee any monies which he has received or have been spent for his benefit.² The same equity binds a subsequent valid purchaser from the guardian of the same property, should the minor not have made the refund.³ The same is the position where a natural guardian (other than a manager of the joint-family property alienating the minor's interest: § 430) alienates improperly the minor's property. In *Hemraj v. Nathu*⁴ the alienation was set aside but the minor had to repay the purchase price to the heirs of the defendant-purchaser. Although in the case of minors upsetting alienations by their manager they too must repay to the dispossessed alienee their proportions of any monies which were needed for family purposes and which are therefore presumed to be taken from the alienee for their benefit, the alienee himself

¹ *Rangaswami v. Marappa* AIR 1953 Mad. 230; *Neenakshamma v. N. S. Aswathanarayana* AIR 1961 Mys. 193, 195 (an interest under the Mysore Hindu Law Women's Rights Act); *Baidi v. Singrai* AIR 1962 Or. 170.

² *Dwijendra v. Manorama* (1922) 49 Cal. 911, 918, AIR 1922 Cal. 150.

³ *Nagendranath v. Mohinimohan* (1930) 58 Cal. 128, AIR 1931 Cal. 131.

⁴ (1935) 59 Bom. 525, AIR 1935 Bom. 295 (FB).

has no equity over the property recovered (§ 485), and this constitutes an important difference between the two classes of guardian-ward relationship. Where the guardian alienates as if the property were his own, so that the alienation is totally *void*, the position is different again: no equity is created in favour of the purchaser even in cases where the guardian actually uses the money or part of it to pay debts binding upon the minor's estate.¹

107. Where an alienation is set aside the alienee is entitled to be compensated for any improvements he has made only where he believed in good faith that he was absolutely entitled to the property.² This is negatived where the sale is by a guardian for an inadequate price or is otherwise outside the powers of a guardian, which the alienee (who is not protected by a mistake of law) is conclusively presumed to know.³

108. Formerly the law respecting the powers of a guardian of property was as stated above, prior to the amendment effected by the HMGA, which extends the capacity of those who claim under the minor to avoid improper alienations. Formerly the right to avoid a voidable alienation ceased with the minor's death, and this gave rise to situations uncongenial to the welfare of a minor whose guardian contemplated improperly alienating his property.

The de facto guardian

109. It has been seen that the modern Hindu law knows the *de facto* manager or guardian of the property of a minor, and that he fulfils a most valuable function until such time as he or someone else is appointed guardian by the court or until the minor reaches majority. There is no positive obligation upon a *de facto* guardian to seek appointment by the court and most such guardians function in cases where the expenses of seeking appointment are not justified by the size of the minor's estate. Where a well-to-do minor's affairs are managed by a *de facto* guardian who does not

¹ *Ammani v. Ramaswami* (1918) 37 M.L.J. 113; *K. Suryanarayana v. A. Purnachandra* [1946] Mad. 531, 535-6, AIR 1946 Mad. 150.

² Transfer of Property Act, 1882, s. 51.

³ *Sidh v. Har* AIR 1937 Oudh 446, [1938] Luck. 450.

seek appointment there are grounds for suspicion that his motives are not disinterested, as a guardian's must be.

110. The powers of alienation possessed by such a guardian as an honest *de facto* guardian are peculiar and are not yet finally determined in spite of numerous dicta in reported cases. Suspicion of intermeddling by dishonest and incompetent persons under the pretence of saving the minor's property where no legal guardian exists led to Parliament's obscuring the legal position by providing in s. 11 of the HMGA, 'After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor'. Very naturally most commentators agree that this section abolishes *de facto* guardians.¹ This does not, however, appear to be the case. One will interpret narrowly a statutory provision taking away rights of minors to be represented in transactions which are for their welfare, particularly where the statute does not purport to remove the *de facto* guardian as a step in the way of remedying abuses. No one suggests that he was an abuse: on the contrary the Hindu law was rather proud of him. The difficulties to which the institution of the *de facto* guardian gave rise in Anglo-Hindu law were hardly abuses, and the statute does not in any case tell us that his acts are void.

111. Two interpretations of s. 11 are possible. According to the first the *de facto* guardian of a minor is reduced to the position of a *de facto* guardian of a lunatic adult (§ 42). All his dispositions on the minor's behalf are void, and even his receipts for the minor's debts are unable to discharge the minor's debtors, even if they are evidence against the guardian that he has received money to the use of the minor. The *de facto* guardian is therefore abolished. Since a minor cannot under the modern law of India appoint a guardian if he cannot appoint a *de facto* guardian, and since a very young child cannot purport to appoint anybody under any provision of law, this is highly inconvenient. It is very doubtful whether the common law rule (§ 45)

¹ Pradhan, p. 229. The view is supported by *obiter dicta* of Chagla, C.J., in *Narayan v. Ramchandra* AIR 1957 Bom. 146, 59 Bom. L.R. 763 (FB).

enabling the minor to appoint a guardian can be taken away by the words of s. 11, and if the *de facto* guardian is saved in such instances there is every likelihood that he is saved in the other instances also. If the section had said that the acts of the *de facto* guardian should be null and void, thus preserving the liability of the guardian for receipts, whilst destroying his capacity to alienate, no room for doubt would remain. But the second line of interpretation takes advantage of the words, 'entitled to dispose' and interprets them strictly. No guardian by virtue of his guardianship has any title in the property of his ward, but his office, established by law, *entitles* him to make alienations which will bind the minor's estate. The previous state of the law, by which, in certain circumstances, a *de facto* guardian was *entitled* to bind the minor's estate, is not, it is submitted, altered by s. 11. What the statute aims to prevent, it would seem, is an alienee claiming against a minor on the ground that the alienor (the guardian) was *entitled* to alienate to him 'merely on the ground of his or her being the *de facto* guardian'. In other words, where the alienee can show that the alienation was on the ground of the minor's necessities or the evident benefit of the minor's estate, and not merely the character which the *de facto* guardian enjoyed for the time being as the minor's general representative, the alienee was to be protected exactly as under the previous system, to which we must necessarily refer as the continuing law of India in reference to Hindu minors. The marginal note, '*De facto* guardian not to deal with minor's property,' does not control the meaning of the plain words of the section,¹ and we must interpret the statute in such a way that its plain words take effect, particularly when their effect is consistent with the intention which, on other grounds, we may believe Parliament had. An interpretation which, relying upon the marginal note alone, attempted to destroy the institution of the *de facto* guardian, would create more inconveniences than it would solve.

112. Naturally a third party dealing with a person who purports to be guardian would be well advised to inquire

¹ Maxwell, *Interpretation of Statutes*, 10th edn, 43, 50. *Emperor v. Sadashiv* (1947) 49 Bom. L.R. 526 (PC); *Emperor v. Fulabhai* (1940) 42 Bom. L.R. 857.

why he does not seek, if he is not a legal guardian, appointment as guardian by the court. Yet, where the minor's assets are worth, say, Rs. 50, and the elder brother offers them for sale to provide the minor with food, he would be a fool to inquire why the brother did not apply for appointment, and dishonest to give a price lower than the market value on the pretence that the brother was 'not to deal with the minor's property'.

113. Formerly, despite considerable apparent judicial disagreement as to the reasons for the rules, a fairly consistent picture of the powers of the *de facto* guardian had emerged. Where his act was justified upon the standards applicable to legal guardians' alienations, the third party was protected and the minor bound, no difference appearing in their connexion between a *de facto* and a legal guardian. The touchstone of the act was the minor's necessity and not the authority of the person acting.¹ The provisions of the Limitation Act² preclude the possibility of a *de facto* guardian's extending the life of a debt owed by the minor, and an acknowledgement by such a guardian (as opposed to a legal guardian) did not prevent the debt from becoming time-barred.³ The *de facto* guardian could not execute a promissory note in the name of the minor even in respect of a debt binding on the estate, since he could not exclude his own liability, and therefore a sale in discharge of the note would not bind the minor.⁴ But where a surety joins the guardian in renewing a debt for which renewal the consideration was the discharge of a debt binding on the estate, the alienation by the guardian to reimburse the surety was binding on the estate of the minor.⁵

114. Where the alienation by the *de facto* guardian was unjustified it was called 'void in toto', but was really inchoate.⁶ If the property were in the minor's possession

¹ *K. Sriramulu v. M. Pundarikakshayya* AIR 1949 F.C. 218, 260; [1949] FCR 65.

² Ss. 20, 21.

³ *Nagayya v. Narasayya* AIR 1938 Mad. 853, [1938] 2 M.L.J. 501.

⁴ *K. Sriramulu* (cited above).

⁵ *Ramalinga v. Srinivasulu* [1956] Mad. 242, AIR 1955 Mad. 657.

⁶ See *Kailash v. Rajanikanta* [1945] Pat. 273, 277-8; *T. Bapayya v. M. Pundarikakshayya* [1946] Mad. 648, 658, AIR 1946 Mad. 198. Below, § 465.

when he attained majority he had only to repudiate the transaction by notice, or by conduct inconsistent with the alienee's title.¹ If it were out of his possession, as is usually the case, he might sue for the alienation to be set aside, for a declaration that it did not bind him, and for possession.² He must repudiate or sue within 12 years from his attaining majority. The period is that indicated in Art. 144 of the Limitation Act, and runs from the time when the minor would be entitled to affirm the alienation or treat it as binding on him. Art. 44 (three years) is not applicable because a *de facto* guardian acting improperly is a wholly unauthorized person.³ If the minor failed to sue, or adopted or 'ratified' the guardian's act, not only he, but also his heirs or assignees, were prevented from setting the alienation aside, for alienees under such circumstances, and those deriving title through them, might take advantage of the law of limitation except where they had been parties to fraud in collusion with the guardian.

115. The view apparently expressed in Federal Court dicta⁴ that an improper alienation by a *de facto* guardian is only voidable, and the calamitous decision to that effect in *Palani Goundan v. Vanjiakkal*⁵ are wrong in so far as they purport to inhibit the legal representative of the minor from recovering the property after the minor's death but within the period indicated by Art. 144. Judicial expressions, on the other hand, that such alienations are 'void' *ab initio*, must be understood⁶ in the manner indicated in § 114 above.

THE LIABILITIES OF THE GUARDIAN

116. Though as we have seen (§ 77) no guardian is entitled to remuneration, except under certain special provisions of

¹ *Panchu v. Hrishikesh* AIR 1960 Cal. 446. ² *Panchu* (cited above).

³ *Mata v. Sheikh* (1912) 39 I.A. 49, 56, 34 All. 213; *Purushotama v. Brundavana* AIR 1931 Mad. 597(2). These authorities remove my doubts expressed at 63 Bom. L.R. (J.), pp. 6-8.

⁴ *K. Sriramulu* (cited above) at pp. 605, 610.

⁵ AIR 1956 Mad. 476, [1956] 1 M.L.J. 498. On the other hand *Mon v. Bidhu* AIR 1939 Cal. 460, 43 C.W.N. 295 was correctly decided.

⁶ *Tattya v. Rabha* AIR 1953 Bom. 273, 55 Bom. L.R. 40; *N.B. Sitarama v. Venkatarama* [1956] Mad. 99, AIR 1956 Mad. 261 (FB), per B. H. Sayeed, J.

the GWA in regard to appointed guardians (with whom we are not immediately concerned in this book) and under the provisions of the will in the case of testamentary guardians, all guardians are personally liable for breach of trust. Though there is, of course, no express trust in the normal guardianship relation and the ward's property does not vest in the guardian (though there is no reason why a guardian should not also be a trustee for the ward in respect of some of the ward's property) the legal position of all guardians is fiduciary.¹ A guardian cannot therefore possess the property of the ward adversely to the latter, no matter how long he retains it, and no matter whether or not the ward comes to know that it is really his own property. We have noticed the distinction between a breach of trust which will enable the transferee from the guardian to perfect a title, either because he is a *bona fide* purchaser for value without notice of the breach (§ 100), or because, being clear from fault himself and free from collusion with the guardian, he may in some circumstances be able to take advantage of the law of limitation (§ 114). But the guardian himself cannot hide behind the protection (if any) which the law may allow to his alienee.

117. What is required of the guardian is prudent management. He is not personally bound to contest every possible claim against his ward, or to litigate on the ward's behalf whatever the chances of success.² The guardian is bound, however, to hold for the benefit of the ward³ any pecuniary advantage obtained by him out of the minor's estate, including profits made by the use of the ward's money, and profits he would have received but for his gross and wilful default. The minor's discharge in full knowledge of the facts when he comes of age (§ 79) will release the former guardian from a liability to account for advantages he may have obtained from his position as guardian, and as a matter of practice it is in this way that many doubtful dealings by guardians with their ward's properties are never counted against them as they strictly should be. A minor is usually, as a matter of fact, grateful to his former guardian, who has acted without remuneration, and only in exceptional

¹ *Shamrao v. Shashikant* AIR 1948 Bom. 15, 19, 49 Bom. L.R. 498.

² *Baboo Lekraj v. B. Mahtab* (1871) 14 M.I.A. 393, 398-9.

³ Trusts Act, 1882, s. 88, ill. (h).

cases are his rights in equity exacted to the full. The court looks, consequently, with great suspicion at transactions, a party to which has recently reached majority, where the other party is his former guardian or a nominee of the latter, in case the transaction is vitiated by undue influence.¹ Once undue influence is alleged by the ward the onus of showing good faith shifts to the guardian, or his nominee or transferee, where the latter had notice or must have known of the likelihood of the operation of undue influence.² Inactivity by the ward must amount to laches, i.e. a determination not to pursue his right, before the court will deny him his relief against unconscionable transactions.³

118. In his fiduciary capacity a guardian is liable to render accounts on demand by the former minor. So also is an agent appointed by the guardian who has handled the minor's property. Against the legal representative of the guardian into whose hands property of the minor has come it may be necessary to file a suit, not for accounts, but for sums owed to the minor on the basis of accounts as proved by the minor.⁴ The minor has, it seems,⁵ six years after attaining majority in which to sue for an account of the guardian's management. Where he has settled accounts with the former guardian he may re-open the account only by alleging and proving fraud, but even if one fraudulent entry is found by the court the account may be opened for a great number of years back in the court's entire discretion.⁶

FURTHER READING

Modern Hindu Law

M. W. Pradhan, *The Guardianship Acts*, Bombay, 1958.

N. R. Raghavachariar, *Hindu Law*, 4th edn, pp. 990-1019.

¹ *Toolseydas v. Premji* (1889) 13 Bom. 61. On undue influence see also below, § 714.

² *Trusts Act*, 1882, s. 89. *Rama v. Manikkam* (1934) 58 Mad. 454, AIR 1935 Mad. 726.

³ *Lakshmi v. Roop* (1907) 30 Mad. 169.

⁴ *Mirabai v. Kaushalyabai* [1948] Nag. 794, AIR 1949 Nag. 235; *Custodian v. Hamiduddin* AIR 1955 All. 417.

⁵ Art. 120 of the Limitation Act (the residuary article) was held to apply in *Mani v. Anpurna* (1943) 22 Pat. 114, 131, but in *Kisandas v. Godavaribai* AIR 1937 Bom. 334, [1937] Bom. 636 it was held that the period was three years.

⁶ *Ramlalsao v. Tansingh* [1952] Nag. 650, AIR 1952 Nag. 135.

- D. F. Mulla, *Principles and Precedents*, ed. S. T. Desai, 12th edn, pp. 1021-42.
- S. Venkataraman, 'Some reflections on the Hindu Minority and Guardianship Act, 1956,' [1957] 1 An. W.R. (Jour.) pp. 5ff.

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- J. D. Mayne, *Treatise on Hindu Law and Usage*, ed. N. Chandra-
sekshara Aiyar, 11th edn, ch. vi.
- N. R. Raghavachariar, op. cit., ch. vi.
- D. F. Mulla, op. cit., ch. xxiv.

The Historical Background

- P. V. Kane, *History of Dharmasastra*, III, pp. 164-5, 460, 573-4.

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- E. J. Trevelyan, *Law Relating to Minors*, 6th edn, Calcutta, 1926.

CHAPTER FOUR

Adoption

INTRODUCTION

119. Adoption is the taking by an adult of a child¹ into a relationship with himself or herself like that of legitimate parent and child. In relatively few legal systems a child may adopt and an adult may be adopted. In numerous systems the relationship falls considerably short, in particular respects, of that of legitimate parent and child. In India adoption as a legal institution exists only between adult adopters and children, and only amongst Hindus. Only a Hindu can take and only a Hindu may be taken in adoption. Adoption is governed entirely by the Hindu Adoptions and Maintenance Act, 1956,² so far as concerns adoptions (other than foreign adoptions (§§ 191ff)) made on or after 21 December 1956. An adoption (other than a foreign adoption) made otherwise than in accordance with the Act is void, and of no effect in law.³

120. Formerly, although a void adoption could not be validated by any subsequent action of interested parties,⁴ an estoppel raised by conduct or representation of fact might prevent the estopped party from denying the validity of the adoption in question, and this might in certain circumstances give the invalidly-adopted child a security *pro tanto*.⁵ Moreover in *Laxman v. Bayabai*⁶ the boy was adopted shortly after his birth, and he had been treated as

¹ For the permissible age for adoption see § 159.

² HAMA, sec. 5. ³ HAMA, s. 5 (1), (2).

⁴ *K. Sattiraju v. P. Venkataswami* (1916) 40 Mad. 925, AIR 1918 Mad. 1072.

⁵ Indian Evidence Act, s. 115. *Draupadi v. Sambari* AIR 1958 Or. 242; *Kishori v. Chaltibai* AIR 1959 S.C. 504, [1959] S.C.J. 560. Mere acquiescence or even presence at the ceremony is not sufficient to create an estoppel (the *sastric* principle that 'silence means consent' not being applied): *Tirkangauda v. Shivappa* AIR 1944 Bom. 40, 45 Bom. L.R. 992.

⁶ AIR 1955 Nag. 241, [1955] Nag. 636.

a *dattaka* (adopted) son for over 50 years not only by his adoptive father but also by his *aurasa*¹ brother, born to the adoptive father subsequently to the adoption. At a partition the *dattaka* participated with his adoptive and not with his natural father (a collateral). For over 25 years the *dattaka* was allowed to assume that his position was upon that footing. This hardly amounted to a 'change of status' or position induced by the *aurasa* son, as the learned judges suggest,² and so did not (it is submitted) amount to an estoppel. It appeared to be inequitable to allow such an *aurasa* to dispute the validity of the adoption. It seems highly unlikely that an adoption which is declared to be void under the HAMA could be rendered effective either by a true estoppel or by the operation of the rule in *Laxman's case*; and it is clear that these rules of evidence may at most hinder proof by certain parties of an invalid adoption. However, it is clear too that under the current, as under the former law, the invalidly adopted child cannot himself pursue a right founded merely upon his alleged adoption.

121. An adoption which conforms to *sastric* principles but is not in accordance with the Act may provide for religious purposes. But it is unable, for example, to provide the adoptive parent with an heir on intestacy, and the adopted son would have no legal right of maintenance against his adoptive parent or parents. In what follows no reference will be made to adoption in accordance only with *sastric* principles. Those who are concerned to make adoptions which will be valid under both systems, for religious as well as for secular purposes, will naturally consult advisers qualified in either sphere. It will be understood that to conform to the requirements of Anglo-Hindu law will not necessarily amount to compliance with *sastric* requirements.³

122. The Anglo-Hindu law considered the adopted son as for practical purposes indistinguishable from a legitimate child, except in so far as he should not be allowed to marry, for example, his natural (i.e. naturally related) sister or any other person within the prohibited degrees applicable prior to his adoption, and as a result might not be entitled to

¹ At Hindu law *aurasa* means 'born of the body' and therefore in that sense only 'natural', as opposed to adoptive, etc.

² At p. 243b.

³ Derrett, *H.L.P.P.*, ch. vi.

adopt the sons of certain females (§ 163). In so providing the old system was more thorough-going than most contemporary systems, and conformed to modern concepts of the adopted child's welfare. The present system continues the tradition. An adopted child is deemed to be the child of his or her adoptive parent for all purposes from the date of adoption, and from that date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by their counterparts in the adoptive family.¹

123. A child may be adopted (rarely—subject to special conditions—an adult²), and in this way an orphan or a child of a relatively poor family may be given a good home and security. In practice however Hindus have tended to adopt in order to fulfil needs prevailing in the family of adoption. The need for a male heir capable of managing the estate and protecting the adopting father's surviving spouse or the adoptive mother herself has resulted in adoption's being confined to sons. It has also resulted in a lack of power to adopt more than one son concurrently, and in the right of adopted sons to upset alienations of joint-family property and to demand a share in the corpus and also in the profits of family property accruing since the death of the adoptive father. Though an adoption would not be invalidated by evil motives on the adopting parent's part (§ 130), some features of the system brought it into disrepute. Consequently some have now been discarded. Where an adoption took place on or after 21 December 1956 the adopted child cannot disturb the title of any holder of property.³ An adoption, therefore, will seldom be made out of mere malice, for example, against the adopting mother's relations by marriage. Moreover it is possible that a girl may be adopted rather than a boy, or, at different times, a girl and a boy. As a concession to prejudice of long standing the simultaneous adoption of more than one child is forbidden, as also the right to have more than one son or daughter, natural, or adoptive, concurrently.⁴ As before, the presence of an illegitimate child is no bar to an adoption. As before, adoption is made not by a married couple

¹ HAMA, s. 12.

² HAMA, s. 10 (iv), see § 159.

³ HAMA, s. 12, prov. (c). Interests in joint-family property at Mitakshara law may well be affected. See § 179.

⁴ HAMA, s. 11.

jointly, or by any others jointly, but by the adoptive parent entitled to make the adoption.

124. Since Hindus have long been accustomed to effect an adoption by way of a transaction between two families, it has not yet been provided that an adoption should not commence except from the time of an order of a court. There is no judicial supervision of adoptions, other than adoptions of children given in adoption by their guardians (except their parent). In such cases, of which the most common must be adoptions of orphans, no widespread custom existed in 1956. The court's prior consent must thus be obtained; the adoption is, however, effective from the date of the transfer of the child in pursuance of the permission so obtained.¹ We may expect that this statutory power to refuse permission to an adoption proposed by the guardian will develop within the framework of the court's ultimate guardianship of minors (§ 46). It is too early to say whether in guardianship proceedings commenced in connexion with a proposed, or a completed, adoption the court will apply the principles evolved in proceedings to obtain its consent under s. 9 (4) and 9 (5) of the Act. If this takes place an indirect supervision of adoptions other than adoptions of orphans, etc., may develop. It is submitted that it is in the public interest that children should not be given and taken in adoption for corrupt purposes, in exchange for valuable consideration, or indeed for any purpose which excludes the child's best interests as these will be understood by the court. The reintroduction, after more than a millennium, of adoption of girls, re-enforces this submission. Any attempt to invoke s. 15 of the Act, whereby it is provided that the adoption, if validly made, cannot be cancelled or the benefits of the status renounced, must, it is submitted, fail in any case where the validity of the adoption may be effectively challenged. This may happen on the ground that the adoption took place while the adopting parent lacked the 'right' (under s. 6 (i)) to take the child in adoption. No one has the *right* to participate in the transfer of a child for a purpose inconsistent with the child's welfare, and the words of the section cannot exclude the Indian law relating to the court's jurisdiction

¹ HAMA, s. 9 (4).

over all minors.¹ The next friend may certainly apply for the child to be made a ward of court; whereupon the actual transfer of the child (which is necessary for the effecting of an adoption: § 166) may be impeded subject to the court's approval.

125. The principles of the law of adoption are to be studied under the following heads:—who may give in adoption, who may take in adoption, who may be adopted, by what means adoption is effected, the various results or effects of adoption, special rules relating to foreign adoptions, and the question of customary adoptions after the Hindu Adoptions and Maintenance Act came into force.

WHO MAY GIVE IN ADOPTION?

126. The father, the mother, or failing them the guardian with the court's permission, can alone give a child in adoption.² The conditions governing their capacities to give differ considerably.

The father

127. The father's capacity to give is absolute, provided he has not been declared by a court in lunacy proceedings to be of unsound mind, and provided he has not completely and finally renounced the world, subject to one condition, namely that the mother of the child must, if possible, give her consent. This consent may be dispensed with where she has renounced the world, has ceased to be a Hindu, or has been judicially declared to be of unsound mind.³ The word 'father' does not include the putative father of an illegitimate child, even though he may have married the mother and recognized the child as his own;⁴ nor does it

¹ The need to construe statutes consistently with fundamental principles of law was asserted in *Kenchava v. Girimallappa* (1924) 51 I.A. 368, AIR 1924 P.C. 209 (the murderer and succession), and in *Ramaiya v. Mottayya* AIR 1951 Mad. 954, [1951] 2 M.L.J. 314 (FB) (chastity of widow-heiresses).

² HAMA, s. 9 (1).

³ HAMA, s. 9 (2).

⁴ For the want of legitimation in Hindu law see § 32.

include an adoptive father.¹ On the other hand it is submitted that a father who has ceased to be a Hindu is not thereby debarred from giving his Hindu son in adoption.²

128. Formerly the father's capacity to give was unrestricted, the mother's consent not being required, and her objections, if any, irrelevant.³ The father of an illegitimate son was believed to be capable of giving him in the case of Sudras,⁴ but the better view, that no putative father could give, gained the weight of authority.⁵ The curious rule that a non-Hindu father might give his Hindu son, founded upon that son's continuing right to be given, and the father's power to delegate the actual transfer to a Hindu agent, was abolished in Mysore State by statute.⁶ On the question whether the natural father might continue to be entitled to give his son born prior to the adoption of himself into another family, some doubt remains. In Bombay the permanence of paternity was insisted upon by a Full Bench,⁷ while a later Full Bench in Nagpur very naturally dissented from this view, holding that the capacity to give was lost upon the father's own adoption, on the ground that there had been a complete severance of legal status, a characteristic of the *dattaka* form of adoption: *Sharadchandra v. Shantabai*.⁸

The mother

129. The mother may give her legitimate or illegitimate child (for motherhood does not rest upon the presumption of paternity or the status of legitimacy) if the father (of a legitimate child) is dead, or has renounced the world, or has ceased to be a Hindu, or has been judicially declared to be of unsound mind.⁹ The living, undisqualified, father's

¹ HAMA, s. 9, expl. (i).

² On the subject of the child's own religion, see § 82.

³ Mit. I, xi, 9. *Alank v. Fakir* (1834) 5 S.D.A. 418, 419.

⁴ *T. Hanumi v. T. Guthya* (1946) 26 Mys. L.J. 8.

⁵ *R. Bulli v. R. Nakaraju* AIR 1958 An. P. 611, [1957] 2 An. W.R. 308.

⁶ *Shamsing v. Santabai* (1901) 25 Bom. 551; Mysore Act XV of 1938, s. 2, ill. (f).

⁷ *Martand v. Narayan* AIR 1939 Bom. 305, [1939] Bom. 586 (FB).

⁸ AIR 1944 Nag. 266, [1944] Nag. 544 (FB).

⁹ HAMA, s. 9 (3).

consent does not validate a gift in adoption by the mother; nor does his prohibition prevent his widow from giving. It appears that if the child is illegitimate the mother can give him irrespective of the existence or qualification of the putative father, since 'father' in the relevant section of the Act cannot include a putative father. We apply the regular canon of construction.

130. Where a widow gives in adoption, the motives inducing her so to do will not, of themselves, invalidate the adoption. Despite strenuous efforts to suggest the contrary, Anglo-Hindu law settled that motives were in all cases irrelevant. In *Ganu Purnaji v. Shriram*¹ the Nagpur High Court followed an old Bombay Full Bench ruling² in the view that where a widow had power to adopt as a religious benefit to her deceased husband, the inquiry into additional or even improper motives must be irrelevant. There is no instance where an adoption has been set aside on the ground of corrupt motives, a possibility envisaged by the Privy Council in *Yadao v. Namdeo*,³ where it adopted a dictum of the Bombay High Court in *Rakhmabai v. Radhabai*.⁴ The dangers of unduly extending the scope of public policy so as to confine capacities existing under the personal laws was pointed out in a still more recent Nagpur decision.⁵ But the aspects of religious benefit and of the widow's pious duty are much reduced in cogency since the commencement of the HAMA, and an adoption which threatened the welfare of the child could not, it is submitted, now be upheld on the ground that his or her adoption was conducive to the spiritual benefit of any deceased or living person. For the court's jurisdiction to investigate the motives in guardianship proceedings see § 124.

131. 'Mother' does not include step-mother, nor adoptive mother.⁶ She does not lose her capacity to give by ceasing to be a Hindu, nor by marrying again after the death of, or her divorce from, the father of the child: for in all such

¹ AIR 1954 Nag. 353, 355, [1954] Nag. 646.

² *Ramchandra v. Mulji* (1898) 22 Bom. 558, 566 (FB).

³ AIR 1922 P.C. 216, 48 I.A. 513, 24 Bom. L.R. 609 (PC).

⁴ (1868) 5 Bom. H.C.R. ACJ. 181, 191.

⁵ *Bhimabai v. Dattatraya* AIR 1956 Nag. 231, [1956] Nag. 451.

⁶ HAMA, s. 9, expl. (i).

cases, it appears, the statute, ignoring the old system, emphasizes the inalienable relationship of motherhood.

132. Formerly the mother, if she had reached the age of discretion, could give her son in adoption with the living father's consent,¹ or without his consent if he was dead, had renounced the world, or was insane,² provided that he had not forbidden it. The general requirement that a woman's acts in matters of adoption should be authenticated by her 'lord' was waived by Nandapandita (*Datt. Mim.* IV, 10-12) in cases of 'distress' (*āpad*) and no wife can be 'dependent' upon an insane husband. To give the son of a deceased man was an act in furtherance of *dharma*, and thus conducive to his spiritual welfare.³ But once she had remarried she ceased to be connected with the boy's father's family and her position, un contemplated (it was believed) by *sastric* texts, was inconsistent with a capacity to give the boy in adoption.⁴ The *ratio* of the decision in question having been overturned by the passing of the HMA, it is not surprising that the rule has been discontinued in modern Hindu law.

The guardian

133. Where the parents cease to be Hindus and have not given their child in adoption, no relative or other person, even if he or she had obtained guardianship of the child, is capable of giving the child. On the other hand if both are dead, or have renounced the world, or have been judicially declared to be of unsound mind, the guardian may give the child with the previous permission of the court, i.e. the City Civil Court or District Court within whose jurisdiction the child is ordinarily resident as the case may be.⁵ The guardian may be a testamentary guardian or an appointed or declared guardian,⁶ but not, apparently, a *de facto* guardian.⁷ It was necessary in many cases for a person interested in a child first to apply for appointment under the Guardians and Wards Act (§ 68) and later to

¹ *Rangubai v. Bhagirthibai* (1877) 2 Bom. 377.

² *Shivprasad v. Natwarlal* AIR 1949 Bom. 408, 51 Bom. L.R. 734.

³ *Mit.* I, xi, 9; *Shivprasad* (cited above) at 414.

⁴ *Fakirappa v. Savitrewa* AIR 1921 Bom. 1, 23 Bom. L.R. 482 (FB).

⁵ HAMA, s. 9 (4) with expl. (ii).

⁶ §§ 68, 69.

⁷ HAMA, s. 9 (4) (unamended). For the *de facto* guardian see § 109.

apply for permission to give the child in adoption. But since 29 November 1962 a person having the care of the child's person, even if he is neither appointed nor declared as guardian, may give the child in adoption with the court's permission.¹

134. The court's permission will be given only when it is satisfied that the adoption will be for the welfare of the child, that the applicant for permission has not received or agreed to receive a reward in consideration for making the gift in adoption, and that no other person has made or given, etc., a reward in consideration of the adoption, other than such as the court may sanction.²

A applies for permission to give *X*, his deceased sister's son, aged 10, in adoption to *B* his brother, who already has three children aged 2, 4, and 5. *A* has a child aged 18. The court may refuse permission, on the ground that *X* will receive less care and attention with *B* than with *A*.³

A applies for permission to give *X*, her grandson, in adoption to *B*, a lawyer. *A* reveals that *B* promised to pay her Rs. 2,000 if the transfer should take place, in consideration of her educating *X* at an expensive school so as to be qualified to assume a place in *B*'s household. The court may sanction this payment.

135. If the court is satisfied that no payment or no unsanctioned payment has been made or promised, and consents to the gift in adoption, yet notwithstanding the provisions of the section a payment is subsequently made, it is submitted that the adoption is not void, and cannot be upset unless it is shown in guardianship proceedings that the giver lacked the 'right' to give (§ 124). It is very doubtful whether the court can entertain the question where the validity of the adoption is an incidental issue, e.g. in a succession dispute. It is submitted that *factum valet* applies to such a case.⁴

136. The wishes of the child may be consulted by the court in determining whether the proposal is for the child's welfare, if the child's age and degree of understanding make this practicable.⁵ This may be done in chambers, and the court will exercise discretion whether to bring the child face to face with the proposed adoptive parent and any

¹ HAMA, s. 9 (4) expl., as amended by Act 45 of 1962, s. 3 (c).

² HAMA, s. 9 (5). ³ See § 61. ⁴ For the doctrine see § 12.

⁵ HAMA, s. 9 (5).

objectors to the application separately in order to discover the child's true feelings in the matter. There is no reason to doubt but that the court has jurisdiction to grant permission subject to terms and conditions, though the Act does not explicitly provide for this. Where the court refuses its permission because of an incorrect appraisal of the motives of the adopting parent, an appeal will lie; and where all circumstances relevant to the proposed adoption are not investigated certiorari will be granted.¹

137. Formerly no such question arose, as no one other than a parent might give the child in adoption.²

WHO MAY TAKE IN ADOPTION?

138. The respective capacities of a male and of a female Hindu to take in adoption vary. As in the case of the capacity to give, so the capacity to take is essential to the adoption's validity. Hindus of indeterminate sex or hermaphrodites are, it is safest to assume, not entitled to take in adoption.

139. An agreement (whether partial or absolute) by a widow not to adopt was unenforceable as being opposed to public policy³ but it is not clear whether the same considerations apply when, as now, adoption can be made to the adoptive parent only and irrespective of spiritual benefit. Nevertheless it is submitted that while breach of any contract not to adopt may found an action (where appropriate) for damages, the validity of the act remains unaffected, on account of the applicability of the maxim *factum valet*.

A male Hindu

140. A male Hindu must be over 18 years old (even if a guardian has been appointed for him under the Guardians

¹ *Re D. (an infant)* [1958] 3 All E.R. 716 (C.A.); *R. v. City of Liverpool Justices, Ex p. W.* [1959] 1 All E.R. 337.

² *Dhanraj v. Soni* AIR 1925 P.C. 118, 52 I.A. 231, 27 Bom. L.R. 837; *Haribhau v. Ajab Rao* AIR 1947 Nag. 143, 228 I.C. 173.

³ *Jagannadha v. Kunja* AIR 1919 Mad. 447, 452b, 49 I.C. 929; *Punjab Rao v. Shesh Rao* (1959) 62 Bom. L.R. 726, 733.

and Wards Act)¹ and of sound mind in order to be able to adopt.² 'Of sound mind' relates to general mental condition and may include an epileptic while it would exclude an idiot or lunatic.³ The right is subject to the condition that if he has a wife, she, or if he has more than one, all of them, must consent to the adoption in question. It is not required that this consent should be formal, or indeed specific: her participation in the adoption ceremony or other signs of approving or adopting the act of her husband may raise an inference that he adopted with her consent. Her consent may in any case be dispensed with if she has ceased to be a Hindu or has renounced the world, or has been judicially declared of unsound mind.⁴ As a result a wife, even if judicially separated from her husband, can prevent him from adopting.⁵ This may be so even though her mental condition is subnormal: whereas, in the interests of the child, the mental condition of the adopting husband must be normal.

141. Apparently even a Hindu who has renounced the world can take in adoption. The desirability of any such adoption may be questioned in guardianship proceedings. It appears that a male who has married under the Special Marriage Act, 1954, or whose parents married under that Act, is not deprived of his right as a Hindu to adopt. As such a male is not a coparcener, the adopted son could not through him acquire a birthright in joint-family property. And since the Indian Succession Act, which governs succession to such a male Hindu, does not recognize the claim of an adopted son, he would have no rights on his adoptive father's intestacy (§ 176). *Mutatis mutandis* the same must be the case with Hindu females seeking to adopt under the current law. The anomaly has been noticed,⁶ and it seems desirable for Parliament to undertake a revision of the status of this category of persons who are only partly within the pale of the Hindu law.

142. Formerly a male (even if he was unmarried)⁷ could adopt if he had reached an age of independent volition,

¹ HAMA, s. 3 (c).

² HAMA, s. 7.

³ *Ran Bijai v. Jagatpal* (1891) 17 I.A. 173, 18 Cal. 111 (PC). See § 345.

⁴ HAMA, s. 7. Lunacy Act, 1912, s. 65. ⁵ [1962] 2 S.C.J. (J.), 74.

⁶ Sri B. Sivaramayya, in [1960] S.C.J. (Jour.), 201-6.

⁷ *Durga v. Santosh* AIR 1944 Cal. 428.

able to understand the purpose of his act and the criteria for the choice of a son. In *Jumoona v. Bamasoondarai*¹ it was decided that a boy of 15 (a major according to the Bengal school) was capable of authorizing an adoption to himself; in the earlier case of *Rajendro Narain v. Saroda*² Dwarkanath Mitter, J., held that a sonless minor who has arrived at the age of discretion was not only competent but bound to adopt if he could not contemplate the birth of an *aurasa* son in his lifetime. In *Patel Vandravan v. P. Manilal*³ it was held that the necessary discretion could be presumed even before the boy reached the age of majority, and the doubts expressed in *K. Sattiraju v. P. Venkataswami*⁴ were, it is submitted, properly ignored in *Kashinath v. Anand*,⁵ in which it was decided that a boy of 14½ who understood what an adoption was and meant in practice was competent to adopt. In *Aravamudha Iyengar v. Ramaswami*⁶ it was held that a Hindu under 16 could in no circumstances adopt, on the ground that the *vyavahara* (secular) aspect of the transaction could not be overlooked; but it is submitted that this is wrong, since, according to the *sastra*, even a minor can accept a gift — a proposition which no one doubts in the law of Wills, which is based upon the law of gifts. However, where the minor was incapable of the required discretion there was no ground for supposing that the lack of it could be made good by the exercise of discretion on his behalf by his guardian. It seems certain that this case must be distinguished from marriage, where the guardian's ability to consent to the match may complete any defect in the minor's consensual capacity. The lack of consent of any wife was immaterial.⁷ One who had renounced the world was, it seems, incompetent to adopt,⁸ but not one who suffered from a mere ritual impurity.⁹ On the other hand disqualifications such as would disqualify from inheritance at Dayabhaga law (§ 595) were sufficient to disqualify from

¹ (1876) 3 I.A. 72, 1 Cal. 289 (PC).

² (1871) 15 W.R. 548.

³ (1890) 15 Bom. 565.

⁴ AIR 1918 Mad. 1072, (1916) 40 Mad. 925.

⁵ AIR 1942 Bom. 284, 44 Bom. L.R. 629.

⁶ AIR 1952 Mad. 245, [1953] Mad. 123.

⁷ *Rungama v. Atchama* (1846) 4 M.I.A. 1.

⁸ Because of his severance from family life.

⁹ *Sukumari v. Ananta* (1901) 28 Cal. 168; *Asita Mohon v. Nirode* (1916) 20 C.W.N. 901; *S. Annapurnamma v. G. Manikyamma* [1946] Mad. 755, AIR 1946 Mad. 308.

adopting.¹ It has been supposed, perhaps wrongly, that the removal of a disqualification by the Hindu Inheritance (Removal of Disabilities) Act, 1928, enabled persons to make an adoption who would otherwise be disqualified. On the question whether a man having a disqualified son, or son's son, or son's son's son, might adopt see § 154.

143. If he adopts a girl, at least 21 years' difference in age between them is required.² Where the age of either party is unknown the court may arrive at an estimate in the light of medical evidence, which remains, however, no more than an opinion.³

A female Hindu

144. Normally a female Hindu 'adopts' by becoming the adoptive mother of a child adopted by her husband with her consent. Marginal cases are liberally provided for in the Act. What follows relates to these independent adoptions by a woman.

145. She must be over 18 years old, and of sound mind. She must be unmarried, divorced, or widowed; or her husband must have ceased to be a Hindu, renounced the world, or have been judicially declared of unsound mind.⁴ Her husband's consent cannot confer upon her any right to adopt. If she adopts a boy there must be at least 21 years' difference in age between them.⁵ Apparently a female Hindu who has renounced the world is competent to adopt.

146. Formerly a wife could adopt with her husband's consent or upon his instructions. Vasishtha says, 'Nor let a woman give a son, nor should she accept one, otherwise than with the consent of her lord'. It was held in Bombay that where the husband was a lunatic his wife was incompetent to adopt, since *she* had no capacity where *he* could not consent.⁶ The authority of that decision has been gravely

¹ *Bhagaban v. Roghunundun* (1895) 22 I.A. 94, 22 Cal. 843 (PC); *Fakirnath v. Krishnachandra* AIR 1954 Or. 176; *Malojirao v. Tarabai* AIR 1956 Bom. 397.

² HAMA, s. 11 (iii).

³ *Emp. v. Qudrat* [1939] All. 871, AIR 1939 All. 708.

⁴ HAMA, s. 8. See § 140.

⁵ HAMA, s. 11 (iv).

⁶ *Ramkrishna v. Laxminarayan* AIR 1920 Bom. 220, 22 Bom. L.R. 1181.

shaken by *Shivprasad v. Natwarlal*,¹ in which the meaning of Vasishttha was related to the woman's dependence, and the non-dependence of a wife upon a lunatic husband was pointed out. A widow could adopt if she had reached the age of discretion, puberty alone not being a sufficient test of that qualification.² In *Mondakini v. Adinath*³ a widow of under 15 was held competent to adopt, but this authority, applying to a case where the widow's scope for discretion was limited, is not so cogent as *Punjabai v. Shamrao*,⁴ in which an adoption by a widow of 'about 15', having arrived at the age of discretion, was upheld after careful consideration of the authorities. *Aravamudha's case*⁵ (§ 142) is, it is submitted, insufficient to shake this position. In *Paryanibai v. Bajirao*⁶ the Bombay High Court (Abhyankar, J.) held, following the old case of *Bayabai v. Bala*,⁷ that where a person claims to have been adopted by an immature girl the conscience of the court must be satisfied by evidence that her act was done consciously in full knowledge of its legal effects and as a free agent. The mere proof of her age by no means suffices.

A widow could adopt to herself, without affecting her husband's *santana*, or line of descent (as also could the husband himself without affecting his wife's posterity) only in the *kritrima* form which survived in Mithila (§ 200). Otherwise a widow when validly adopting adopted to her husband as his surviving half and deputy.⁸ Just as a husband could adopt even if his wife were pregnant (for she might miscarry or bear a daughter), so a widow could adopt notwithstanding the pregnancy of a co-widow with a child which subsequently turned out to be a son. In *Melappa v. Guramma*⁹ it was shown that the *aurasa* so born would have no ground for complaint, for the widow's inherent right to adopt (as then understood in Bombay) together with the

¹ AIR 1949 Bom. 408, 51 Bom. L.R. 734.

² *Murgeppa v. Kalawa* (1919) 44 Bom. 327, AIR 1920 Bom. 354.

³ (1891) 18 Cal. 69.

⁴ [1954] Nag. 805, AIR 1955 Nag. 293, 294b, confirming *Basappa v. Shidramappa*, AIR 1919 Bom. 107.

⁵ AIR 1952 Mad. 245, [1953] Mad. 123.

⁶ (1961) 64 Bom. L.R. 86, 90, 95-6.

⁷ (1866) 7 B.H.C.R. (App.) 1, followed in *Mallangouda v. Dundapagouda* AIR 1932 Bom. 529, 34 Bom. L.R. 1009.

⁸ *Pudum v. Koer* (1869) 12 M.I.A. 350, 356.

⁹ AIR 1956 Bom. 129, 133.

then paramount religious purpose of adoption outweighed what were at the operative time purely speculative considerations. Outside Bombay the husband's authority, or the *sapindas'* caution (see below), would normally obviate such a discussion.

147. According to the law administered in Bombay she might adopt provided her husband had not forbidden her to do so, since her 'pious duty' overcame other considerations.¹ In Madras, failing the consent of the husband in his lifetime, that of the nearest *sapinda* (e.g. the father-in-law) or *sapindas* (e.g. brothers-in-law) was required,² which consent could be dispensed with if it were improperly withheld.³ It seems that a consent based upon a misapprehension of the facts, e.g. whether the husband had himself consented, was not a sufficient consent.⁴ The consent of *sapindas* need however not be contemporaneous with the adoption nor with reference to the boy in question, provided that the widow's lack of independent capacity to adopt was made good by a substantially relevant consent.⁵ Consent was required in the first instance from agnate *sapindas* of the husband, undivided (§ 515) first and then divided; in case these were dead, incapable of consenting or improperly withholding consent, even cognates could be approached.⁶ *Sapindas* were obliged to consider whether the adoption would be in the woman's interest in a broad sense, not whether they individually would themselves stand to lose by the adoption (as would frequently be the case).⁷ Consent might be withheld if the widow proposed to adopt a boy who was legally (and not merely sastrically) disqualified, or an idiot or one otherwise unfit to continue the line, as where he was of bad character.

¹ *Rakhmabai v. Radhabai* (1868) 5 Bom. H.C.R. ACJ. 181; *Tadao v. Namdeo* AIR 1922 P.C. 216, 48 I.A. 513, 24 Bom. L.R. 609 (PC).

² *Coll. of Madura v. Mootoo* (1868) 12 M.I.A. 397.

³ *V. T. S. Chandrasekhara v. Kulandaivelu* AIR 1963 S.C. 185; *K. Subbaya v. K. Ramakoteswara* AIR 1958 An. P. 479.

⁴ *K. A. Gopalaswami v. P. Siddammal* AIR 1958 Mad. 488, [1958] 2 M.L.J. 107.

⁵ *Bodo v. Dondo* AIR 1952 Or. 307, 311a.

⁶ *G. Seshamma v. K. Venkata* AIR 1940 Mad. 356, [1940] 1 M.L.J. 400 (FB); *Chellathammal v. Kalitheertha* AIR 1942 Mad. 606, [1942] 2 M.L.J. 206.

⁷ *Gopalaswami* (cited above); *V. Sundara v. C. Satyanarayanamurthi* AIR 1950 Mad. 74, [1950] Mad. 461.

The *sapindas*, as the widow's advisers, were entitled to prevent a capricious or *mala fide* adoption.¹ Where *sapindas* of equal nearness to the husband disagreed, the widow was not at liberty to adopt unless the majority consented; where there was no *sapinda* at all, or the refusal of consent by all available *sapindas* might be disregarded, she could not adopt at all, since she held no independent residual power of adoption.² Wherever power to adopt was given by the husband to more than one widow, or even where in fact more than one widow adopted, the act was deemed in law to be that of the senior widow, and the power was to be exercised by or in her name. Therefore in Madras her refusal of consent, if proper, would be fatal to an adoption by a junior widow, even if it were to be authorized by the consent of near male *sapindas*,³ but when the entire function of consent was re-examined in *K. Varadamma v. K. Sankara*⁴ it was held that the lack of consent of a junior co-widow would not render ineffectual the consent of male *sapindas*, whose discretion supplied the lack of capacity in the senior widow.

148. In Mithila no adoption was possible by a widow in the *dattaka* form, since the text of Vasishtha was believed to require the living husband's consent.⁵

149. In Bengal, Northern and Central India (Benares school), the consent of the husband was required whether in his lifetime or by his testament. Power to adopt was construed strictly and an excessive or undue exercise of the power would lead to a void adoption.⁶ Where the power was given to two or more jointly, other than co-widows, or was given conditionally and the condition was not strictly observed, the adoption purporting to be in pursuance of the power was void. Yet where the conditions could be so construed as to amount to a recommendation that a particular course should be followed the court would lean in favour of

¹ *V. T. S. Chandrasekhara* (cited above).

² *Balasubrahmanya v. M. Subbaya* AIR 1938 P.C. 34, 36a, 65 I.A. 93, [1938] Mad. 551 (strong dictum).

³ *Muthuswami v. Pulavaratal* AIR 1922 Mad. 106 (2).

⁴ [1955] An. W.R. (HC) 948.

⁵ *Sri Chandra v. Bibhuti* AIR 1945 Pat. 211, 23 Pat. 763.

⁶ *Pudum* (cited at § 146); *Bhupendra v. Purna* AIR 1939 P.C. 222, 66 I.A. 265, [1939] 2 Cal. 486.

an adoption made as substantially in compliance with the recommendation as the circumstances permitted.¹

150. A Sudra woman, pregnant by adultery, might adopt to her deceased husband,² and no doubt on principle such adoptions even by widows of the 'twice-born' classes were not invalid notwithstanding their impropriety by *sastric* standards, for the actual transfer could be done through undisqualified deputies. The older view that her disqualification from performing or having performed the necessary religious ceremonies was fatal to her adoption, though still formally authoritative in Bengal, was much weakened by the argument above as expounded in *Govind v. Godubai*.³

151. A female's capacity to adopt in the *dattaka* form was coextensive with her duty to prolong, if possible, the line of her deceased husband, in order that spiritual as well as secular needs might be met. Where the line was not extinct, or the duty to prolong it had devolved on a daughter-in-law, or granddaughter-in-law, no question could arise of the widow's capacity to adopt. Rationally one might suppose that on the death of such a daughter-in-law without exercising her own power of adoption the power of the senior widow, in abeyance until that time, would revive, and, in the interests of her husband and his ancestors, she should prolong the line by adopting a son. Considerations which would not have been paramount in 1956 had, however, long settled that, once extinguished, a widow's capacity to adopt could not be revived and in *Gurunath v. Kamalabai*⁴ the Supreme Court established that 'The power of a widow to adopt comes to an end by the interposition of a grandson or a son's widow competent to adopt'. If the son had died unmarried after his father's death, or had married a girl who was at all times incompetent to adopt and he had

¹ *G. T. Kotturuswami v. S. Virappa* AIR 1952 Mad. 609 (a case disposed of in the S.C. on another point); see also *K. Sri Hari v. K. Venkaiah* [1953] Mad. 624.

² *Deorao v. Raibhan* AIR 1954 Nag. 357, [1954] Nag. 558.

³ AIR 1946 Bom. 439, 48 Bom. L.R. 177, dissenting from *Sayamalal v. Saudamini* (1870) 5 Ben. L.R. 362.

⁴ AIR 1955 S.C. 206, 57 Bom. L.R. 694, [1955] SCR 1135, relying upon *Bhoobun v. Ram* (1865) 10 M.I.A. 279, 311 and *Pudma v. Ct. of Wards* (1881) 8 I.A. 229, 8 Cal. 302 (PC).

died and she likewise had died, it seems that the widow's capacity, previously in abeyance, would have revived.

F died in 1950 leaving a son, *S* and a widow, *W*. *S* died in 1951 leaving a widow, *W2*. In 1952 *W* adopted *X*. The adoption was invalid.

F died in 1950 leaving a son *S*, and a widow, *W*. *S* died unmarried in 1951. In 1952 *W* adopted *X*. The adoption was valid.

F died in 1950 leaving a widow *W*. *W* adopted *X* in 1951. *X* died unmarried in 1952. *W* adopted *T* in 1953. The adoption was valid.

F died in 1950 leaving a son, *S*, and a widow, *W*. *S* married in 1951 and died in 1952 leaving a widow, *W2*, and a son, *SS*. In 1953 *W2* died. In 1954 *SS* died unmarried. *W* adopted *X* in 1955. The adoption was invalid.

F died in 1950 leaving *S*, an unmarried son, and *SW*, the widow of a predeceased son, and a widow, *W*. *S* died in 1952 unmarried. In 1953 *SW* adopted to her deceased husband. In 1954 *W* adopted *X*. Both adoptions were valid. *SW* was not a daughter-in-law upon whom had devolved, by her husband's death, the duty of continuing the line by adoption.¹

'Giver cannot be taker'

152. By reason of the provision of the Act that there must be a giving and a taking,² it is impossible for the guardian to adopt his ward during the period of his guardianship or for a mother to adopt her illegitimate child. A putative father, however, is not incapable of adopting his illegitimate child, for the mother may give him. A limited exception has been created as from 29 November 1962 by the Hindu Adoptions and Maintenance (Amendment) Act.³ Where the child is an orphan, or abandoned by his parents, or in any other case where a guardian (§ 133) may give in adoption, the guardian may himself receive the child.

153. The above-mentioned objection operated at Anglo-Hindu law,⁴ and there were no exceptions.

¹ *Sahebrao v. Rangrao* (1960) 63 Bom. L.R. 411. The opposite view in *Narhari v. Rajiah* AIR 1957 Hyd. 1 (FB) is vitiated by too literal an adherence to the proposition set out by the Privy Council and the Supreme Court.

² HAMA, s. 6, (ii), (iii).

³ S. 3 (b), amending s. 9 (4) of the HAMA.

⁴ *Fakirappa v. Savitreva* AIR 1921 Bom. 1, 2b; *Sharadchandra v. Shantabai* [1944] Nag. 544 (FB), AIR 1944 Nag. 266 (FB). § 173.

A who was married to W was adopted into another family (§ 160) leaving a son, S, in his natural family. After A's death W purported to adopt S, her own son, as *dattaka* son of A. The adoption was a nullity.¹

Restrictive conditions applicable to adoptive parents

154. No two or more persons may adopt the same child.² No one who has a living Hindu son, son's son, or son's son's son, may adopt a son; and no one who has such a daughter or son's daughter may adopt a daughter. The bar operates whether the existing descendants are legitimate or adoptive (§ 123).³ The rule continues the ancient rule that the adopted son is a substitute for an *aurasa* son, and that the gift in adoption is the gift of an indivisible object to a single person.

155. Formerly two males might share a son in the so-called *dyamushyayana* form,⁴ according to which an 'incomplete' adoption gave the boy a similar status in both families.⁵ He would inherit, for example, from both mothers, and they could share his estate.⁶ A 'complete' adoption, on the other hand, could be made by one person only, of one person, though a Hindu could speak of himself and his wife adopting, meaning thereby himself with his wife's co-operation.⁷ Two co-widows might adopt the same boy, for they were deputies of their common husband; but in law it would be the act of the senior of them.⁸ If a father had a son, etc., who was disqualified from performing the *sraddha* ceremony by reason of conversion to another religion or otherwise, the father was sonless for the purposes of capacity to adopt.⁹ But where the disqualification was such as not to make him incapable of inheritance under the provisions of the Hindu Inheritance (Removal of Disabilities) Act, 1928, the Bombay High Court wrongly, it is submitted, ruled that the father

¹ *Sharadchandra* (cited above). ² HAMA, s. 11 (v), s. 9, expl. (i).

³ HAMA, s. 11 (i), (ii). ⁴ The word means 'double-belonging'.

⁵ *Basappa v. Gurlingawa* (1933) 57 Bom. 74, AIR 1933 Bom. 137.

⁶ *Kantawa v. Sangangowda* AIR 1942 Bom. 143, 44 Bom. L.R. 269.

⁷ *N. Kasturi v. D. Ponnammal* AIR 1961 S.C. 1302.

⁸ *Tiruvangalaratnam v. Butchayya* (1927) 52 Mad. 373, AIR 1929 Mad.

11.

⁹ *Nagammal v. Sankarappa* (1930) 54 Mad. 576, AIR 1931 Mad. 264. *Bharmappa v. Ujjangauda* (1921) 46 Bom. 455, AIR 1922 Bom. 173 takes too superficial a view of the *sastric* provisions.

was not sonless.¹ Other High Courts may yet take the view that the statute's operation should be confined to its proper sphere, namely inheritance.²

156. Where the adopting parent is himself or herself a ward of court the permission of the Court of Wards is needed. This will not normally be withheld if the applicant is competent to adopt the proposed adoptive child according to the personal law, subject to conditions on this subject laid down in the relevant State statutes, if any. In Uttar Pradesh, for example, the court has jurisdiction to refuse consent where the adoption would involve financial embarrassment and loss of influence or respectability.³

Adoptions for reward

157. It is a punishable offence to agree to take, or to take, any reward in consideration of an adoption, and the offence may be committed by brokers or others besides the giver or taker. But prosecution may not be instituted without the consent of the State government.⁴

158. Formerly adoptions for reward, however objectionable, were not invalid, nor was the agreement, etc., punishable.

WHO MAY BE ADOPTED?

159. The child must be a Hindu,⁵ must not previously have been adopted, must be under 15 and must be unmarried unless a special custom permits the adoption of children over 15 and married persons.⁶ The exceptions in favour of custom amount to this: in each case the custom of the caste or castes in question must in practice permit the adoption in question. Proof of custom may be either by the normal means,⁷ or by citation of judicial decisions showing that the usage was known to the Anglo-Hindu law in respect of the

¹ *Krishnaji v. Raghavendra* AIR 1942 Bom. 178 (2), 44 Bom. L.R. 371.

² *Nagammal* (above) is not affected by that Act: but Mayne and Gupte appear to take a different view.

³ *Thakurji v. Parmeshwar* AIR 1960 All. 339.

⁴ HAMA, s. 17.

⁵ Here see § 17 (end) above.

⁶ HAMA, s. 10.

⁷ § 14.

caste or castes in the region in question, provided that in the latter case proof of discontinuance of the usage is not forthcoming.

160. In fact the adoption of boys over 15 was universally known if they had not undergone the *upanayana* (thread-ceremony) in the case of 'twice-born' castes, and of unmarried boys amongst Sudras, amongst whom *upanayana* does not occur.¹ Even after *upanayana* an adoption could take place if the *gotra* of the taker were the same as that of the giver.² The adoption of married boys was regular under the text of the *Vyavahara-mayukha* for all castes, and thus became a commonplace in the former Bombay Presidency.³ It was reported as customary in certain castes in other parts of India.⁴

161. Presumably, even after the commencement of the HAMA the adoption of a married man who has children, where valid, will continue to have the effects noted under the Anglo-Hindu law: the children born prior to the adoption would be left in the natural family, children born subsequently belonging, with him, to the adoptive family.⁵ His wife will, as formerly, accompany him into the adoptive family. This remains true, since, although adoption under the HAMA is of one person only (§ 123), this provision of Anglo-Hindu law has no counterpart in the 'Hindu Code' and is not inconsistent with any provision of it, and so, being a *casus omissus* so far as the 'Code' is concerned, is saved under s. 4 of the HAMA. Moreover, the basic rule that husband and wife are one person has not been repealed by anything in the 'Code', so that a valid adoption of the one must operate as an adoption of the other.

162. Except for the conditions laid down, any child may be adopted.

¹ *Surabala v. Sudhir* AIR 1944 Cal. 265; *Krishna v. Deolia* AIR 1918 Nag. 173 (2), 44 I.C. 928.

² *Bal Gangadhar v. Shrinivas* AIR 1915 P.C. 7, 42 I.A. 135, 39 Bom. 441.

³ *Dharma Dagu v. Ramkrishna* (1886) 10 Bom. 80; *Vishwasrao v. Sahebrao* AIR 1958 Bom. 375, [1958] Bom. 531.

⁴ *Sheo v. Dako* (1878) 5 I.A. 87; *Nathu v. Hiraji* AIR 1955 NUC 5944 (M. Bh.).

⁵ *Martand v. Narayan* AIR 1939 Bom. 305, 41 Bom. L.R. 845 (FB).

163. Formerly a daughter could be adopted only in matrilineal families in Kerala, or by a *devadasi* in South India, the provision authorizing the ancient custom of adoption of daughters being treated as obsolete at Anglo-Hindu law.¹ An illegitimate child could, according to the better view, not be given (§ 128), for his incapacity to perform a *śraddha* for his natural father was felt to deprive him of capacity to give spiritual benefit to the adoptive parent. Nor could an orphan be given.² Nor a daughter's son of the adoptive parent, nor his sister's son, nor a mother's sister's son,³ nor, beyond Bombay Presidency, the son of any woman whom, as a maiden, the adoptive father could not lawfully have married.⁴ This rule attempted to reproduce in the adopted son the maximum likeness to an *aurasa*, and the ancient texts condemning such adoptions were not mere admonitions but actual prohibitions. Saunaka appeared to require that the adopted child should 'bear the reflection (or image) of a son'. No part of this awkward rule applied, fortunately, to Sudras.⁵ Attempts to enlarge the circle of prohibited degrees for adoption, though many, have failed,⁶ and that too notwithstanding that the adoption (e.g. of a husband's father's cousin) might offend Hindu sentiment, and that an isolated text of Ashvalayana cited in the *Dattaka-mīmamsa* seemed to support such enlargements.⁷ To the basic rule itself customary exceptions were well established, and a custom to adopt, for example, the sister's son was judicially recognized in Madras and Andhra Pradesh, the region around Delhi and elsewhere.⁸

164. A boy disqualified from performing the *śraddha* ceremony was incapable of being adopted, for the main

¹ *In the matter of Jamadar Munshi Ram* AIR 1931 Lah. 399, 12 Lah. 658.

² Except by custom, e.g. in *Bhajangdas v. Nanuram* AIR 1954 Raj. 17, 21a.

³ *Bhagwan Singh v. Bhagwan Singh* (1899) 26 I.A. 153; *Ramchandra v. Gopal* (1908) 32 Bom. 619.

⁴ *Ragavendra v. Jayarama* (1897) 20 Mad. 283.

⁵ *Bai Nani v. Chunilal* (1897) 22 Bom. 973; *Bhagwansingh* (cited above); *Kahandas v. Jivan* AIR 1923 Bom. 427.

⁶ *Abhiraj* (cited below); *Deoki v. Madanlal* AIR 1958 An. P. 693, [1957] 2 An. W.R. 358.

⁷ *Abhiraj v. Debendra* AIR 1962 S.C. 351.

⁸ *Vayidinada v. Appu* (1886) 9 Mad. 44 (FB); *G. Hanumaiah v. G. Mallayya* AIR 1959 An. P. 177, [1958] 2 An. W.R. 565; *Deoki v. Rikhi* AIR 1960 Pun. 542.

object of the classical institution would thereby have been frustrated.¹

165. A boy of a different sub-caste from his adoptive father might validly be adopted, but not one from a different *varna* or caste.²

BY WHAT MEANS ADOPTION IS EFFECTED

166. The means effecting adoption are regulated by law identically, whether the gift is by a parent or by a guardian with the court's prior permission. The law insists upon one formality only, namely that the child must be actually given and taken in adoption with intent to transfer the child from the family of its birth to the family of adoption. This implies a ceremony, however brief and however sparsely attended. The actual transfer may be done by persons other than the giver and taker, provided what is done is done under their authority.³ Customary ceremonies, such as saffron-water drinking in South India and feeding in the lap or *pagri*-tying elsewhere with or without offerings by Brahmans in the sacred fire, may serve to indicate the intention to transfer in adoption, but so long as that intention is unequivocally manifested no particular ceremonial is required. In particular the *datta-homam* is not essential.⁴ It would be a farce in cases of inter-caste adoptions and other non-*sastric* adoptions. Once he is transferred the child's adoption cannot be undone, and no change of mind or retransfer is permitted.⁵ Here the current law refuses to depart from the former system.⁶

167. Proof of adoption is often required, since a heavy burden lies upon him who asserts that an adoption has taken place to prove it.⁷ Under the current system relatives

¹ *Surendra v. Bholanath* AIR 1943 Cal. 613, 47 C.W.N. 899.

² *Shib Deo v. Ram* (1924) 46 All. 637, 646, AIR 1925 All. 79, 83b.

³ HAMA, s. 11 (vi).

⁴ HAMA, s. 11, proviso. The word means 'adoption-oblation'.

⁵ HAMA, s. 15.

⁶ *Asa Bai v. Prabhulal* AIR 1960 Raj. 304; *Deoki* (cited at § 163).

⁷ *Muthuswami v. Chidambara* AIR 1949 P.C. 18, 75 I.A. 293, [1949] Mad. 604; *Devakka v. Giraddi* AIR 1956 Bom. 99.

are less threatened by adoptions than they formerly were, and so disputed adoptions will probably become rarer. It is not essential to register a deed of adoption, and no written record of the transfer is required in order that it may be binding. However, a duly registered document recording an adoption and signed by the giver and the taker (but not necessarily by the person adopted in those cases where he may be adopted above the age of 15) will raise a presumption that the adoption has been made in compliance with the law.¹ Nevertheless the document is no substitute for an actual transfer, which is essential in all cases.

168. Negotiations leading up to an adoption are of no legal significance except in so far as they may show corrupt purposes (§ 124) or may found a prosecution under s. 17 of the Act (§ 157).

169. Formerly the registered deed, which was usual though not obligatory, was corroborative evidence that an adoption had taken place, and might in appropriate circumstances amount to primary evidence, where the act would not itself be inconsistent with other available evidence.² Actual giving and taking were essential, though the parties might be represented thereat by their agents appointed for the purpose.³ For publicity's sake a ceremony was essential, though no particular form was prescribed. An agreement between the families, followed by a welcoming of the boy by the adoptive parent, was *not* sufficient. Every possibility of doubt as to the character of the transaction must be eliminated.⁴ The *datta-homam* was regarded as desirable in 'twice-born' castes, but might be postponed, so that in effect its performance was optional.⁵ Customary secular adoptions in which no religious ceremony occurred were

¹ HAMA, s. 16.

² *Devakka* (cited above) at p. 102a; *Punjabrao v. Sheshrao* (1959) 62 Bom. L.R. 726, 731. In *Biradhmāl v. Prabhavati* AIR 1939 P.C. 152, 41 Bom. L.R. 1061 execution of the deed was found to be sufficient evidence of the factum of adoption (see n. 4 below).

³ *Vijjarangam v. Lakshuman* (1871) 8 B.H.C.R., OC, 244.

⁴ *Lakshman v. Rup* AIR 1961 S.C. 1378, 1379, 1381, where some doubt was cast upon the correctness of the Privy Council decision in *Biradhmāl v. Prabhavati* (cited above).

⁵ *Bal Gangadhar v. Shrinivas* AIR 1915 P.C. 7, 12-13, 42 I.A. 135, 39 Bom. 441.

commonly known, and several States prior to the Union insisted upon compliance with official formalities before the adoption could validly affect the descent of land.

THE EFFECTS OF ADOPTION

In the natural family

170. The child ceases to be a child of the family for all civil and secular purposes, except for the fact that he remains subject to all rules relating to prohibited relationship for marriage as if he had not been adopted, in addition to the new prohibited relationships created for that purpose by the adoption.¹

171. Any interest which he had in Mitakshara joint-family property together with any liabilities attached thereto cease on his adoption as if he had then died,² but a share in a Dayabhaga joint-family property and any property which vested in the adopted child at the time of the adoption continues so to vest,³ and the natural family may suffer inconvenience thereby. This is seldom serious, firstly because children with property of their own rarely leave in adoption, and secondly because if an adopted child owns property subject to the rights of maintenance of others,⁴ the property continues to vest in him or her subject to all obligations attaching to the ownership.⁵

172. The natural parents' rights of guardianship cease with the adoption for all purposes, whether the child be male or female and whether or not the child be below 15 years of age (§ 54). The natural parent may indeed have a respectable claim to be *appointed* guardian if for any reason the adoptive parent is temporarily incapable of acting as guardian. The general part of s. 12 of the HAMA provides that, '... all the ties of the child in the family of his or her birth shall be deemed to be severed ...', and accordingly the provisions of s. 7 of the Hindu Minority and Guardianship Act (which refers only to a 'son') must not be read in

¹ HAMA, s. 12, prov. (a). ² § 407. ³ HAMA, s. 12, prov. (b).

⁴ On these rights of maintenance see § 40 and §§ 656-73.

⁵ HAMA, s. 12, prov. (b).

too narrow a sense. Similarly, where a child is adopted by an unmarried, divorced, or widowed woman, and the question is who is the guardian in marriage of the child, the natural father (under s. 6 of the Hindu Marriage Act) or the adoptive mother, the provisions of s. 12 of the HAMA must prevail and the latter, or, failing her, other relatives in the adoptive family may be guardians in marriage. The maxim *generalia specialibus non derogant* (§§ 34, 44) cannot apply where the policy of the law and the overriding interest of the minor are plain.

173. On the other hand one High Court has held that notwithstanding his adoption the boy (who was then married and had a son of his own) was entitled to give that son in adoption. The better view is that substitution of families is so complete that he can neither give such son in adoption,¹ nor affect the status of that son when he himself separates, even if the son remained in a collateral branch of the same family.²

174. Formerly the adoptive father or adoptive mother acting on her deceased husband's behalf assumed unqualified responsibility for the child. The adopted son was not divested of property which had vested in him before the adoption, but according to the Bombay High Court any ancestral or joint-family property which he may have held as heir or as sole surviving coparcener was 'divested', or rather passed by succession as if he had died.³ The text of Manu IX, 142 (the adopted son shall never take the . . . estate of his natural father) was interpreted as applicable to an estate vesting prior to the adoption. The reverse, and it is submitted preferable, view was taken by Madras,⁴ more recently completely vindicated in *Rakhalraj v. Debendra*,⁵ where the Calcutta High Court investigated the meaning of Manu's text more thoroughly, and showed that the adopted son was prohibited from taking with him (or subsequently inheriting) only what was not vested in him at the time.

¹ *Sharadchandra v. Shantabai* AIR 1944 Nag. 266, [1944] Nag. 544 (FB).

² *Babarao v. Baburao* AIR 1956 Nag. 98, [1955] Nag. 903.

³ *Dattatraya v. Govind* AIR 1916 Bom. 210, 40 Bom. 429.

⁴ *Venkata v. Rangayya* (1906) 29 Mad. 437.

⁵ AIR 1948 Cal. 356, 359b, 361b, 52 C.W.N. 771.

In the adoptive family

175. The relationships acquired in the new family correspond as nearly as the circumstances will permit to the relationships that would have existed if he had been born in the adoptive family. The fiction proceeds less far under the current system than under the former system, since some rights of property which might formerly have been disturbed are no longer disturbed by the adoption, with the abolition (apart from rights in the Mitakshara joint family) of the doctrine of 'relation back' to the date of the adoptive father's death, which figured so largely in the Anglo-Hindu law.

176. In all discussions of the rights of a Hindu adopted child it must be remembered that children adopted by a Hindu married under the Special Marriage Act, 1954, or by a Hindu whose parents were married to each other under that Act, are not entitled to succeed on intestacy to that parent, or to any relation of the parent who is governed by the Indian Succession Act, 1925.¹ The last-mentioned Act makes no provision for succession by *adopted* children.

F and *M*, married in a Hindu form in 1950, had a son, *S*, born in 1952. In 1954 *F* and *M* registered their marriage as a special marriage (Ch. III of the Act of 1954; § 209). In 1962 *S* adopted *A* under Hindu law. Immediately afterwards *S* died intestate, and after him *F* and *M*, and after them *FB*, *F*'s brother, who had neither married under the Special Marriage Act nor was the issue of such a marriage. *A* cannot succeed on the intestacies of *S*, *F*, or *M*. But he can take, being the Hindu heir of a Hindu (under HAMA, s. 12), on the intestacy of *FB*.

This peculiar anomaly is ignored in our succeeding paragraphs.

177. When an unmarried man or widower adopts, his wives subsequently married to him become step-mothers of the child.² When a married man adopts, his wife becomes mother of the child, even in a case where he was entitled to adopt without her consent.³ Where there are several wives the senior, i.e. first married, wife becomes mother and the other or others step-mothers, provided the adoption was made with the consent of more than one wife.⁴ Where a widow or unmarried woman adopts, any subsequent husband will become

¹ Sp. Mar. Act, s. 21, § 141 above.

² HAMA, s. 14 (3).

³ HAMA, s. 14 (1).

⁴ HAMA, s. 14 (2).

the step-father of the child.¹ The relationship of step-mother may be significant in maintenance claims (§ 40) but that of step-father is not legally significant. It is submitted that the position as regards divorced persons adopting a child is the same as that regarding unmarried persons; the omission to mention them in the statute being merely *per incuriam* (cf. § 622), for the word 'unmarried' strictly includes 'divorced'.

178. The adoptive parent is in no way hindered in disposing of his or her property merely by reason of the adoption.² We must recollect however that the adoptee's right to be maintained attaches (so long as it endures) from the moment of adoption and is a right against the parent irrespective of what property he may own at any time. The statute provides that the parent's freedom in respect of disposition is 'subject to any agreement to the contrary'.³ This must be a binding agreement and must be such as may deprive 'the adoptive (parent) of the power to dispose . . .'. Where the child was a minor an agreement between the adoptive parent and the natural parent which entitled the former to withhold from the adoptive child so much of the ancestral property as would, for example, suffice for her own maintenance and other charges legally binding and even morally binding upon her as provisional owner of her deceased husband's estate (under the former system) was held valid by the Privy Council (§ 185). Other agreements were held inconsistent with the nature of adoption and therefore void.⁴ However, where the agreement limiting the rights of the adopted son was entered into by him, being a major at the time of adoption, the contract has been held to be binding notwithstanding its inconsistency with the status of a *dattaka* son of the family.⁵ Yet it must be noted that now only such agreements as 'deprive . . . of the power . . .' are capable of limiting the parent's freedom. The parent may disappoint the child utterly, unless he has so settled the estate in trust or otherwise as to deprive himself in equity of the *power* of disposition contrary to the terms of

¹ HAMA, s. 14 (4).

² HAMA, s. 13.

³ HAMA, s. 13.

⁴ *Krishnamurthi v. Krishnamurthi* AIR 1927 P.C. 139, 54 I.A. 248, 50 Mad. 508; *Venkatarao v. Venkateswararao* [1955] An. W.R. 783.

⁵ *Pandurang v. Narmadabai* AIR 1932 Bom. 571, 56 Bom. 395; *Asa Bai v. Prabhulal* AIR 1960 Raj. 304.

the agreement or covenant. A mere right to sue him or his executors or heirs for damages¹ is not in question, and a natural parent giving his child in adoption cannot, therefore, rely upon the old-fashioned agreements whereby the natural parent used to exact from the adoptive parent a promise that he would not alienate the existing properties and would make the child joint-owner thereof with himself. A disappointed child may in fact not be able to upset an alienation by the adoptive parent by will or otherwise, and the action in contract against the executors or heirs may prove futile.

179. Nevertheless an adoption of a boy by a member of a Mitakshara joint family, or a sole coparcener in such a family, will cause the boy to acquire an interest from the moment of adoption as if he had been then born a legitimate son of his adoptive father. This is due to the fact that s. 12, 'for all purposes,' calls in the surviving institution of the Mitakshara joint family. As a result the power of the father to dispose of his interest *inter vivos* is curtailed to the same extent as if he had had a legitimate son born at the relevant time (§ 461). This limitation is not affected by s. 13 of the HAMA, which refers to existing powers of transfer of 'his ... property'. The interest even of a sole coparcener is subject to the essential limitation that the adoption of a son recreates a coparcenary, and joint-family property even under the management of a single coparcener is never strictly *his* property exclusively.²

Granted that a child adopted after the coming into force of the HAMA cannot 'divest any person of any estate which vested in him or her before the adoption' (§ 123) — a provision which plainly prevents the adopted child from succeeding as if he were a legitimate child either to a predeceased 'father' or any relative of his adopting parent who died before the adoption — the Act does not by those words, or otherwise, prevent the acquisition of a coparcenary interest by being adopted even by a *widow* validly under the HAMA, provided that the adoption would

¹ As provided a basis for a class of English marriage-settlements. See *Hammersley v. De Biel* (1845) 12 Cl. & F. 45 = 12 E.R. 1312 (HL); *Eyre v. Monro* (1857) 3 K. & J. 305; *Synge v. Synge* [1894] 1 Q.B. 466 (CA). That debts created by the *propositus* against his estate can defeat dependants is shown in HAMA, s. 26.

² See Derrett in (1960) 23 S.C.J. (J.), 43 at pp. 51ff.

not have been invalid at Mitakshara law. As a result difficulties must at times occur which the Anglo-Hindu law did not contemplate, and upon which our courts have not yet had an opportunity to pronounce.

There were three brothers, *B1*, *B2*, and *B3*. *B1* died leaving a widow, *W*, in 1955. The family was governed by Mitakshara law, the brothers had been a coparcenary, and the Hindu Women's Rights to Property Act, 1937 (§ 412) applied to all the property in question. *W*'s interest under the Act of 1937 was a coparcenary interest and unquantified (§ 415), and as such became her absolute property when the HSA came into force (§ 417). *W* adopted *A* in 1957. He obtained, *semble*, a Mitakshara birthright in the coparcenary property in which *B2* and *B3* had normal coparcenary interests, and *W* a statutory unquantified coparcenary interest. *W* died in 1958. It is submitted that her heirs took a one-sixth share.

180. For the purposes of inheritance¹ and maintenance² an adopted child is precisely upon the same footing as a legitimate child. The adopted child is prohibited, as we have seen, from marrying an adoptive *sapinda* or 'prohibited relation' (unless customs permit either),³ as if he were a blood relation of those relations by adoption.⁴ The question whether an adopted son might marry the adoptive parent's adopted daughter is not without difficulty. The proposition is revolting to Hindu sentiment. S. 12 of our Act speaks of 'severing' and 'replacing' ties, but where he had no sister in his natural family the boy would not replace a tie when he joined, or was joined by, an adoptive sister, herself adopted. Yet it seems clear that both the son and daughter are caught by the words 'relationship by adoption as well as by blood',⁵ for each is related to the other by adoption, so that marriage between them is prohibited.

181. For purposes of guardianship the adopted child is placed upon the same footing as a legitimate child,⁶ subject to the reservation made above (§ 172).

¹ HAMA, s. 12. The provisions of HSA, s. 3 (1) (a) and (c) are not to be read as excluding adopted sons or their descendants from the Schedule. Where the *propositus* died between 17 June 1956 and 21 Dec. 1956 it is not clear whether his adopted son could inherit on intestacy, for the provision of s. 3 (53) of the Gen. Clauses Act, 1897, seems not to provide relief (see the terms in which the section commences).

² Gen. Cl. Act, 1897, s. 3 (53); HAMA, s. 12.

³ § 246.

⁴ HMA, s. 3, expl. (iii).

⁵ HMA, s. 3, expl. (iii).

⁶ HMGA, s. 7.

182. Formerly the rights of an adopted son (the *dattaka*) and the effects of his adoption upon the adoptive family, its property, and the alienees into whose hands it had come, would in very many cases differ sharply from the position at modern Hindu law. The 'new birth' in the adoptive family was no mere figure of speech, and was taken very seriously.¹ The HAMA very naturally provides, by s. 30, that nothing contained in that Act affects adoptions made before its commencement and that their validity and effect must be determined as if the Act had not been passed. We are obliged in certain cases to consult the previous law in determining the rights of any person adopted prior to 21 Dec. 1956. A careful distinction must however be drawn between an 'effect' which is controlled by a statute or law other than the HAMA, i.e. where 'previous law' does not mean the Anglo-Hindu law, and an effect which is within that scope. Some caution must be used in construing this provision, as the examples will show:

A was adopted by *F* in 1955. His legitimate brother (*aurasa* son of *F*) was born in 1956. *F* died intestate in May 1956, prior to the commencement of the Hindu Succession Act. *A* will take proportionately a smaller share in the estate of *F* than will *B*.²

A was adopted in June 1956. His legitimate brother, *B*, was born in July 1956. His adoptive father, *F*, died intestate in August 1956. *A* and *B* are entitled to share equally as heirs of *F*. The law applicable is not the Anglo-Hindu law of adoption.

A was adopted in November 1956 by *W*, widow of *H*. In 1955 *W* had improperly alienated *H*'s estate to *X*. Until limitation completes *X*'s title in 1968, *A* may divest the estate of *H* in *X*'s hands, notwithstanding the provisions of s. 12 prov. (c), which apply only to an adoption on or after 21 Dec. 1956.³

A was adopted in June 1956 by *F*, who adopted *D*, a girl, in January 1957. *F* died intestate in February 1957. *F* had been a member of a Mitakshara coparcenary. By March 1957 *A* had become the sole coparcener, with *D* as owner of a share of the joint-family property by succession from *F*. *A* is not liable to maintain *D* beyond a proportionate share of the income of his share obtained by succession from *F*,⁴ since, as an adopted daughter, *D* has no rights against the joint family as such.

183. Reference to the former law cannot be avoided in practice for some years to come and therefore we shall review the adopted son's rights prior to codification under the

¹ *Raghuraj v. Subhadra* AIR 1928 P.C. 87, 55 I.A. 139, 3 Luck. 76.

² § 186.

³ The provisions of s. 14 of the HSA are inapplicable. ⁴ § 601.

heads (1) the right to marry, (2) the right to succeed or to share at a partition, and (3) the right to divest property.

184. (1) The right to marry was never conclusively settled. Strong *sastric* opinion limited the *dattaka*'s sapindaship in one or both families.¹ It appeared however that the limits of sapindaship were the same in practice as those of an *aurasa*'s, but in both families.²

185. (2) The *dattaka*'s rights of succession or inheritance and his right to take by survivorship or to divest provisional heirs (§ 187) could not be varied by agreement between the natural parent and the adoptive parent. We have seen that a reasonable provision for the maintenance of the adopting widow or other dependants of the adoptive father was held to be allowable and not incompatible with the proposition stated above.³ The bargain made on the *dattaka*'s behalf by the natural parent was compared with a reversioner's right to allow a widow who was surrendering her limited estate to retain a portion of that property for her maintenance (§ 697). As a result an agreement, whereby the adopting widow took one-tenth of the adoptive father's estate *absolutely* to secure her maintenance—the *dattaka* taking the remainder—was held reasonable and valid.⁴

186. The *kritrima* son could not inherit from his adoptive parent or parents if an *aurasa* was born,⁵ and an impartible estate went invariably to the *aurasa*. Under the text of Katyayana as read in the *Dayabhaga* the *dattaka* in the Bengal school was entitled to one-third and a subsequently born *aurasa* to two-thirds of the estate.⁶ If two *aurasas* shared the *dattaka* would, upon that basis, take only one-fifth and each *aurasa* two-fifths. As read in other sources the text entitled a *dattaka* to a 'fourth share'. Thus in the Benares school, for example in Rajasthan and Madras, it has been held that he took a fourth of the entire estate so that an

¹ Kane, *Hist. of Dharmasastra*, III, 696.

² Mayne, 11th edn, § 194.

³ *Krishnamurthi v. Krishnamurthi* AIR 1927 P.C. 139, 54 I.A. 248, 50 Mad. 508, § 178.

⁴ *M. Purnananda v. C. Purnanandam* AIR 1961 An. P. 435.

⁵ *Kanhaiya v. Suga* AIR 1926 Pat. 90; *Gokhul v. Janki* AIR 1955 Pat. 487. For limitations on the *kritrima*'s rights see § 200.

⁶ *Dayabh.* X, 7-9; Jolly, TLL, pp. 184-5.

aurasa would take three fourths.¹ Yet according to the *Dattaka-mimamsa* as checked by reference to other Sanskrit sources and to common sense, the *dattaka* ought to take one-fourth of what any *aurasa* takes, i.e. one-fifth of the estate if there be one *aurasa* in competition with him and one-ninth if there be two *aurasas*.² According to two High Courts which follow in this respect the *Dattaka-chandrika* the discrimination did not apply to Sudras.³ The *Dattaka-mimamsa* having no such provision Northern, Central and Western India ignored this equitable rule unless custom could be proved to the contrary.⁴ Where a succession opened on or after 17 June 1956 *dattakas* and *aurasas* shared equally in Indian law. At partitions of joint-family property the proportions indicated above still apply so far as interests acquired by birth or adoption are concerned, though not in relation to undivided interests which have passed by testamentary or intestate succession under the Hindu Succession Act.

A was adopted by *F* in November 1956. They were members of a 'twice-born' Mitakshara coparcenary consisting of *F*, *A*, and *B*, the brother of *F*. *S* was born to *W*, the wife of *F*, in 1957. In 1958 *F* died intestate. The share in coparcenary property that would have been allotted to *F* at a partition before his death, i.e. $1/8$, devolved on *W*, *A*, and *S*, in equal shares. At a partition in 1959 between *A* and *S*, *A* takes $1/24 + 1/5 \times 2/4$ (*A*'s and *S*'s coparcenary interest in *F*'s branch) $\times \frac{1}{2}$ (interest of *F*'s branch) i.e. $1/24 + 1/20 = 11/120$ of the family estate, while *S* takes $1/24 + 4/5 \times 2/4 \times \frac{1}{2}$ i.e. $1/24 + \frac{1}{5} = 29/120$ of the same estate.⁵

187. (3) Because of the doctrine that an adoption related back to the moment of the adoptive father's death it was logically supposed that all transactions with the father's separate estate by a limited or provisional heir might be set aside if they would not have been binding on the *dattaka* if he had been alive at the time of the father's death. The

¹ *Anandi v. Onkar* AIR 1960 Raj. 251 (headnote apparently inaccurate).

² *Moti v. Lachhman* AIR 1960 Raj. 122; this is the Bombay view: *Tukaram v. Ramchandra* AIR 1925 Bom. 425, 49 Bom. 672.

³ *Asita Mohon v. Nirode* AIR 1917 Cal. 292, 20 C.W.N. 901; *A. Perrazu v. Subbarayudu* AIR 1922 P.C. 71, 48 I.A. 280, 300-1, 44 Mad. 656.

⁴ *Anandi* (cited above); *Laxman v. Bayabai* AIR 1955 Nag. 241, 243-4, [1955] Nag. 656.

⁵ The reduced share of the *dattaka* enriches, it is submitted, only the *aurasa*. The anomalous Bombay rule concerning successive partitions (§ 534) is ignored here.

position was similar with the father's interest in Mitakshara coparcenary property. A partition, for example, in the interval between the death and the adoption might have to be reopened to enable the *dattaka* to take his father's share with intermediate accretions and profits. The rule that limitation began to work against the *dattaka* only from the date of his adoption, coupled with the fact that widows might adopt as late as 75 years or longer after the father's death, produced situations of grave inconvenience, and gave rise to widely unpopular decisions. An incautious and incorrect *obiter dictum* in the Privy Council lent support to conservative decisions.¹ However, while considering the logical but disturbing case of *Anant v. Shanker*,² the Supreme Court in *Shrinivas v. Narayan*³ authoritatively determined that the claim of the adopted son to divest a vested estate rests on a legal fiction and the legal fiction must not be extended so as to lead to unjust results. The fiction of 'relation back' had to be trimmed to perform precisely the purpose for which it was intended, namely the continuation of the *santana* and family of the deceased adoptive father.

188. Thus the logic of the proposition was finally accepted so far as to enable the *dattaka* to divest :

(i) the separate estate of the father, father's father, or father's father's father, from the hands of a provisional heir;⁴

(ii) to reopen partitions to enable himself to participate to the extent that his father might have done had he lived to that moment;⁵ and

(iii) to cause the alienation of joint-family property that would not have been binding upon him, made by the sharers during the period when an adoption to his adoptive father might conceivably have been anticipated, to be set off in *South India* (§ 462) against (technically 'be allotted to') the shares of the alienors respectively, so that he might take his share as far as possible free of non-binding

¹ *Krishnamurthi v. Krishnamurthi* AIR 1927 P.C. 139, 144, 54 I.A. 248, 50 Mad. 508. *Veeranna v. Sayamma* AIR 1929 Mad. 296, 52 Mad. 398.

² AIR 1943 P.C. 196, 70 I.A. 232, 46 Bom. L.R. 1.

³ AIR 1954 S.C. 379, [1954] S.C.J. 408, 57 Bom. L.R. 678.

⁴ *Shrinivas* (cited above).

⁵ *Tatya v. Ratnabai* AIR 1949 F.C. 101, [1949] FCR 258; *Singriah v. Ramanuja* AIR 1959 Mys. 239.

alienations.¹ This is recognized (with questionable accuracy) as a right in equity available to a plaintiff in a partition action.² And for this reason where the alienors had alienated joint-family property of the best or better quality it would be inequitable to allot to the alienors' shares *all* the property they purported to alienate, and only the alienors' interests (e.g. one-third or one-fourth) in the alienated items would remain with the alienee.³ It would seem better to account for it on the basis of the *dattaka*'s hypothetical existence from the father's death, modified though that fiction is.

F died in 1919 leaving a widow, *W*, and a brother, *B*. *B* died, and then *B*'s son, leaving *BSS*, *B*'s son's son. *BSS* had two sons, *BSSS1* and *BSSS2*. In 1948 *BSS* improperly alienated (§ 439) the best items of joint-family property to *X*. In 1950 *W* adopted *A*. It was held (i) that *BSS* could alienate 1/3 of the joint-family property, and not merely 1/6 since, in view of the decision in *Shrinivas v. Narayan* (cited above), it would be unjust to limit retroactively the competence of a relation such as *BSS*; (ii) in the remaining property *A* was entitled to his 1/2 as the representative of *F*'s branch; and (iii) because *BSS* had alienated items of the best quality they could not be 'allotted' to *BSS*'s share, only *BSS*'s interest (i.e. 1/3 in each case) passed to *X*, and *A* was entitled to his 1/2 out of the remaining 2/3 of each item.⁴

(iv) The *dattaka* is also entitled to demand, when he reopens a partition, that he receive in addition to a share in the corpus (ii above) as it existed at the time of his father's death the proportion of the profits appropriate to the share in the corpus.⁵

189. (v) Finally he may divest the alienee who has taken from his father's widow improperly, i.e. without necessity or benefit to the estate (§ 683), and he may divest her surrenderee (§ 697) without waiting—as he must in the former case—for the termination of her estate itself.⁶ The alienees from the surrenderee and his heirs may also be divested.⁷

¹ *Gurupadappa v. Karishiddappa* AIR 1954 Bom. 318, 56 Bom. L.R. 252; *Kristappa v. Gopal* [1957] Bom. 588, AIR 1957 Bom. 214.

² *Kristappa*, AIR 1957 Bom. 214, 215b, '... a simple case of doing equities on the reopening of a partition in order that the property should be redivided on a fair and equitable basis'.

³ *Chanbasayya v. Basayya* AIR 1961 Mys. 191.

⁴ *Chanbasayya* (cited above). ⁵ *Gurupadappa* (cited above).

⁶ *Bahubali v. Gundappa* AIR 1954 Bom. 451, 56 Bom. L.R. 501 (FB).

⁷ *Mahalu v. Shankar* [1953] Bom. 1231; *Bahubali* (cited above); for the contrary see *Ramachandra v. Taibai* AIR 1955 NUC 5895, severely criticized at (1956) 58 Bom. L.R. (J.) 102f.

But the effect of s. 14 of the Hindu Succession Act on this provision must be noted. There can be no surrenders after 17 June 1956, except in respect of property within HSA, s. 14 (2) (see § 696).

F died in 1936 leaving a widow, *W*. *W* adopted *A* in May 1956. She alienated without necessity $\frac{1}{3}$ of her inheritance to *X* in April 1956 and she alienated a further $\frac{1}{3}$ similarly to *Y* in July 1956 (after the commencement of the HSA). *A* can divest property in the hands of *X* (but not that in the hands of *Y*) when *W* dies, and within the appropriate period of limitation thereafter.

190. The logic of the basic proposition has *not* been permitted to allow the *dattaka* to divest the following classes of property:

(i) Ancestral or joint-family property alienated by will of the adoptive father, even where the will authorizes the adoption itself. The 'will speaks at death and the property is carried away before the adoption takes place'—an erroneous notion established as a matter of law by *stare decisis*.¹

(ii) Property that passed by succession from a collateral,² or from a predeceased wife of the adopting husband (for she could in no sense be described as a 'receiving mother' under the text of the *Datt.-mimamsa* VI, 50),³ or a relative of such a wife,⁴ but which would have come to the *dattaka* if he had indeed been alive (as an *aurasa* or *dattaka*) at the time when the succession in question opened.

(iii) Finally any property leaving the hands of a sole surviving coparcener with or without consideration otherwise than by intestate succession.⁵ In *Krishnamurthi v. Krishnamurthi* it was said, 'when a disposition is made *inter vivos* by one who has full power over property . . . it is clear that no rights of a son who is subsequently adopted can affect that . . . which is disposed of'. The distinction, in

¹ *Krishnamurthi* (above), AIR 1927 P.C. 139, 145a; *D. Lakshminarasimham v. G. Rajeswari* AIR 1955 And. 278, [1955] An. W.R. 344.

² *Shrinivas* (cited above).

³ *Sivagami v. Somasundaram* AIR 1956 Mad. 323, [1956] 1 M.L.J. 441; *K. Ramakrishnayya v. M. Narasayya* AIR 1957 An. P. 109, [1956] An. W.R. 1120.

⁴ The dictum in *Thirumaleshwara v. K. Ganapayya* AIR 1953 Mad. 132, is no longer good law.

⁵ *Jhunkaribahu v. Phoolchand* AIR 1958 M.P. 261; *P. Pardhasaradhi v. P. Srinivasa* AIR 1959 An. P. 512, [1959] 2 An. W.R. 341.

particular between sale and gifts on the one hand and legacies on the other, is difficult to sustain on principle, but the authorities have stood for a long time and are supported by the incorrect dictum cited above.¹

FOREIGN ADOPTIONS

191. In order to be valid at Indian law a foreign adoption must have been made *by* a person having the capacity to adopt according to the law of his domicile, *of* a person having the capacity to be adopted according both to the law of his own domicile and that of the adoptive parent,² according to the forms and procedure (if any) appropriate to the adoption of such a person by such a person at the place where the adoption is alleged to have taken place. To illustrate the proposition let us take England, which has a municipal adoption law, as our example of a foreign country.

192. A Hindu not resident in England is not prevented from adopting a Hindu child in England merely because the law of England makes no provision for adoption by non-residents; nor because according to *English* law such an adoption would only be effective in accordance with, and where it was proper to refer to, the law of the domicile of the parties. Such an adoption may well be valid in India.

193. Hindus domiciled in England may adopt according to English law, but if they have not adopted in compliance with the HAMA (for adoptions after 21 Dec. 1956) the adopted child cannot succeed to immoveable property in India. Because of the adoptive parent's English domicile he may succeed to moveables in India, since succession to moveables follows the domicile.³ If a Hindu domiciled in India adopts in compliance with the law of a foreign country and not in compliance with Indian law, the child cannot succeed on intestacy as an adopted child of the adopter to

¹ AIR 1927 P.C. 139, 144b.

² *Sukdeo v. Kapil* AIR 1960 Cal. 597 (conflict of personal laws) helpfully illustrates this proposition, which applies equally in a conflict of national laws. A Hindu's national law in family matters is his personal law.

³ See Indian Succession Act, 1925, s. 5.

any property in India,¹ though he may be entitled to succeed to immoveable property situated in the country where the law was complied with — a position which is not beyond doubt. In order that he may succeed as heir under the 'Hindu Code' it may be necessary for a foreign-adopted child of a Hindu domiciled in India to be re-adopted in accordance with Hindu law as now in force in India. It is doubtful whether s. 10 (ii) of the HAMA would prevent the re-adoption in India of a child who had already been adopted, but not adopted so as to produce a valid effect at Hindu law. There is, after all, a difference between recognizing a foreign adoption as valid for certain purposes and considering it to be an adoption as understood in Hindu law.

194. So long as a Hindu domiciled in India does not alter his domicile, his adoption of a non-Hindu outside India is void *ab initio* according to the law of his domicile, and the child cannot succeed to moveables or immoveables in India. The subsequent conversion of the child to Hinduism will not cure the fundamental defect in capacity at the relevant time.

195. If the adoptive parent is competent by the law of his domicile to adopt the child, the forms prescribed in the foreign country are almost certain to be sufficient to effect a valid adoption from the point of view of Indian law, since Hindu law requires a minimum of formalities for the effecting of adoption (§ 166).

196. In *C. S. Nataraja v. C. S. Subbaraya*² the Privy Council held that a Hindu adopted according to a foreign law might succeed as a *dattaka* son to immoveable property in India, although the law of India did not recognize the validity of such an adoption (an adoption by a widow to herself otherwise than in the regular *kritrima* form). The foundation of the decision was the alleged doctrine that the personal law of a Hindu must be given its full effect in another country

¹ *Re Wilson* [1954] Ch. 733. *Re Marshall* [1957] 3 All E.R. 172 (CA). But see § 196, and Mr Justice Scarman, 'English law and foreign adoptions,' (1962) 11 *Int. and Comp. L.Q.* 635-40, and information on trends in New Zealand, Australia and Canada given by Z. Cowen, same title, (1963) 12 *Int. and Comp. L.Q.* 168-74.

² (1949) 77 I.A. 33, [1950] 1 M.L.J. 172.

where the personal law exists in a different form. The decision has been severely criticized,¹ the general doctrines of Conflict of Laws are not adequately discussed in the judgment, and it is submitted that the decision should be confined to its own facts.

Indian authorities are, however, not lacking for the doctrine that immoveable property may be obtained by succession by a claimant whose status was gained according to a foreign law. In conformity with such a view, then, a child adopted according to a foreign statute not in harmony with the HAMA ought to be able to inherit the lands of his parent or his parent's relations, situated in India, as if he were the legitimately-born child of that parent. The conflict between this view and that of the English authorities relied upon in § 193 is apparent.

In *Mira v. Aman*² a Raj Gond, who was not a Hindu (§ 18), married a Hindu under the Special Marriage Act, 1872, whereupon succession to his property became subject to the Indian Succession Act. His children by this marriage were held entitled to his lands, though neither the Special Marriage Act nor the Indian Succession Act were ever in force in the region where the lands lay. The principle asserted was that, 'the personal status of a man accompanies him everywhere as also the status of domestic relations on the principle of universality of status recognized in all countries'. The *lex situs* was held to govern the incidents of status, but the status itself was determined, in this case, by the law of the place (here a part of India where the Acts were in force) where the marriage was solemnized.

That the 'law of the personal status' should determine the right to succeed to land in India was asserted in the controversial *Vasant Atmaram v. Dattoba*,³ which relied on *Nataraja's case*. Here too there was an adoption, but the boy, adopted invalidly by the *lex situs* and *lex domicilii*, was held entitled to succeed to land both there and in British India.

CUSTOMARY ADOPTIONS

197. Prior to the passing of the HSA and the HAMA numerous customs operated, particularly in Kerala,

¹ At (1957) 20 M.L.R. 65-70. It is, however, sympathetically noticed by Sri T. S. Rama Rao at (1959) 3 Y. B. Leg. St. (Madras), p. 94. He disapproves of *Ratanshaw v. Bamanji* AIR 1938 Bom. 238, which he criticized at (1955) 4 I.Y.B.I.A. 225-6.

² AIR 1962 M.P. 212.

³ (1953) 57 Bom. L.R. 1026, AIR 1956 Bom. 49, severely criticized at (1956) 58 Bom. L.R. (Jour.) 33-41.

whereby the effects of what were called (often aptly) 'adoptions' differed greatly from those applicable to *dattaka* adoptions. In Malabar adoptions by *karnavans* (§ 582) with or without the consent of remaining members of a *tarwad*, according to custom, might suffice to engraft one or more persons on to the *tarwad*; but whether they lost all or any rights in the natural family depended upon custom,¹ a study of which is beyond the scope of this book.

198. The overriding section of the HAMA (s. 4) when read with the provision in s. 5 (i) that 'no adoption shall be made after the commencement of this Act . . . except in accordance with the provisions contained in this Chapter', suggests that all customary adoptions in use before 21 Dec. 1956 were then abolished. However, a closer examination of the wording of s. 4, 'any . . . rule or interpretation . . . or any custom or usage . . . shall cease . . . with respect to any matter for which provision is made in this Act',² and 'any other law in force . . . shall cease . . . in so far as it is inconsistent with any of the provisions contained in this Act',³ reveals that certain institutions known as customary adoptions before 21 Dec. 1956 survive in full vigour. This is the appropriate place to mention them.

199. The Act itself does not define adoption, and we are to understand by 'adoption' in s. 5 (1) an institution of law, such as the Anglo-Hindu *dattaka* adoption, which bears a generic similarity to adoption as described in the HAMA itself. Thus wherever a customary or rarely-used Anglo-Hindu form of adoption bears a generic similarity to the modern form we may safely understand it to have been abolished.

200. The *kritrima* form, by which even an adult might be adopted and which was confined in practice to Mithila and to persons governed by the Mithila school, was based entirely on agreement and there was no giving and taking.⁴ Yet the absence of giving is contemplated in the HAMA where custom allows the adoption of a married man, or a man

¹ See *Machingal v. M. Keli* AIR 1939 Mad. 564, [1939] 2 M.L.J. 697; Derrett, at [1956] 2 M.L.J. (J.), 97f.

² HAMA, s. 4 (a). ³ HAMA, s. 4 (b). ⁴ §§ 146, 186.

over 15 (s. 10 (iii), (iv)). Moreover the *krita* or *kritrima* son was related to the adoptive parent for all purposes although he did not lose his rights in his natural family and he had no rights of inheritance from the adopter's kindred.¹ Closely similar was adoption according to Punjab customary laws.² Similarly the *dyamushyayana* adoption (§ 155) created a definite adoptive relationship though not all the results of the full *dattaka* adoption were present. Other customary forms of adoption which created a real filial relationship to the adoptive parent may, like these forms, be considered to have been abolished, merged as it were in the more comprehensive scheme established in the 'Hindu Code'. The adoptions of girls by *devadasis* would seem to be examples, and the adoptions of girls or even of whole *tavazhis* in Kerala matrilineal communities.³ It may be doubted whether adoptions that preserved the adopted child's duties in the natural family were not transactions beyond the contemplation of the Act, and thus saved under s. 4 (a). But so long as an actual giving and taking or transfer in adoption takes place, the provisions of s. 5 (1) seem to be conclusive against the survival of such customary forms.

201. A number of customary 'adoptions' do not, it seems, come within the scope of the above remarks. The *illatam* (Madras and Andhra Pradesh), the *sarvasadhanam* (Kerala)⁴ (though it creates a much closer relationship than the *illatam* form), and the *gharjamai*, or *gharjawai*, alias *khana-damad* (Punjab, Western India, and Bengal), though supposed to be instances of adoption are in reality types of marriage arrangement which, while they serve to give the man concerned a certain status in the home of his bride and a contractual right⁵ of succession to some or all of his father-in-law's property even after an *aurasa* son is born, are mainly concerned with the conversion of what would otherwise be

¹ *Sabitri v. Savi* AIR 1933 Pat. 306, 394-5, 12 Pat. 359; *Gokhul v. Janki* AIR 1955 Pat. 487.

² *Hem v. Harnam* AIR 1954 S.C. 581, [1955] SCR 44, [1954] S.C.J. 566.

³ *Gopinath v. Santhamma* [1956] 2 M.L.J. 38; *Lekshmi v. Narayani* AIR 1955 NUC 3482.

⁴ Both words are often spelt locally with a final -om. The spelling *sarvasadhanam* is incorrect.

⁵ A detailed and complete contract is not necessary: *Nagi v. Nanjundappa* AIR 1940 Mad. 761, [1940] 2 M.L.J. 30.

a virilocal into an uxrilocal marriage. Varadachariar, J., said in *Muthala v. Sankarappa*,¹ '... it is scarcely accurate to speak of an *illatam* son-in-law as an adopted son in any sense'. In fact each of these customary institutions was intended to enable a father to marry off his only daughter, or where he had no son more than one daughter, and at the same time keep her at home, obtain through her an heir to the estate, and obtain for the price of his keep a substitute for a son in a son-in-law who would work the farm or carry on the father-in-law's business. The purposes served have little in common with those behind the *dattaka*, or even the *kritrima*, form of adoption.

202. The rights of a *gharjamai* or *khana-damad* are not affected by the 'Hindu Code', but they are based upon agreement, specific or implied,² and the law must take note of this when the distribution of the father-in-law's estate is under litigation. The *illatam*'s rights are likewise unaffected by the 'Code'. Apart from agreement they are surprisingly limited.³ The *illatam* son-in-law cannot take property by survivorship, and his heirs are to be found in his natural family.⁴ He himself cannot question alienations, and his descendants are not members of the 'adoptive' family.⁵ His widow cannot claim maintenance against the heir of any son of the father-in-law, whether *aurasa* or *dattaka*.⁶ The rights of the husband under the *sarvasvadanam* form are (subject to what is said in § 203 below) dependent upon the question whether he was instituted as heir *as well as* husband of the daughter of the sonless Nambudiri father. In the rare cases where he has not been instituted he will not inherit, but that he retains a right of maintenance in the *illam* or home of the father goes without saying. Where he is taken into the family this must be done with the consent of all adult members of the *illam*; but it is evident that convenience will urge his being

¹ AIR 1935 Mad. 3 (2), 4a, 67 M.L.J. 706.

² Rattigan, *Digest of Customary Law*, § 27, 13th edn, pp. 450-7. The arrangement is normally intended primarily for the benefit of the daughter and her issue.

³ *Sitanna v. Viranna* AIR 1934 P.C. 105, 107b, 61 I.A. 200, 57 Mad. 749.

⁴ *Chenchamma v. Subbaya* (1886) 9 Mad. 114.

⁵ *Muthala* (cited above).

⁶ *A. Venkatappadu v. M. Atchayamma* AIR 1945 Mad. 172, [1945] 1 M.L.J. 134.

admitted as member upon the supposition that his eldest son will eventually inherit the bride's father's estate. If the bride, who retains her jural relationship with her natural family, dies sonless, the nature of the agreement under which her surviving husband entered the family would be considered in order to see whether he was or was not heir to the father-in-law.¹

203. The question arises whether a son 'adopted' in the *illatam* form can claim as a son on the intestacy of his father-in-law. A parallel problem faces the *sarvasvadanam* son-in-law also, for Nambudiris likewise are subject to the Hindu Succession Act, which does not provide for customary exceptions. Under that Act, only a 'son' is contemplated and if an adopted son is to count as a 'son' must he come within the system set up under the HAMA or be governed by s. 30 thereof? Since by custom the *illatam* is entitled to inherit on intestacy from his father-in-law,² though not from the latter's relations, it would seem that here is a right by virtue of the son-in-law relationship established upon a footing independent of both sonship as understood in the Hindu law of succession, and of adoption as understood both under the modern Hindu law and the Anglo-Hindu law of adoption. We must turn to the overriding section of the Hindu Succession Act this time, when we find that, as before, laws are saved which deal with matters for which no provision is made in the HSA and which are not themselves inconsistent with anything in the HSA.³ Upon this view, accordingly, the *illatam* is still entitled to succeed. The statutory rights as such of the heirs indicated in s. 8 of the HSA cannot be prejudiced by the existence of an *illatam* son-in-law, and although the position is far from clear it seems that the statutory heirs and the *illatam* (counting as a son) must be called to the succession together. The *gharjama'i*'s position, upon the same footing, cannot be held to have been abolished by the general sweeping away of Punjab customary laws. In cases where he would be entitled to inherit by custom he must come in as if he were a son. Likewise the *sarvasvadanam* son-in-law. And if their rights

¹ *Neelakantan v. Velayudhan* AIR 1958 S.C. 832.

² *P. Lakshmi v. L. Lakshmi* AIR 1957 S.C. 314, [1957] SCR 195, [1957] S.C.J. 248; *Narasayya v. Ramachandrayya* AIR 1956 An. P. 209.

³ HSA, s. 4.

as heirs on intestacy are not judicially recognized their rights against the estate based upon the agreement cannot be gainsaid, for they are at least creditors of the deceased and will be able to take precedence over all dependants under s. 26 of the HAMA.¹

FURTHER READING

Modern Hindu Law

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 N. R. Raghavachariar, *Hindu Law*, 4th edn, pp. 1020-54.
 D. F. Mulla, *Principles and Precedents*, ed. S. T. Desai, 12th edn, pp. 1045ff.
 S. Venkataraman, 'Adoption: then and now,' [1957] 2 M.L.J. (J.), pp. 65ff, [1957] 20 S.C.J. (J.), pp. 231ff.
 R. D. Gupta, 'A note on Hindu law of Adoption,' *Vyavahara Nirnaya* (University of Delhi), vol. 6, 1957-8, pp. 236-54.

Anglo-Hindu Law

- J. D. Mayne, *Treatise on Hindu Law and Usage*, ed. N. Chandra-sekhara Aiyar, 11th edn, ch. v.
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 K. V. V. L. Narasimhachari, 'Adoption of sister's son . . .,' [1954] 2 M.L.J. (J.), pp. 18-22.
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 J. D. M. Derrett, 'Divesting by an adopted son,' [1960] 23 S.C.J. (J.) pp. 43ff.
 J. D. M. Derrett, 'Recent decisions . . . 1. Adoption,' (1957) 59 Bom. L.R. (J.) pp. 178-82.

The Historical Background

- P. V. Kane, *History of Dharmasastra*, III, 641-99.
 G. C. Sarkar Sastri, *Hindu Law of Adoption* (1891).
 J. L. Kapur, *Law of Adoption in India and Burma* (1933: Supplement, 1936).
 J. D. M. Derrett, 'Adoption in Hindu Law,' *Zeitschrift für vergleichende Rechtswissenschaft*, 60 (1957), 34-90.
 J. D. M. Derrett, 'Conflict of Laws: Adoption . . .,' (1956), 58 Bom. L.R. (J.), pp. 32-41.

¹ See § 664.

CHAPTER FIVE

Marriage and Divorce

MARRIAGE

THE NATURE OF MARRIAGE AT HINDU LAW AND SOURCES OF THE LAW OF MARRIAGE

204. 'Marriage' sometimes signifies the ceremony or event by means of which the common intention of a man and a woman to marry is publicly 'contracted', that is to say acknowledged and announced; and sometimes the status or 'estate', or state of affairs which prevails when, after undergoing or partaking in the public acknowledgement or announcement, the parties acquire, and continue in, the condition of having married each other. Though the former sense is occasionally used in the Hindu Marriage Act, 1955 (hereafter referred to as HMA), e.g. s. 5 (i), (ii), we shall use the word chiefly in the latter sense. 'Marriage is a status fulfilling a contract.'¹ A man and a woman 'marry' each other when both, having formed the irrevocable intention of living together and sharing all the experiences of daily life (in other words, 'to cohabit together'), signify this solemn determination in a public acknowledgement and announcement in conformity with law. The married state is a legal condition or status, the rights of the married persons are determined by law, and the termination of a marriage is possible only in accordance with law.

205. It is true that in some communities outside India and even in India herself in ancient times a marriage could commence with an understanding between the parties which was, perhaps for some period, known only to themselves. No ceremony was required. This, however, is so far from common experience in modern Indian communities that it need not be given further consideration here.²

¹ *Ross Smith v. Ross Smith* [1962] 1 All E.R. 344, 370, per Lord Hodson.

² § 258.

206. It is also true that the formation of *intention* is somewhat handicapped in the majority of Hindu communities. The actual parties, or at least the bride, in such cases frequently have little (or little overt) say in the choice of partner in marriage. That the parties should precisely consent to marry each other at the ceremony is therefore not required. This is not, however, to suggest that the youth and girl do not form the intention to marry each other. Every ceremony contains signs indicative of the man's desire to acquire the woman in marriage and her willingness so to be acquired by him : differences in nuances and delicacy in the more or less ancient forms still in use do not diminish the importance of these acts, which are not mere scenes in a farce. If the parties consent, though their consent is the result of persuasion, the intention is formed, and it is only where the participation of a party at the ceremony is that of an unwilling automaton, and the alleged marriage is not approved afterwards, that the marriage is vitiated by absence of intention.

207. Marriage being the principal event of a Hindu's life, and the future prospects of himself, his family, and even of his sub-caste, being bound up with the alliance to a degree unknown in most modern western countries, it is natural that marriages should be arranged by parents and should be solemnized at a time convenient to the two families rather than consistently with the couple's own preferences, should these differ. Early marriages occur, even those frowned upon by the law (§ 238) ; sometimes these lead to tragedies, and according to the traditional outlook a young bride should not be exposed to hazard merely because of the youth, shyness, or ill-health of her husband : thus contrary to western usage failure, or even reluctance, to consummate the marriage by sexual intercourse is not fatal to the full validity of the intention, once acknowledged and announced, as the foundation of marriage. This is only one of the major differences between the western and Hindu concepts of marriage, of which we must take account in view of the huge importation of English matrimonial law into Hindu law during the period 1946-55.

208. The sources of the modern Hindu law of marriage are varied. The *sastrie* concept of marriage as a *samskara* (' sacrament'), a union of two persons for all purposes, spiritual and

secular, indissoluble even by death, has been trimmed but not destroyed by legislation. The Anglo-Hindu law, by admitting remedies which either did not exist previously or existed only in an uncertain shape, had strengthened and enriched the ancient framework. The operation of customs both facilitated marriages which the *sastra* abhorred, and enabled unhappy spouses to separate and remarry free from the hindrance which orthodox Hinduism would have imposed. Large sections of Anglo-Hindu law remain operative despite the passing of the HMA, for the Act does not strictly *codify* the law, and the scope allowed to custom is extensive, if carefully defined. The effects of various statutes further impairing the operation of *sastric* limitations on the capacity to marry have been incorporated into the HMA. With that Act the entry of English nullity and divorce law into Hindu law, which commenced to a certain extent even prior to the State statutes of 1947-9 which first imported English notions on a large scale, was confirmed and enlarged. Cases on the Bombay Hindu Divorce Act, 1947 and the Madras Prevention of Bigamous Marriages and Divorce Act, 1949, are of considerable value, where the provisions of those Acts agree substantially with those of our Act. They serve as precedents for the application of English law in Hindu matrimonial causes.

209. This book being an introduction to modern Hindu law, it is beyond its scope to explain in any detail the working of the Special Marriage Act, 1954. That Act, which is, like its predecessor of 1872, part of the general law of India, is no part of the Hindu law, although its predecessor was originally passed to relieve the scruples of a reforming Hindu sect. But since Hindus may marry each other under its provisions, and a marriage under that Act will have serious consequences upon some aspects of their family lives, the reader must be warned of features of this matrimonial régime upon which he may acquaint himself more fully from a specialist text-book.¹ In order to marry under the Act the man must be over 21, the woman over 18; their consent to marry each other must be pronounced personally at the ceremony; their and their children's estates will pass on their deaths under the provisions of the Indian Succession Act and not under

¹ For example D. H. Chaudhari, *Special Marriage Act, 1954*, 2nd edn, Calcutta, 1958.

Hindu law; at his marriage the husband severs himself from his joint family, if he is governed by Mitakshara law (§ 521), and will own his share in severalty. The law of nullity and divorce applicable has some special and even unique features, which the Act itself provides: impotence, for example, renders the marriage *void*, and divorce is available (apart from grounds) by decree founded upon mutual consent. Under the original Act the Indian Divorce Act, 1871, was applicable to such marriages, and the husband, if a Hindu, surrendered for ever his right to adopt a son. Now it is in general possible for couples married under Hindu law to register their marriages as 'special marriages' under the Act of 1954, with all the results which would have materialized had the marriage originally been solemnized under that Act at that date, the continuation of the legitimacy of children born previously being specially provided for. The impression current that a marriage, even to another Hindu, under the Special Marriage Act is an act evincing an intention to desert the fold of Hinduism is probably inaccurate; but there is no doubt but that modern Hindu law is very little concerned with couples who have married under that Act, or even (to a less notable extent) with their progeny.

THE LAW, AND MARRIAGE AND DIVORCE

210. Many chapters of Hindu law are concerned with the disposal of property and the regulation of purely material affairs, in which the parties are left to themselves to provide largely as they think fit for their convenience, the law being concerned only or chiefly with delimiting their powers and ascribing due effects to their acts. Guardianship, religious and charitable trusts, and preeminently marriage, are exceptions. The law is here concerned to a preponderant degree with the needs of society or 'public policy' in the broadest sense. Ramaswami, J., in *Meganatha v. Susheela*¹ adopted a well-known dictum of Lord Westbury of nearly a century ago, thus emphasizing the identity of outlook on this matter in India and England: 'Marriage is the very foundation of civil society, and no part of the laws and institutions of a country can be of more vital importance to

¹ AIR 1957 Mad. 423, 426.

its subjects than those which regulate the manner and conditions of forming, and if necessary of dissolving, the marriage contract.' There is not the slightest doubt but that whatever sympathy a judge may have for the difficulties of a particular spouse or couple, he will not facilitate their separation or divorce otherwise than in complete accordance with the policy of the HMA, which does not by any means provide for the termination of the duties reciprocally of a married pair to suit their personal claims or prejudices. It is of interest to the nation that marriages should be stable, and matrimonial relief is available upon that fundamental understanding.

In *Arun v. Sudhansu*,¹ where a husband of 26 petitioned for a decree of nullity against his wife, aged 23, on the ground that she was impotent *quoad* her husband, a Special Bench of the Orissa High Court remarked on the lack of evidence of abnormality, the fact that neither party had led medical evidence, and the general air of collusion about the whole case. They insisted that the state is interested in preserving the institution of marriage, and sent it back for a retrial.

These remarks deserve emphasis in view of the number of cases recently started by husbands who have never come to grips with reality, trumping up preposterous charges against their wives in the hopes of marrying again. The courts must scotch these unhealthy efforts at an early stage and save the parties costs and loss of self-respect if their disputes come to be rehearsed in a court of appeal.²

BETROTHAL AND GUARDIANSHIP IN MARRIAGE

211. At common law an infant has no right of action against the parent or guardian of another infant if the latter breaks a contract of betrothal entered into between the guardians of the two infants. But Anglo-Hindu law recognizes the special powers of guardians in marriage to bind their wards (of any age) in betrothal agreements. At Hindu law the guardian in marriage is under a duty³ to arrange his ward's marriage, the law considering the duty more significant than any financial terms. Moreover the custom of child marriages, which is now disappearing, made it imperative for the

¹ AIR 1962 Or. 65 (SB).

² As in *Bhagwanti v. Sadhu Ram* AIR 1961 Pun. 181.

³ *Atma v. Banku* (1930) 11 Lah. 598, 608, 613, per Tek Chand, J.

guardian to be able to sue for damages where the betrothal agreement was improperly broken, and, since the guardian who made the agreement did so on behalf of the ward, for the ward himself or herself to have a right of action against the defaulting parent or guardian and even against the defaulting proposed bridegroom himself.¹ Where *A*, the father of a minor boy *B*, and *X*, the father of a minor girl, *G*, agree that *B* and *G* shall marry, and later *G* marries *Z*, not only *A* but also *B* has a right of action against *X*.² If expenditure was incurred for a feast given by *A* in celebration of the betrothal, the amount spent may be recovered as special damages. If presents were made by *A* to *G*, these may be recovered specifically, or if they are, like clothing, worn out, then their value is recoverable (and the same is the case if *G* dies before the marriage).³ Similarly if in accordance with caste usage the feast was given by *X* and the breach of agreement was caused by *A*'s marrying *B* to another girl. On the other hand it must be observed that an action for damages will be for pain and suffering and/or loss of reputation,⁴ and it may be difficult to prove damage under these heads, especially where alternative brides or bridegrooms are available, and the marriage which took place in breach of the agreement could be attributed to causes outside the guardian's control (as where *G* eloped) or where the proposed spouse was properly rejected when the time came, because of marked mental or physical defects. The guardian of the bride has, in any case, an absolute right to reject a faulty bridegroom. In practice the girl and her guardians are more likely to suffer than the boy and his; for it is more frequently in the girl's interest that boys are 'booked' by means of betrothal agreements.⁵ Contrary to popular belief betrothals of unborn children are void.⁶ The court has no jurisdiction specifically to enforce

¹ Dictum in *Khwoja Muhammad v. Husaini* (1910) 37 I.A. 152, 159; *Khimji v. Lalji* AIR 1941 Bom. 129, [1941] Bom. 211.

² *Purshotamdas v. Purshotamdas* (1896) 21 Bom. 23; *Mulji v. Gombi* (1887) 11 Bom. 412; *Venkata v. Govinda* [1937] M.W.N. 1274 (damages assessed under Contract Act, s. 73).

³ *Gulabchand v. Fulbai* (1909) 33 Bom. 411; *Rajendra v. Roshan* AIR 1950 All. 592.

⁴ *Kandaswami v. Kanniah* AIR 1924 Mad. 692, 78 I.C. 573; *Mulji* (above).

⁵ As explained at AIR 1958 Jour. 5.

⁶ *Atma* (cited above) at p. 606.

a marriage in compliance with an agreement, and an action for damages and restitution of specific property is the only remedy. Marriages in defiance of betrothal agreements, as also marriages without the consent of the guardian in marriage, are valid under the maxim *factum valet*.¹

212. The HMA is silent as to the purpose of guardianship in marriage, thereby continuing the previous pattern of negotiation between the guardians of the proposed spouses. It provides² that the marriage of girls under 18 shall not take place without the consent of a guardian 'if any', and a long list is given of those entitled to give such consent. It is nowhere provided that a marriage without the proper consent shall be void, and in *Kalawati v. Devi*³ it was held that even where the brother, who purported to act as guardian but was in fact under the then age of majority — HMA, s. 6 (2) is clear that a guardian in marriage must be 21 years of age, and not merely a major according to the personal law, on which see § 43 — the marriage could not be annulled on that ground, and here the former law and the present system are in agreement.

213. The reader is advised to consult the list of guardians itself.⁴ Briefly the order of priority in which relatives may give consent to the marriage of a girl under 18 years of age (including a widow or divorced girl) is the father, the mother, the grandparents on the father's side, then brothers, uncles, maternal grandparents, and the maternal uncle, subject to a special requirement in the case of collaterals of the half-blood (i.e. consanguine half-blood : s. 3 (c)). The question may arise whether, if, for example, the mother gives consent while the father is in ignorance of the proposed marriage, or the maternal uncle arranges the marriage in the ignorance of the paternal uncles, the marriage would be void. The question may well arise in the matrilineal communities of Kerala for whom the HMA sets out no different list than that referred to above, which is plainly suited to a patrilineal family. The answer is that *factum valet* applies, and a consent given properly and in the interest of the bride will serve even though the person who acts is

¹ *Khimji v. Narsi* (1915) 39 Bom. 682, 17 Bom. L.R. 225; *B. Sivanandy v. P. Bhagavathyamma* AIR 1962 Mad. 400.

² HMA, s. 5 (vi).

³ AIR 1961 H.P. 1.

⁴ HMA, s. 6.

not the highest in priority amongst the qualified guardians in marriage. This was the position according to the former law.¹ The list of guardians in marriage previously in force was father, paternal uncle, brother, other paternal relations in the order of kinship, and the mother. This applied in the Mitakshara school. But the Bengal school introduced the maternal grandfather and maternal uncle before the mother. The Anglo-Hindu law recognized the right of the mother to give the girl as her guardian without the concurrence of the paternal grandfather,² and this is the source of the amended order provided in the HMA, s. 6.

214. The Act provides that a girl under 18 may marry without the consent of any guardian if no person mentioned in s. 6 (1) exists: this provision must be read with s. 6 (3) which provides that if any person otherwise entitled to be the guardian in marriage 'refuses, or is for any cause unable, or unfit, to act as such' the person next in order is entitled to be the guardian. If all persons mentioned in the list are unable, unfit, or refuse to act as guardian, the girl would seem to be as free to arrange her own marriage as if they were all dead.

G, aged 17, a member of a professional family, has five relations, her mother *M*, her mother's brother *MB*, her mother's sister *MSis*, her half-brother *B*, and a deceased full brother's son *BS*. She proposes to marry a fellow student *X*. *M* refuses consent as she is attempting to give *G* to *Z*, aged 75. *MB* refuses to consider *X* unless he already owns landed property worth Rs. 1,50,000. *B*, who is favourably inclined, is aged 20, and thus his consent would be insufficient. *BS* refuses to accept any responsibility, but *MSis* favours the plan to marry *X*. But neither of them is in the list of statutory guardians in marriage. It is submitted that *M*'s refusal would be improper if she is planning to arrange the marriage with *Z* for a consideration, and even otherwise, and she is unfit to act as guardian *pro tanto*. *MB*'s refusal is unreasonable, and he also is 'unfit'. The consents or refusals of the others are immaterial, and *G* can arrange her marriage independently. *B* is competent at *sastric* law (which the HMA does not disturb in this connexion) to give *G* away at the actual ceremony.

G, aged 15, whose father is dead, proposes to marry *X*, a rich widower, aged 50, who keeps a concubine. Her mother is unwilling to consent until two years have elapsed; her paternal grandfather is willing to consent at once, but he is senile. *B*, her full brother, aged 21, is willing to consent if *X* gives him Rs. 10,000 as a personal present. It is submitted that *G* is not competent to arrange her marriage with *X*.

¹ *Mulchand v. Bhudhia* (1898) 22 Bom. 812; *Ram Harakh v. Jagar Nath* AIR 1932 All. 5, 53 All. 815.

² *Ranganayaki v. Ramanuja* (1912) 35 Mad. 728, 21 M.L.J. 60.

215. The statutory right to arrange her own marriage in certain circumstances is not negligible (even taking into account the effect which the operation of *factum valet* has upon the force of s. 6), since it has a direct bearing on the court's jurisdiction to prohibit a marriage (§ 223). No one may insist on acting as guardian in marriage if the court is of opinion (upon application by the girl through her next friend) that his or her guardianship will not be for the welfare of the minor.¹ The result of the provisions, therefore, is that during the critical period of betrothal arrangements and up to the time when the marriage is actually under preparation the girl can take advantage of the policy of the law to protect herself from an undesirable and improper marriage, and the popular belief to the contrary is quite without foundation.

216. Formerly the guardians in marriage of a minor widow whose marriage had not been consummated were in order her father, her paternal grandfather, her mother, her elder brother, and failing brothers her next male relative.² Where her marriage had been consummated her own consent was sufficient to validate the marriage.³ Marriages made contrary to the consent of the guardian, in the first case, or the widow herself, in the second, were declared capable of being annulled until they were consummated, after which time the possibility of nullity for lack of consent (which was in any case to be presumed, in favour of the validity of the marriage) ceased.⁴ In other words in this special class of marriages the doctrine of *factum valet* was removed *pro tanto*. In *Paras Ram v. State*⁵ it was held that the guardians by virtue of affinity (§ 71) had the right to arrange a minor widow's remarriage without the consent of her mother, or of herself. It is submitted that the decision was *per incuriam*.⁶

DOWRIES AND MARRIAGE EXPENSES

217. Because the prospective bride has the right to approach the court either to save herself from being given in marriage

¹ HMGA, s. 13 (2). ² Hindu Widows' Remarriage Act, 1856, s. 7.

³ Same section, last clause. ⁴ Same section, third clause.

⁵ AIR 1960 All. 479, [1960] All. L.J. 267.

⁶ The decision has stirred the wrath of commentators: 63 Bom. L.R. (J.), pp. 1-4; pp. 51-5 (where Sri B. K. Sharma points out that it is in conflict with *Sant v. Emperor* AIR 1929 Lah. 713).

by a person who is 'unfit' or to vindicate her statutory right to arrange her own marriage when the statutory guardians in marriage are unable, unfit, or are refusing for irrelevant or improper reasons to consent to a match which she herself proposes, or refusing to act as guardians at all, a special and perhaps unexpected importance attaches to legislative provisions which were not believed likely to take immediate or widespread effect. The Dowry Prohibition Act, 1961, came into force on 1 July 1961 and repealed previous State Dowry Restraint Acts, excepting the Jammu and Kashmir Dowry Restraint Act, 1960. It makes it an offence to give, take, or demand a dowry, or to abet the giving or taking of a dowry (ss. 3, 4). Punishment for contravention extends up to six months' imprisonment and a fine of up to Rs. 5,000. Where a dowry is in fact given (for under the maxim *factum valet* the transfer, though prohibited, is valid) the bride herself is entitled to it; the person receiving it must transfer it subject to a penalty for failure so to do, and if she dies before receiving it her heirs are entitled to claim it from the person holding it for the time being (s. 6). Agreements for giving or taking dowries have been declared void (s. 5). The last provision may not be very effective, but the prospect of a bride's heirs (perhaps quite remote relations) suing for the dowry may not be so fanciful as a daughter's actually suing, or instituting a prosecution of, her father or father-in-law.¹ The offences created by the Acts are non-cognizable, and prosecutions may be instituted only with the consent of the State Government in the case of the offence of *demanding* a dowry (ss. 4, 8). It seems that the bride's creditors or assignee in insolvency, or even a universal donee or a legatee from her, have or has no right to the dowry, for the statute studiously avoids *vesting* it in the bride herself. It appears that she can, however, assign it, with the holder's assent.

Where, in contravention of the Act, a dowry is paid, and then the marriage fails to be solemnized, the dowry cannot be recovered by way of suit, for it was an illegal contract and the parties are *in pari delicto*.²

218. By 'dowry' is meant any property or valuable security given or agreed to be given between the parties to the

¹ Cf. Mysore Hindu Law Women's Rights Act, 1933, s. 10 (3).

² *Ramekbal v. Harihar* AIR 1962 Pat. 343.

marriage, or by any person to any person at, before or after the marriage *as consideration for the marriage* (s. 2). Wedding presents are expressly excluded from the definition unless they are made as consideration for the marriage. The phrase 'consideration for the marriage' is not explained, and it is submitted that a present or payment is in consideration for the marriage if the marriage would not have been arranged by those who arranged it unless the present or payment had been made or promised to be made. The definition of *sulkam* at Anglo-Hindu law can be utilized for this purpose (§§ 222, 628). In Brahman families the payment euphemistically called a *vara-dakshina*, or ceremonial present to the bridegroom, is in fact a bridegroom-price to induce the bridegroom's family to consent to the marriage. It is certainly a 'dowry' within the meaning of the Act. Now that marriage is compulsorily monogamous the power of parents of an unmarried man of good earning-capacity to hold out for a high 'dowry' is great, and the religious and social obligation on parents of daughters to secure their marriages at all costs tends to strengthen the bargaining-power of their opposite parties. This is a social evil and the statutes referred to above properly attempt to abolish it.

219. The little-known but important rule in *T. I. Sundaram v. S. I. Thandaveswara*¹ provides that where money is paid to the father of the bridegroom as *vara-dakshina* or as an inducement to the bridegroom to agree to marry the daughter of the payer, the presumed intention is not that the father of the bridegroom should keep it and use it for his own purposes (e.g. the 'dowry' for his unmarried daughters), still less that he should profit from the 'sale' of his son, but that the money should serve as a nucleus of the married couple's matrimonial estate. Consequently such monies are held by the father as an express trustee for the bridegroom himself. Though few sons will sue their fathers for an account as trustees for such monies, it is possible that the death of the dowry-system as it exists at present may come from this quarter rather than from the provisions of the dowry-abolition statutes themselves, which fail to vest the 'dowry' in the couple.

¹ [1946] Trav. L.R. 224 (FB). See also 25 Trav. L.R. 196 (Nambudiris).

220. Responsibility for marriage-expenses lies squarely with the joint family of the father of the bride. Whoever actually pays for the marriage to be solemnized in customary rituals and with the usual celebrations is entitled to recover the costs from the father or paternal uncles or others whose duty it is to pay.¹

221. In view of the prohibition of dowries the court's hand is strengthened to assist girls under the age of 18 in resisting a proposed marriage, and in vindicating their right to arrange their own marriage where their guardians are unfit or refuse to act. Where the father is 'holding out' and refusing to act as guardian in marriage until he has accumulated or obtained a large 'dowry' demanded by the father of the favoured young man, and where no other statutory guardian will act in face of the father's attitude, it seems that the girl can arrange her own marriage with the same young man or another, in defiance of the arrangements which the parents are hoping to make contrary to the policy of the statutes prohibiting the demanding and receiving of 'dowries'.

'FORMS' OF MARRIAGE UNDER THE OLD SYSTEM

222. Formerly it was of importance to know in what 'form' a woman was married, since upon that question, *inter alia*, turned the claim to succeed to her estate on her death intestate. Of the original eight 'forms' of conjugal union recognized by the *smritis* as valid (conferring legitimacy on the issue) only three survived in 1955. By far the most common was the Brahma 'form' in which the girl was *given* to her bridegroom. All marriages were presumed to be in an 'approved form', such as the Brahma was, and therefore even the remarriage of a widow was presumed to be Brahma in form.² The Asura form was a *sale* of the

¹ *Ranganayaki v. Ramanuja* (1912) 35 Mad. 728, 21 M.L.J. 60. On the liability to pay for a daughter's, sister's, or niece's marriage see further below, §§ 426, 550.

² *Velayutha v. Suryamurthi* AIR 1942 Mad. 219, [1941] 2 M.L.J. 770; *Gopi v. Gokhei* AIR 1954 Or. 17; *Puyam v. Moiranthem* AIR 1956 Manip. 18 (extreme case); *Jotiram v. Bai* AIR 1939 Bom. 154, 41 Bom. L.R. 239. The ownership by the wife of property capable of being designated *sulkam* does not turn a Brahma marriage into an Asura marriage: *Surayya v. Balakrishnayya* AIR 1941 Mad. 618, [1941] 1 M.L.J. 496.

girl,¹ and 'unapproved'. The Gandharva form was a love-match.² Though originally 'unapproved' it counted as approved for the purpose of succession (§ 629).

THE COURT'S JURISDICTION TO PROHIBIT MARRIAGES

223. The child's next friend may apply for an injunction to restrain a marriage which it is apprehended may not be in the minor's best interests, and the court is by no means bound by the consent of the guardian in marriage or to accept the latter's reasons or motives.³ The HMA expressly leaves untouched⁴ the court's jurisdiction to prohibit an intended marriage, if in the interest of the minor the court thinks it necessary so to do. The Act provides something in the nature of a guide, and the court cannot, for example, prohibit by injunction a marriage arranged by the girl under s. 6 (4) merely on the ground (as explained above in § 214) that guardians mentioned in the list in s. 6 (1) refused to act: the circumstances must be reviewed and their refusal investigated. Nor can it interfere on the ground that the prospective bridegroom is of the same *gotra*, or of a different sub-caste or caste, or professes a different religion within the general scope of the term 'Hindu'. On the other hand it will grant an injunction where either proposed spouse is under the minimum age for marriage (§§ 224, 238), since a child marriage is prohibited and its solemnization is a criminal offence. It will also grant an injunction where the marriage is about to be solemnized to an unsuitable

¹ *Velayutha* (cited above); *V. P. Muthu v. K. K. Narayanan* AIR 1950 Mad. 351; *Venkata v. K. S. Reddi* AIR 1955 Andh. 31. The dictum of Subba Rao, C. J. in the last-cited case at p. 33 that *sulkam* as a gift to the bride in the nature of a bride-price is obsolete does not affect the definition of the Asura form, or render it obsolete. For an instance in western India (payment of *daj*) see *Govind v. Savitri* (1918) 43 Bom. 173, 177.

² *Kamani v. Kameshwar* [1946] Pat. 58, AIR 1946 Pat. 316, where (at p. 72) Ray, J., expressed doubts whether all the rights created by the Brahma form flowed from this form (a question perhaps only of academic interest now). *Deivanai v. Chidambaram* AIR 1954 Mad. 657, [1955] 1 M.L.J. 120. It is unlikely that *Bhaoni v. Maharaj* (1881) 3 All. 738 (which held the Gandharva form to be obsolete as a form of marriage) would be followed today even in Allahabad.

³ *Wellesley v. Beaufort (Duke of)* (1837) 2 Russ. 1, 28, 29 = 38 E.R. 246. ⁴ HMA, s. 6 (5).

bridegroom. The word 'unsuitable' must here be given a technical force. Old cases reflecting the habits of Hindus of past generations may not now deserve to be followed. It is the modern sense of Hindus as to what is fitting that the court must respect. The court may feel bound to grant an injunction where the ages are grossly disparate, or where the age of the bride is unusually greater than that of the bridegroom, though the difference is not gross, and where the health of either spouse is not suited to a marriage at that time; so also where the proposed bridegroom is of markedly poor health, still more if he is a eunuch or impotent, or he is congenitally deaf and dumb, handicapped by deformities, or mentally deficient. But that he is weakly, a member of a large or poor family, or has a mother who might prove to be an intolerable mother-in-law would seem to be inadequate grounds for applying for an injunction. An application by a senior guardian, for example, the father, to stop a marriage arranged without his knowledge by a junior guardian, such as the mother, may not succeed if the match is in itself unobjectionable. But allegations (credibly supported) that the father of the bridegroom has been guilty of incest with his daughters-in-law, still more his conviction for the offence, will certainly be taken into account in considering whether an injunction should issue.

224. Where an injunction issues under the provisions of s. 12 of the Child Marriage Restraint Act, 1929 (as amended by Act 19 of 1938) upon information laid before the court that a child marriage (§ 238) is arranged or about to be solemnized, knowingly disobeying such an injunction is punishable under s. 12 (5) of that Act by imprisonment (except in the case of females) of up to 3 months or with a fine of up to Rs. 1,000 or with both.

225. Because a marriage is valid under *factum valet* even in the face of an injunction restraining it, one might overlook the injunction. But to solemnize a prohibited marriage is to incur the risk of attachment for contempt, the penalties for which (apart from the statute cited above) are unregulated by precedent and are therefore as capable of being unexpectedly heavy as they are bound to be inconvenient. Families will take risks if their desire to get their child married is

sufficiently strong, but for that very reason the court may impose onerous conditions before it allows an offender to purge his contempt.

CONDITIONS FOR A HINDU MARRIAGE
VOID AND VOIDABLE MARRIAGES
FOREIGN MARRIAGES

226. The HMA somewhat disingenuously lays down 'conditions' subject to which a marriage may be solemnized between two Hindus. The 'conditions' are in fact of two sorts, as the provisions of the Act plainly show. In the first class come 'conditions' which may be disregarded without risk that the marriage will be void. In the second come those, disregard of which will render the marriage void *ab initio*. The first class may be still further subdivided into 'conditions' disregard of which will render the marriage voidable, and the remainder, disregard of which will in no way impair the validity of the marriage. It is convenient to tackle each 'condition' in the order in which it appears in s. 5 of the HMA, appending to each its counterpart, if any, in Anglo-Hindu law. In general however it is safe to say that cases construing the somewhat similar provisions of the Special Marriage Act, 1872, namely 'marriages may be celebrated under this Act... upon the following conditions...' in such a manner as to render all marriages void, if celebrated in contravention of any of the conditions prescribed, cannot be unreservedly relied upon in construing s. 5 of our Act. One *ratio*, namely that the provisions of the section of the earlier statute are mandatory and that therefore the statutory right to marry does not exist apart from the permissive conditions,² hardly applies to Hindu law cases, and in any event a Special Bench of the Nagpur High Court in *Ganesh-prasad v. Damayanti*³ took the opposite view of the meaning of the section and allowed scope even there for *factum valet*. Moreover, another and more compelling *ratio*⁴ is that in s. 17 of the Special Marriage Act it was laid down that

¹ s. 2.

² *Santosh v. Chimanlal* AIR 1950 Bom. 307, 52 Bom. L.R. 394.

³ [1946] Nag. 1, AIR 1946 Nag. 60 (SB), agreed with in *Mira v. Aman* AIR 1962 M.P. 212, 215 (ignore partition point).

⁴ *Santosh* (cited above); *Basana v. Aghore* (1928) 56 Cal. 628, AIR 1929 Cal. 631 (SB).

marriages might be declared null and void on the ground, *inter alia*, that they contravene any of the conditions set out in s. 2. The principle cannot be applied in 'consent' problems under Hindu law, as the corresponding section of the HMA, s. 11, carefully excludes lack of consent as well as nonage from its ambit.

227. It is essential to remember that void marriages are marriages that in the eye of the law never took place, no subsequent events being able to cure their defects. A void marriage can, under s. 11 of the HMA, be declared null and void, but this is not necessary before the alleged marriage may be treated as a nullity by the parties and all other persons. Without such a decree, which is merely of a declaratory nature, the parties may marry again or behave exactly as if the alleged marriage had never happened. Voidable marriages, however, are good and valid for all purposes, but are subject to defects, temporary or permanent, on the grounds of which one or (rarely) both parties are at liberty, so long as the defect lasts, to seek the termination of the marriage by petitioning the court for a decree of nullity. Unless a spouse takes this step the marriage is unassailable by strangers: and it goes without saying that once a spouse has died or the marriage has been terminated by divorce, the validity of a voidable marriage can never be questioned.

228. Foreign marriages come within the scope of the HMA in the following way. A Hindu marrying another Hindu out of India will be validly married according to Indian law if the capacities of both to marry each other are within the provisions of the law of their domicile. If the domicile of both is India, the provisions of the HMA must apply; if one only then the HMA and the law of the domicile prior to marriage of the other must be consulted.¹ If neither is domiciled in India the marriage, celebrated abroad, will, if it satisfies the fundamental requirements of conformity with the laws of the domicile or domiciles, be valid in India without reference to the HMA. If one of the parties is a non-Hindu the provisions of the HMA are not applicable.² In cases of nullity, whether the marriage be void or voidable,³

¹ s. 1 (2). ² s. 5, 'between any two Hindus'. Below, § 262.

³ Jackson, *Formation and Annulment of Marriage*, 245-8.

the court of residence of the spouses, i.e. their last matrimonial home where one resides separately from the other,¹ has jurisdiction to annul the marriage,² or (in the case of void marriages only) the court of the country where the marriage was solemnized,³ or the court of any country whose decree is recognized as valid by the court of the country where the parties were at that date domiciled.⁴ In questions of form, the *lex loci celebrationis* is consulted,⁵ in questions of capacity the *lex domicilii* (in Anglo-American systems) or the law of the nationality (in others).⁶ It is submitted that in whatever country a nullity case between Hindus domiciled in India is heard, or between Hindus who were married in India under the HMA or the Anglo-Hindu law, the law to be applied in questions of capacity must (subject to local statute: §§ 851, 869) be the personal law, i.e. the Hindu law, which will be the HMA, which supersedes and codifies a great part of the previous law relating to nullity, together with so much of the Anglo-Hindu law as remains untouched by the HMA. Reference will be made to these elements in the subsequent sections. The former objections to granting matrimonial relief to persons married according to a system of personal law which permitted polygamy⁷ are no longer relevant to Hindu marriages solemnized in India after 18 May 1955, since which date no Hindu marriages so solemnized are potentially polygamous.

CAPACITY TO MARRY

Parties must be unmarried

229. Neither party may have a spouse living at the time of the marriage.⁸ The word spouse includes any spouse validly

¹ *Aykut v. Aykut* AIR 1940 Cal. 75, 76a, [1939] 2 Cal. 60.

² Jackson, 242-4.

³ *Ross Smith v. Ross Smith* [1962] 1 All E.R. 344 (HL); Jackson, 305-7. In view of the House of Lords' evident disapproval this jurisdiction may be denied authority in India. *Ross Smith* is exhaustively discussed by three jurists at (1962) 11 *Int. and Comp. L.Q.* 651-69.

⁴ *Abate v. Gauvin* [1961] 1 All E.R. 569 applying *Armitage v. Att. Gen.* [1906] P. 135.

⁵ Jackson, pp. 166-70.

⁶ M. Wolff, *Private International Law*, 2nd edn, 100-102.

⁷ *Hyde v. Hyde* (1866) 1 P & D 130, 35 L.J.P. & M. 57; *Mehta v. Mehta* [1945] 2 All E.R. 690; *Risk v. Risk* [1950] 2 All E.R. 973, [1951] P. 50; *Srini Vasan v. Srini Vasan* [1945] 2 All E.R. 21, [1946] P. 67; *Sowa v. Sowa* [1961] 1 All E.R. 687.

⁸ HMA, s. 5 (i).

married under any other system of law or in a foreign country, but does not include a former spouse whose marriage with the party in question has been annulled or dissolved. Marriages of Hindus in India or under the HMA have, since 18 May 1955, been compulsorily monogamous.

230. If anyone purports to marry in contravention of s. 5 (i) he commits the offence of bigamy and becomes subject to the penalties applicable under ss. 494 and 495 of the Penal Code.¹ The supposed marriage is also void *ab initio*.²

231. Formerly a male Hindu might marry an unlimited number of wives concurrently.³ He might also change his religion, acquire a wife in another community, revert to Hinduism and marry again, thus having concurrently wives of different religions.⁴ A married female Hindu might not marry a second husband. The remarriage of widows, being regulated by custom and statute, involved some loss of rights in the family of the former marriage which are discussed below (§ 695). A *sanyasi* might marry only after repudiating the status of *sanyasa*, from which act of apostasy the law did not restrain him.

Parties must be neither idiots nor lunatics

232. The Act provides that neither party may be an idiot or a lunatic,⁵ and if a marriage is vitiated by the idiocy of a spouse or his or her lunacy at the time of the marriage, the marriage is *voidable* at the option of the other spouse.⁶

233. The words 'idiot' and 'lunatic' are not defined in the Act. It is established in Anglo-Hindu law that an idiot is congenitally incapable of distinguishing right and wrong.⁷ These and other, closely similar, symptoms are distinguishable on the one hand from mental aberration due to trauma,

¹ HMA, s. 17.

² HMA, ss. 11, 17.

³ Mayne, § 129.

⁴ *A. Marthamma v. A. Munuswamy* AIR 1951 Mad. 888, [1951] 1 M.L.J. 691.

⁵ HMA, s. 5 (ii).

⁶ HMA, s. 12 (1) (b).

⁷ *Tirumamagal v. Ramaswami* (1863) 1 M.H.C.R. 214; *R. Muthammal v. Sri Subramaniaswami* AIR 1960 S.C. 601, [1960] 2 SCR 721, [1960] S.C.J. 963.

drugs, or disease producing temporary or permanent feeble-mindedness, and on the other from the condition of a person who is spastic or deaf-and-dumb, but whose mental faculties are unimpaired.¹ Foolish hallucinations by no means establish 'idiocy' for this purpose, it would seem.² A lunatic is one whose mental faculties are totally, though not necessarily incurably, wanting:³ and it is to be noticed that the Act does not require that the lunacy should be congenital, or that the party should have been judicially declared insane.

234. Whether a party is an idiot or lunatic is a question of fact to be determined on the evidence. The burden of proving either allegation lies heavily on him who asserts it. A peculiarity of Hindu law is that a marriage may be merely voidable even when a party thereto is a lunatic and thus incapable of forming the intention to marry. Thus it is possible for a girl to marry a lunatic whose *participation* may be entirely governed by his guardian or even his guardian in lunacy. The guardian's assent to the gift of the bride is *traditionally* regarded as sufficient;⁴ but compare what is said below at § 236 — the guardian cannot form on the lunatic's behalf the intention to marry. The bride may trust to his being kept under restraint, and if this proves to be an inadequate protection, to securing judicial separation or divorce on favourable financial terms. The reason for this deplorable state of the law must be explained with reference to the previous history of the capacity of lunatics to marry. The notion that marriage and the procreation of male issue were essential for the spiritual welfare of the lineages of both boy and girl prevailed in custom and law to such an extent that where a girl was given in marriage to a lunatic the court would uphold the marriage if the boy was sufficiently sane to comprehend that he was being married.⁵ Thus in a relatively lucid interval even a lunatic, who frequently had no comprehension of anything, might validly marry. Conditions, even in the Hindu joint family, might

¹ *Harrod v. Harrod* (1854) 1 K. & J. 4=69 E.R. 344. *Ran v. Jagatpal* (1891) 17 I.A. 173, 18 Cal. 111 (PC).

² *Mouji v. Chandrabati* (1911) 38 Cal. 700 (PC), 38 I.A. 122.

³ *Ran* (cited above).

⁴ *Bhagwati v. Parmeshwari* [1942] All. 518, 581ff, at 590 (see next note).

⁵ *Ratneshwari v. Bhagwati* AIR 1950 F.C. 142, 178, [1949] FCR 715, [1950] S.C.J. 514; *Kaura v. Indra* [1943] All. 703, 711, AIR 1943 All. 310 (he was 'insane', 'childish', given to 'exaggerated emotions').

prove too much for the bride; but the Hindu law, even as now modified by statute, has taken the view that a lunatic spouse was better than no spouse at all, and that prevention was by no means so valuable as cure. Marriage with a lunatic was not even voidable unless the lunacy precluded comprehension of the nature of the ceremony at the time: the formal reason being that the 'sacrament' of marriage is too sacred to be upset upon grounds which amount to less than a fraud upon the sacrament.

235. In determining whether a spouse was an idiot or a lunatic so as to be incapable of marrying at the time in question the court will take account of the fact that mental capacity for marriage has to be related to the nature of marriage and the strength of discrimination suited to the desire to marry. It may well be that a man is sane enough to marry but not sane enough to participate in a financial contract, notwithstanding that marriage itself gives rise to rights and liabilities of a financial character.

In *In the estate of Park, Dec'd, Park v. Park*,¹ the testator married and on the same day made his will. As a result of illness he had been showing signs of lack of interest in the details of affairs in which he had formerly been expert, he had been vague and wandering, suffered intermittently from loss of memory, but rallied when talking of things past. The mental condition resembled senility. It was held that the marriage was valid, for the testator understood what he was about in marrying the lady, but that the will was void for lack of capacity to grasp its content and his responsibilities as a testator.

236. The state of the former law may fortunately be relied upon to supplement the provisions of s. 5 and s. 12 of the HMA. The Act does not in so many words provide for the annulment of marriages entered into by one who is incapable of forming the intention to marry an identifiable person at a particular moment. The marriage of a minor may be valid even if he or she has not seen and does not know the person that is to be married. But the capacity to intend to marry that person at that place and time, an intention embracing the notion of what marriage involves, is present in principle even in the minor, and any defects in the minor's power or information enabling him to discriminate so as to form a reasoned intention are supplied for him by the intention of his guardian. Except in lunacy cases, where the guardian

¹ [1954] P. 89, 97.

cannot in any case form the intention that the lunatic should marry, guardians cannot evince on the ward's behalf an intention which the ward himself is incapable of forming. Following this line of reasoning it is submitted that notwithstanding the silence of the HMA,¹ a marriage will be voidable at the option of the other party if at the time of the solemnization the other party, being a major, was so handicapped mentally, whether by reason of drugs, intoxicants, injuries, or mental weakness not amounting to 'idiocy' or 'lunacy', that he or she was incapable of intending to marry and to marry there and then the person with whom the marriage was solemnized. Nevertheless, if the handicap disappears and the marriage is approved subsequently it is clear that this approval will have retrospective effect, and the marriage cannot be annulled. This, however, is not the case where the spouse is handicapped permanently, though not so severely as to be an 'idiot' or 'lunatic', so as to be incapable of forming the intention to marry. A person of retarded development, such as one who will never progress beyond the mental age of eight, cannot, it is submitted, form the intention to marry.

237. Where the marriage is vitiated by idiocy or lunacy the sane spouse has an absolute right to petition for nullity.² Where the ground for petitioning is lack of capacity to form intention to marry, under § 236 above, no bar exists to the granting of the petition under s. 23 (1) (c) on the ground of approval of the marriage by the petitioner, or similar grounds which have been introduced from English law in connexion with impotence, etc. (§ 297).

Parties must be above the 'minimum age'

238. Section 5 provides in 'condition' (iii) that the bridegroom must be 18 years of age or above and the bride 15 years of age or above. It is provided in s. 18 that anyone who procures a marriage of himself or herself to be solemnized under the Act in contravention of the provision of clause (iii)

¹ The Hindu law may grow, as those of Europe have grown. Cf. Blackstone, 2 Comm. 438-9, cited by Caruthers, J., in (1857) 5 Sneed's Tennessee Rep. 58, cited by Singleton, L.J., in *Park v. Park* [1954] P. 112, 125-6.

² HMA, s. 12 (1) (b).

of s. 5 may be punished with simple imprisonment for up to 15 days or a fine of up to Rs. 1,000 or with both. The Child Marriage Restraint Acts, 1929-49,¹ provide that if a male under 21 years of age marries a child (i.e. here a female under 15) he is punishable as provided by the HMA above;² a male above 21 is punishable with imprisonment of up to 3 months and is also liable to fine. Whoever performs, conducts, or directs a child marriage is punishable similarly unless he proves that he had reason to believe that the marriage was not a child marriage, i.e. that both parties were above the minimum age. Promoting a child marriage whether as parent or guardian or otherwise, permitting it to be solemnized or negligently failing to prevent its solemnization are similarly punishable offences. But mere attendance at a child marriage is not punishable.³ And the marriage, notwithstanding the penal provisions, was valid irrespective of the Child Marriage Restraint Acts,⁴ and a marriage in disregard of the corresponding provisions of the HMA will be valid also.⁵

Parties must (subject to custom) be beyond sapindaship and prohibited relationship

239. Prohibited degrees. The provisions of the HMA on 'prohibited degrees' owe something to the Anglo-Hindu law and something to the Special Marriage Act, and in turn to the antecedents of that Act. Two tests must be satisfied before the marriage may be valid, and breach of either 'condition' will render the marriage void *ab initio*.⁶

240. Sapindaship is the relationship which *sapindas* bear towards each other. For the purposes of marriage sapindaship relationship occurs even though a link in the family tree may be illegitimate or adoptive (which is not normally

¹ Act 19 of 1929; Act 19 of 1938; Act 41 of 1949. The central Act is supplemented in Assam by Assam Act 27 of 1948, s. 45, and there are numerous State statutes which copy the provisions of the central British Indian statute.

² Act 19 of 1929 as amended, s. 3.

³ *Emp. v. Fulabhai* AIR 1940 Bom. 363.

⁴ *Ram v. Sital* AIR 1939 All. 340, [1939] All. L.J. 173.

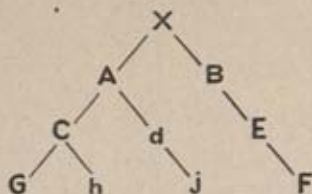
⁵ *B. Sivanandy v. P. Bhagavathyamma* AIR 1962 Mad. 400.

⁶ HMA, s. 11.

the case in succession-claims), still more if the relationship is by legitimate blood relationship but only by the half- (i.e. consanguine half) or uterine (half-) blood.¹

241. The degrees of sapindaship are three degrees counting through the mother of either party and five degrees counting through the father. The party himself is counted as a degree in the traditional Hindu method of counting. If, counting in this manner, one reaches a common ancestor or ancestress, the marriage would be void because the parties would be *sapindas*.

X had two sons, *A* and *B*. *A* had a son *C* and a daughter *d*. *B* had a son *E*. *E* had a son *F*. *C* had a son *G* and a daughter *h*. *d* had a daughter *j*. In the diagram males are shown in capital and females in small letters. Deceased relations are not shown in italics here, since the living and dead relations are equally steps in the counting for this purpose. *F* may marry *j* but he may not marry *h*.



242. Formerly the law relating to sapindaship for marriage was complicated and nearly useless in practice, customs occupying a great part of the field. The method of counting degrees was as stated for the current law, but the number of degrees (except in marginal situations, e.g. inter-caste unions and adoption, which the Anglo-Hindu law ignored) was five through the mother and seven through the father. Special complications were added in the Bengal school to which we shall come in § 243. The origin of the numbers lay in the seven-degree unit of sapindaship (four 'living' sapindas making the natural extent of an agnatic family including four generations, plus the three 'dead' sapindas to whom the senior member would make offerings of *pindas* in the *śraddha* ceremony) and in the qualified sapindaship of a daughter's son acting as a substitute son in spiritual matters: he was admitted to be a sapinda only of the 'living'

¹ HMA, s. 3 expl. to clause (f) and (g).

sapindas including his maternal grandfather. Long before the *Mitakshara*, which is the source of the rule in the former system, it appears that degrees could be counted equally through males or females, the number depending upon the sex of the immediate ancestor through whom one counted until a common ancestor was reached, if at all. The possibility, cogently argued,¹ that five degrees only should be counted when a female intervened even higher than the immediate ancestress (the word *mata*, mother, in the text of Yajnavalkya² being taken as illustrative and not exhaustive) may never be tested in practice. The curiosities of *Mitakshara* sapindaship for marriage are illustrated in the following table, where females are once again shown in small letters.



F could not marry *j* or *k*, but he could marry *l* (the so-called doctrine of the frog's leap). Whether he could marry *q* was doubted on cogent academic authority.

243. Under the law nominally applicable in the former Bengal school a man could not marry a girl (i) if she was within the seventh degree in descent from his father or from one of his father's six ancestors in the male line; (ii) if she was within the fifth degree in descent from his maternal grandfather or from one of his maternal grandfather's four ancestors in the male line; (iii) if she was within the seventh degree in descent from his three *pitri-bandhus*³ or from one of their six ancestors through whom the girl was related to him; (iv) if she was within the fifth degree from his three

¹ Mayne, 11th edn, p. 153.

² I, 53.

³ The *bandhus* are enumerated by *Vridha-Satatapa* or *Baudhayana* as quoted in Raghunandana's *Udvahatattva* and also in the *Mitakshara* at II, vi, 1 (so G. C. Sarkar Sastri, *Hindu Law*, ch. iii).

matri-bandhus or from one of their four ancestors through whom the girl was related to him.¹

244. Fortunately where a fit match was not otherwise to be had (a condition regrettably vague in practice) the Kshatriyas in all forms of marriage and other castes in the Asura or Gandharva forms could marry *within* the degrees set out in the last paragraph, provided they did not marry within the fifth degree on the father's and the third degree on the mother's side respectively.²

245. The main rule was also subject to the so-called *tri-gotra* rule, whereby a marriage might be valid notwithstanding breach of the rule against sapinda-marriages if the bride and husband were removed from each other (excluding the *gotra* of the bridegroom from the computation) by three or more *gotras*, i.e. they were related through as many links consisting of females who had lost their *gotras* of birth upon their marriages into different *gotras* (§ 249). It did not matter if a *gotra* was repeated in the course of the three stages.³ In practice few relations by blood used to marry. Further there existed a *viruddha-sambandha*, 'prohibited relationship', between certain relations by affinity: these included a wife's sister, a wife's mother, a wife's sister's daughter and the like.⁴ The rules seldom came before the courts, but there is reason to suppose that they were, at any rate in part, obsolete before 1955.⁵ Custom however, if adequately proved, might render most if not all of these rules inapplicable to non-Brahman castes.

246. The basic rule that sapindas may not marry under the HMA has an exception grafted upon it. If a custom or usage governing *both* the parties permits the marriage of sapindas it will be valid.⁶ In the greater part of the Deccan and

¹ Banerjee, *Marriage and Stridhan*, 5th edn, p. 167; *Anilabala v. Madhabendu* (1941) 46 C.W.N. 20, 25.

² *Bijan v. Ranjit* [1942] 2 Cal. 443, 449, per B. K. Mukherjea, J.

³ *Bijan v. Ranjit* [1942] 2 Cal. 443.

⁴ Kane, op. cit., II, 469. *Abhiraj v. Debendra* AIR 1962 S.C. 351, 353f.

⁵ Affinity was considered *obiter* in *Minakshi v. Ramanada* (1888) 11 Mad. 49 (FB); marriage with the wife's sister's daughter was held valid in *Ragavendra v. Jayaram* (1897) 20 Mad. 283.

⁶ HMA, s. 5 (v).

South India the usage of marriage of the maternal uncle's daughter and similar close relatives has been notorious since primeval times. When judicial notice has been taken of a custom strict proof will not now be required, unless it is alleged (as is hardly likely) that the caste, or castes, have abandoned the custom to marry sapindas.

247. Further to the rule barring sapindas the HMA adds the partly novel rule that persons within the degrees of 'prohibited relationship' may not marry even though they might not be sapindas (with or without the aid of custom derogating from the statutory rules). The degrees of prohibited relationship are of three types, and the reader is advised to consult the statute itself.¹ The first concerns lineal ascendants and descendants — this calls for no comment; the second excludes certain relations by affinity, namely the spouse of a lineal ascendant, e.g. a step-mother, or lineal descendant, e.g. daughter-in-law; also the former wife of the brother or paternal or maternal uncle, or any paternal or maternal granduncle. It is to be noticed that there is no statutory bar to a marriage with the former husband of a sister, nor the former husband of the father's or mother's sister. These bars operate whether the prior marriage terminated with death or by divorce. Thirdly certain relations are excluded who are related collaterally, i.e. brother and sister; uncle and niece; aunt and nephew; or the children of a brother and sister or of two brothers or of two sisters. To both the second and third classes customary exceptions may be proved,² for marriage of cousins and of the deceased husband's brother are by no means uncommon. An attempt to prove a custom of marrying a descendant, however, will almost certainly fail.³

248. It is a punishable offence to 'procure' the solemnization of one's own marriage in contravention of the law relating to prohibited degrees. The offender incurs imprisonment or fine or both.⁴ 'Procure' means to bring about, cause, effect, or produce. This is unfortunately absolute, and one may 'procure' the marriage though one is unaware that the other party is a prohibited relation or sapinda or that

¹ HMA, s. 3 (g).

² HMA, s. 5 (iv).

³ *Balusami v. Balakrishna* AIR 1957 Mad. 97, [1957] Mad. 164.

⁴ HMA, s. 18 (b).

custom did not take the parties out of the rule. Since Parliament imposed, for the first time, a penalty on 'procuring' a void marriage the Act must be construed strictly, and it appears that *mens rea* is not required. Whether one is a sapinda, etc., is a matter of law, not of fact; and 'ignorance of law does not excuse'.¹

249. Obsolete restrictions. The Act continues the provisions which, towards the middle of this century, released Hindus in India from serious restrictions upon the capacity to marry. Prior to 1946 a marriage would be void if the parties belonged to the same *gotra* (patrilineal lineage) or if the *pravara*, or series of names of supposed *rishi*-ancestors, recited at sacrifices instituted by members or their families, substantially corresponded. This cautious rule of extreme exogamy was found to be unnecessary, since it discriminated between Brahmans, who have *pravaras*, and non-Brahmans, many of whom do not even have *gotras*, or at any rate *gotra*-names.

250. The remarriage of a widow could raise the problem, whether her *gotra* for the purpose of her remarriage was that of her late husband or that of the family of her birth. It was held in Allahabad that it was the former, which was inconvenient, since she could not marry her late husband's agnate.² The Madhya Pradesh High Court (T. P. Naik, J.) has taken the more convenient view, holding that in a situation not contemplated by the *sastra* the fiction of change of *gotra* on marriage could not be insisted upon — which is a preferable approach.³

251. Prior to 1949 a marriage would normally be void if the parties belonged to different *varnas* (§ 27), though not if they belonged to different sub-castes within the major *varna*.⁴ Since difference of religion within the fold of Hinduism might amount to a difference of sub-caste or sect and operated as a hindrance to marriage, it was declared that

¹ Gupte, *Hindu Law of Marriage*, suggests, at p. 216, that perhaps ignorance might excuse.

² *Radha v. Shaktipado* AIR 1936 All. 624, 58 All. 1053.

³ *Rewa v. Galharsingh* AIR 1961 M.P. 164.

⁴ *Inderun v. Ramasawmy* (1869) 13 M.I.A. 141; *N. K. Nagappa v. Subramanian* [1946] Mad. 103, AIR 1945 Mad. 270.

difference of religion or of sub-caste should be no bar to marriage. All these statutory amendments and declarations of the previous law were originally given retrospective effect, and are continued in force by s. 29 of the HMA.

252. There is a difference of opinion as to whether the Hindu Marriages Validity Act, 1949, succeeded in validating *pratiloma* as opposed to *anuloma* inter-caste marriages. The Anglo-Hindu law at one time sanctioned in Bombay, Bengal and Assam *anuloma* marriages, in which the caste of the husband was higher than that of the wife: the *sastric* provisions on the subject were not attended to in so far as they regarded inter-varna marriage as obsolete in this, the Kali, age.¹ A dictum² to the effect that Allahabad likewise regarded (or ought to have regarded) *anuloma* marriages as valid is open to some doubt. *Pratiloma* unions, in which the woman was of the higher caste, were void, as obnoxious to the *sastra*.³ Since the Act of 1949 provides that intercaste marriages shall not be deemed invalid 'by reason only of the fact that the parties belonged to different . . . castes', it seems that *pratiloma* unions remained void, for the objection was twofold, that they were between castes, and that the order of castes was objectionable.⁴

253. Arya Samajists could take advantage of a marriage Act of their own, to which it is sufficient to refer the reader (App. III).

Marriages of girls below 18

254. The HMA prescribes in s. 5 (vi) that where the bride is under 18 the consent of her guardian in marriage, if any, must have been obtained for the marriage, i.e. for the marriage in question. No particular form of consent is prescribed, and if no guardian in marriage as listed in s. 6 is alive or competent to consent, and if all who are not

¹ *Bai Gulab v. Jivanlal* AIR 1922 Bom. 32, 46 Bom. 871; *Nalinaksha v. Rajanikanta* AIR 1931 Cal. 741. Cf. *N. K. Nagappa v. Subramanian* [1946] Mad. 103, AIR 1945 Mad. 270, 273.

² *Kastoori v. Chiranjii* AIR 1960 All. 446.

³ *Bai Kashi v. Jannadas* (1912) 14 Bom. L.R. 547, 16 I.C. 133.

⁴ Derrett, *H.L.P.P.*, 94 (sec. 127); but see a dictum in *Makhana v. Thaneshwar* AIR 1956 Assam 11, 12.

unfit refuse to undertake the responsibility of giving or withholding consent, she may marry without consent of any kind (§ 214). Mere presence at the ceremony would probably not amount to consent (§ 238). The maxim 'silence means consent' does not apparently apply in this context. The Act provides that in certain cases a marriage may be annulled where the consent was obtained by force or fraud (§ 299). Yet, as we have seen, a marriage notwithstanding a guardian's objections is none the less valid (§ 212). However, if anyone procures the solemnization of his or her marriage in contravention of the 'condition' relating to consent for marriages of girls under 18, he is liable to a fine of up to Rs. 1,000.¹

Marriages of divorced persons and parties to a voidable marriage

255. The capacity of a recently-divorced person to marry is specially limited. The Act provides in s. 15 that divorced persons may not marry within one year from the decree in the court of first instance, nor in any case while an appeal is pending or during the period in which an appeal, where a right of appeal exists, might be presented against the decree of divorce. The latter part of the rule is plainly essential; the former however is perhaps intended more to prevent confusion of paternity than hasty or collusive divorces intended speedily to facilitate fresh marriages. If a person marries in contravention of either of these rules his marriage is void *ab initio*.² The provision furnishes one ground for preferring, where it is available, recourse to a caste tribunal to a divorce in court — for the decision of caste tribunals if validly given normally terminates the marriage and sets the former spouses free to marry again without delay if they wish.

256. Where a voidable marriage subsists neither party is capable of another marriage, and this is true even after one of them has filed a petition for nullity under s. 12 of the HMA. Although it is logical, where the decree of nullity is

¹ HMA, s. 18 (c).

² *Battie v. Brown* AIR 1916 Mad. 847, 38 Mad. 452; *Jackson v. Jackson* (1912) 34 All. 203, 13 I.C. 958; *V. Nagabhushanam v. Nagendramma* AIR 1955 And. 181, 183, [1955] An. W.R. 18. Sri S. Venkataraman, in [1958] S.C.J. (Jour.) pp. 251-5.

expected and its effect is for many purposes retrospective, to suppose that in such circumstances the parties are free to contract a valid marriage,¹ the correct opinion is that the prior marriage subsists until it is actually annulled.²

CEREMONIES AND REGISTRATION 'MARRIAGE BY REPUTE'

257. Hindus are tenacious of their wedding-ceremonies, though reforming sects have sought to eliminate superstitious elements. Others have added these, or attempted to add them, to their formerly more primitive usages. Where both parties are members of the same sub-caste no problem arises. The customary ceremonies are sufficient and their form is immaterial. If these last over some days, the time at which the bridegroom signifies his acceptance or acquisition of the bride is the crucial time, from which the marriage commences. Where the ceremonies adopted include the *saptapadi*, or the 'walk' hand in hand of bride and bridegroom for seven steps before the sacred fire, the seventh step makes the marriage irrevocable, a feature continued in our Act.³

258. Where the parties are of different castes or sub-castes the customary ceremonies of *either* will be valid.⁴ No ceremonies which are not customary to either party will be valid as marriage ceremonies. Individuals and even groups cannot invent marriage ceremonies,⁵ and it is doubted whether even conventions of representatives of entire sub-castes can validly alter their customary ceremonies.⁶ If it is alleged, however, that the ceremonies were truncated or that traditional elements were negligently or hastily omitted, the ceremony will be valid if what is regarded as the essential element, without which a wedding would hardly be a wedding in the eyes of caste-members, is not omitted.⁷

¹ *Mason v. Mason* [1944] Nor. Ir. 134.

² *De Reneville v. De Reneville* [1948] 1 All E.R. 56, 60, 65 (CA); *Wiggin v. Wiggin* [1958] 2 All E.R. 555.

³ HMA, s. 7 (2). *Sitabai* (cited at § 260). ⁴ HMA, s. 7 (1).

⁵ *Deivanai v. Chidambaram* AIR 1954 Mad. 657, [1955] 1 M.L.J. 120.

⁶ See § 28.

⁷ *Mouji v. Chandrabati* (1911) 38 Cal. 700, 38 I.A. 122; *Appibai v. Khimji* (1934) 60 Bom. 455, AIR 1936 Bom. 138; *Kastoori v. Chiranjii* AIR 1960 All. 446.

In some castes, as among Jats marrying in the *karewa* form,¹ mere cohabitation is sufficient and no ceremony takes place.² It was not the intention of Parliament to invalidate such marriages as were formerly valid with the minimum of, or no, ceremonies.³ At all events, in order to prove any marriage it is not necessary that *saptapadi* should be proved to have taken place.⁴

259. Unlike transfers of property, partition, adoption and wills, marriages are by tradition not registered in India. The great notoriety which usually surrounds practically every wedding and the inevitable entries in the genealogists' books in the case of a family of any standing, secure that the *factum* and date of nearly every marriage will not be disputed. The HMA however provides that the State governments may legislate by rule for the keeping of marriage registers and compulsory entries therein,⁵ reserving the essential safeguard that failure to register shall in no way affect the validity of any Hindu marriage.

260. In suits for restitution of conjugal rights strict proof of marriage is always required.⁶ But in questions of legitimacy, etc., where independent evidence of a marriage, subsisting or dissolved, is not forthcoming it will be presumed until the contrary is proved that what was treated as a marriage by continuous cohabitation between the parties was a marriage in law.⁷ The law leans in favour of the validity of a marriage (rather than a state of concubinage) once it is proved to have existed *de facto*.⁸ Similarly, where

¹ One of the many forms appropriated by custom to marriages of widows or divorced women under the old system.

² *Charan v. Gurdial* AIR 1961 Pun. 301 (FB).

³ Sri M. L. Jain, at AIR 1961 Jour. 84-6 (his construction of the section seems imperfect?), and note *T. A. Menon v. K. P. Parvathi* AIR 1950 Mad. 373. Sri K. S. Mathur, at AIR 1962 Jour. 27-8, differs from Sri Jain and cites Mulla, 12th edn, p. 805 against him.

⁴ *P. M. Paradesi v. P. Subbalakshmi* [1962] 1 An. W.R. 91.

⁵ HMA, s. 8. Registration has commenced in several States.

⁶ *Surjyamani v. Kali* (1901) 28 Cal. 37, 50.

⁷ Evidence Act, s 114; *Chandu v. Khalilar* [1942] 2 Cal. 299, AIR 1943 Cal. 76.

⁸ *Inderun v. Ramasawmy* (1869) 13 M.I.A. 141, 158; *Sitabai v. Vithabai* AIR 1959 Bom. 508; *Mahadervan v. Mahadervan* [1962] 3 All E.R. 1108 (Ceylon Tamils; Ceylon Marriage Ordinance, s. 39; *omnia praesumuntur pro matrimonio*; ignore dictum regarding Hindu marriages at p. 1110 F which applies only to Ceylon).

the neighbourhood or community treated a couple as husband and wife, and they were thus reputed to be married, the burden of proof that they were not married, or could not have been married, lies heavily upon the party asserting it.¹ Where a couple have cohabited continuously for a number of years the presumption is in favour of marriage and against concubinage,² but if there are circumstances which weaken that presumption the court cannot ignore them.³ The presumption is thus rebuttable, and will naturally be applied with caution in oriental countries.⁴

In *Pravinbhai v. Nalinikant*⁵ there was no evidence of a marriage, evidence was led that it would have been invalid according to caste custom, there was evidence of the woman's previous marriage and no evidence of her divorce, the woman herself did not go into the witness-box, and the couple had cohabited for less than eight years. It was held that the presumption of marriage raised by continuous cohabitation was not sustainable.

In *D. Nagarajamma v. State Bank*⁶ the man was already married, the woman claimed to have been married to him since 1936 but produced documents tending to support the claim which ranged only from 1953, and it was admitted that she was originally a member of a community of dancing-girls. Such girls were not unknown to be taken as mistresses by men of the alleged husband's caste. It was held that the presumption raised by cohabitation was rebutted.

261. The dictum⁷ to the effect that cohabitation and repute cannot raise a presumption in favour of a *second* marriage is barely supported⁸ and would seem to be contrary to principle.

¹ *Anandi v. Onkar* AIR 1960 Raj. 251; *Re Taylor* [1961] 1 All E.R. 55.

² *Mohabbat v. Mahomed* AIR 1929 P.C. 135, 56 I.A. 201; *Anandi* (cited above).

³ *Gokal v. Parvin* AIR 1952 S.C. 231, 233, [1952] SCR 825.

⁴ *Ma Wun v. Ma Kin* (1907) 35 I.A. 41, 35 Cal. 232, 18 M.L.J. 3 (PC). Note the learned comment at Mayne, 11th edn, 164 n. (i). The presumption will operate even in respect of members of matrilineal and formerly polyandrous communities: *Vishnu v. Kuttiparu* AIR 1957 T.C. 85 (FB).

⁵ AIR 1961 M.P. 93. So also *Bachubhai v. Bai* AIR 1961 Guj. 141.

⁶ AIR 1961 An. P. 320, [1962] 1 An. W.R. 51.

⁷ *D. Nagarajamma* (cited above).

⁸ See the Note of a decision at 46 M.L.J. (SN) 8. Granted that caution is needed in all such cases, a second marriage (while and to the extent that such were lawful) ought not to be distinguished from a first marriage.

MARRIAGE BETWEEN HINDUS AND
NON-HINDUS AT HINDU LAW

262. Marriage between the main religious communities of India and Pakistan normally takes place under the provisions of the Special Marriage Act applicable. There are however communities, and there may always be in the future individuals as there have been in the past, that prefer to marry solely by Hindu traditional rites, notwithstanding that one spouse is a non-Hindu. At Anglo-Hindu law such marriages were valid.¹ There is nothing in Hindu law which renders a Hindu incompetent to marry a non-Hindu with Hindu or other rites — indeed if there had been, numerous famous dynastic marriages of the 16th and 17th centuries would not have been tolerated. The question arises as to the effect of the HMA, which purports to codify marriages amongst Hindus, on this position. The Anglo-Hindu law is partially saved by s. 4 (since provision for the marriage of such couples is not made by the Act). Is it arguable that, because provision is made for matrimonial causes in reference to, e.g. 'any marriage', the HMA itself could define the rights of such spouses to matrimonial relief? This will certainly be the case where both spouses are Hindus at the time relief is sought though they were not Hindus at the time of the wedding. As for foreign 'mixed' marriages we have already seen (§ 228) that reference must be made to the law of the domicile, or of the *locus celebrationis*, in reference to problems of capacity, and compliance with the required forms respectively.

THE WIFE'S RIGHT TO
MAINTENANCE

263. The wife's right to be maintained by her husband is an important result of the marriage and a principal matter to be attended to in a decree for nullity, judicial separation, or divorce. The principles consulted even then are fundamentally one and the same, and before we turn to matrimonial causes we must ascertain the nature and extent of that right.

¹ *Dubey v. Dubey* AIR 1951 All. 529, [1950] All. L.J. 932. The dictum of Innes, J., at 3 M.H.C.R. App. ix, in 1866, is, it seems, incorrect. One may also consult *Rajammal v. Mariyammal* AIR 1954 Mys. 38.

The wife, whatever her conduct, is entitled to maintenance by her husband, irrespective of whether he possesses property of any particular kind¹ and independently of any distinct demand for it.² She is entitled to pledge her husband's credit for her needs. She is entitled to sue for a charge to be created in her favour not only over existing specific assets but even over all, including future, assets for this purpose.³ Until a charge is created, however, she has no equity over her husband's property, still less an actual right of ownership (though she is traditionally 'half her husband's body'),⁴ and he can defeat her expectations by an alienation for value to a person having no notice of her claim.⁵ An alienation to pay family debts or his own antecedent untainted debts is bound to take priority over her claims.⁶ Her rights of maintenance are laid down in general terms in s. 18 (1) of the Hindu Adoptions and Maintenance Act, 1956. Her remedies at Hindu law are in addition to those provided under s. 488 (1) of the Criminal Procedure Code, which is beyond the scope of this work. Where a charge or a decree for maintenance has been awarded to her it is simply annulled and not merely suspended by resumption of cohabitation between the spouses, since the very basis of the claim is thereby removed.⁷ 'Resumption' cannot be proved by mere instances of sexual intercourse without real resumption of joint living; and it has been doubted whether a *consent* decree, passed without the court's adjudicating on the merits, if any, of the application, will be annulled by a real resumption.⁸ On principle it would seem that the basis of all decrees for maintenance is the same, namely *de facto*

¹ *Kandaswami v. Angammal* AIR 1960 Mad. 348, [1961] 1 M.L.J. 18.

² *Nagendramma v. Ramakotayya* AIR 1954 Mad. 713, [1955] 1 M.L.J. 25.

³ *Ramachandra v. Kamalabai* (1944) 46 Bom. L.R. 358, AIR 1944 Bom. 191; *B. Manikyam v. B. Venkayamma* [1956] An. W.R. 1021, AIR 1957 An. P. 710; *K. M. S. Rudrappa v. Basamma* AIR 1962 Mys. 207.

⁴ *Lakshman v. Satyabhamabai* (1877) 2 Bom. 494.

⁵ *Dattatraya v. Tulsabai* [1943] Bom. 646 (explaining the effect of the Transfer of Property Act, 1883, s. 39, as amended in 1929); *Chandramma v. M. Venkatarreddi* AIR 1958 An. P. 396.

⁶ *Dan Kuer v. Sarla* AIR 1947 P.C. 8, 73 I.A. 208, [1946] All. 756 (widows); *Manilal v. Bai* (1893) 17 Bom. 398.

⁷ *V. Venkayya v. V. Raghavamma* [1942] Mad. 24, AIR 1942 Mad. 1; *Perundevi v. Amavasikan* [1956] 2 M.L.J. 610, AIR 1957 Mad. 113.

⁸ *Meenakshi v. P. S. Muthukrishna* AIR 1961 Mad. 380.

separation while the right to maintenance subsists; and resumption of cohabitation should render all alike ineffective.

When the wife is entitled to reside in her husband's home (as she is presumed to be until the contrary is shown) her right does not come to an end merely because her husband has deserted her. Though the house may stand in his name he may not turn her out. The right of residence remains in full force until the marriage comes to an end by death or divorce, or until the court holds that it is unreasonable to allow her to reside there in view of her ability to seek and find accommodation elsewhere. She is meanwhile a licensee residing with the presumed authority of her husband.¹ His alienees, whether by sale or insolvency, cannot obtain the property free from her 'equity'.² The equity being to reside until her husband provides other accommodation or until the court, in its discretion, finds her occupation to be unreasonable,³ the deserted wife has the comfort of knowing that she does not reside merely at her husband's will and pleasure, still less at that of her husband's relations. She may even let or sublet a room or so to help maintain herself if maintenance is denied or unreasonably diminished. These rules of English law are eminently suited to Indian conditions under 'justice, equity and good conscience'.

264. The amount of maintenance is affected by the wife's conduct, or, in the case of a woman recently living a life of unchastity, her recent conduct, the relations between the spouses, and by the standard of living of the family, their income, or, when the husband is separated (§ 519), his income, the woman's reasonable needs, and by her possession of independent means.⁴ Where she is actually unchaste at the time of her suit for maintenance or for arrears of maintenance, or for a charge, the court is entitled to dismiss the claim for the period of her unchastity, as while she is actually being kept by another man, or is flagrantly denying her marital obligations, she can have no

¹ *Bendall v. McWhirter* [1952] 2 Q.B. 466, 477 (CA), *per* Denning, L.J. (as he then was).

² *Lee v. Lee* [1952] 2 Q.B. 489; *Bendall* (above).

³ *Woodcock & Son v. Hobbs* [1955] 1 All E.R. 445.

⁴ *Santi v. Sudh* AIR 1955 Pun. 22. See § 283.

equitable or legal standing.¹ When it is established that she left home for unchastity it is not open to her to claim maintenance and force her husband to prove her unchastity at the time of suit.² Under the Criminal Procedure Code she must actually be living in adultery in order to fail to obtain the maintenance,³ but this is a stricter requirement than that prevailing at Hindu law. At Hindu law if unchastity is pleaded as a defence she must prove a return to a chaste life,⁴ provided that the plea has been substantiated by reference to past unchastity. Defendants who allege unchastity recklessly and unscrupulously will be mulcted in costs.

265. A woman who has returned from unchastity is entitled to bare maintenance, sometimes called 'starving' maintenance, until she has performed her penance and been readmitted into family life.⁵ In some castes this may never take place,⁶ in others the husband's condonation alone will suffice to raise her rights so far as maintenance is concerned to the level appropriate to a wife who has not been unchaste. The view that even after penance a wife who has been unchaste with a man of lower, or even the lowest, caste cannot be restored to full rights of maintenance⁷ seems to be inconsistent with a modern outlook and must be regarded as wrong.

266. Her conduct apart from unchastity may be relevant, since a wife who can be shown to have been guilty of matrimonial offences, even if condoned, may not be the object of the court's sympathy unless she has reformed, and the court's sympathy is reflected in the amount decreed. As the court (P. Chandra Reddy, J., as he then was) said in *M. Jaggamma*

¹ *Devi v. Gunwanti* (1895) 22 Cal. 410; *Kandasami v. Murugammal* (1895) 19 Mad. 6. The statute, HAMA, s. 18 (3) virtually codified the previous rule, for it is inconceivable that a wife will be culpably unchaste whilst living with her husband.

² *Deivanai v. Kasi* AIR 1957 Mad. 766.

³ *In re Fulchand* (1927) 52 Bom. 160, AIR 1928 Bom. 59.

⁴ *Zuli v. Gopalia* [1946] Nag. 619, AIR 1946 Nag. 375.

⁵ *Ananthanarayana v. Sharadamma* (1943) 22 Mys. L.J. 237.

⁶ It is submitted that it is only in this sense that *Sathyabhama v. Kesava-charya* (1915) 39 Mad. 658 is still good law.

⁷ Dictum of Chandavarkar, J., in *Parami v. Mahadevi* (1909) 34 Bom. 278. See last note.

v. *M. Satyanarayanamurthi*,¹ where the wife abandoned her husband without immoral motives, had remained apart from him for nine years, and then sued for Rs. 4,000 *per annum* for future maintenance, 'A less liberal rate will be awarded where the wife leaves her husband without due cause'. The amount may fluctuate with the fortune of the husband and the wife is entitled to apply for an enhancement, just as the husband may apply for a reduction.² If the property is so small as not reasonably to admit of her obtaining a separate allotment her claim may fail.³ The woman's own means do not affect the validity of her claim for maintenance, though they may reduce the amount awarded to her,⁴ especially if others, equally members of the family with herself, have no such means to fall back upon and the husband's resources will hardly support all in comfort. Where nothing operates to diminish the amount, a wife can expect one-fifth or upwards of one-fifth of her husband's income.⁵ But in a case where a husband married a wife of a more expensive standard of living than his own, he would normally be expected to keep her on the scale to which she was accustomed.⁶ Equity will normally secure that the husband is not exploited by his wife's refusal to live with him, and that she is not impoverished by his neglect. The result may in such cases be a higher proportion than one fifth. A man who has one wife and no children to support may be ordered to pay as much as a third of his income.⁷

267. The problem arises where a woman lives separately from her husband. Normally she is under an obligation to live wherever he chooses, within reason, and pre-nuptial agreements to a different effect are not binding upon him.⁸

¹ AIR 1958 An. P. 582; on appeal: AIR 1962 An. P. 439.

² *Subbarayudu v. Papayamma* AIR 1957 An. P. 865, [1955] An. W.R. 545.

³ *Godavaribai v. Sagunabai* (1896) 22 Bom. 52 (widow: but the principle is wider).

⁴ *Mavji v. Shushila* AIR 1955 Saur. 45; *Ekradeshwari v. Homeshwar* (1929) 56 I.A. 182, AIR 1929 P.C. 128, 8 Pat. 840 (PC). Cf. the position of the widow, § 270 below. ⁵ *Kako v. Ajit* AIR 1960 Pun. 328, 330.

⁶ *Prem Pratap v. Jagat* [1944] All. 118, AIR 1944 All. 97.

⁷ *V. Narayanamma v. V. Narasaraju* AIR 1962 An. P. 371 (ignore retrospective operation point): both wives were alive and one third was the quantum ordered. ⁸ § 306.

Where she lives separately without an improper motive she is entitled to be maintained as before, and suits for separate maintenance must succeed unless she has had a decree for restitution decreed against her, which can happen only where she is not justified in refusing her husband his matrimonial rights. The subject of restitution is dealt with below (§§ 306ff). Until a petition for restitution is filed the wife's right in such cases is absolute and she is under no obligation either to prove that she has incurred debts for her maintenance or that she has good reasons for not residing with her husband.¹ If the husband allowed her to live separately and on her desiring to return refused to permit her to do so,² she is entitled to maintenance as if he had turned her out.

268. A ground upon which a wife would be justified in resisting a petition for restitution is a ground for separate maintenance. The HAMA provides³ that she may obtain maintenance notwithstanding her living separately from her husband if he deserts her (§ 326), or wilfully neglects her; if he treats her with such cruelty as to cause a reasonable apprehension in her mind that it would be harmful or injurious to live with him; if he suffers from virulent leprosy; if he has any other wife living; if he keeps a concubine in the house or habitually resides with a concubine; if he is converted to another religion, ceasing to be a Hindu; or for any other cause justifying her living separately. If she is unchaste or ceases to be a Hindu by conversion to another religion she forfeits her right.⁴

269. Formerly in British India under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, somewhat similar rights were secured by statute. There was a difference of opinion whether that Act declared the existing law or was innovative, but this is now of academic interest only as the Act of 1956 totally supersedes it in India. It is important to note, however, that in Pakistan a wife cannot rely upon that Act in a case where the husband had 'married again' before the commencement of the Act⁵ but in other cases the court is free to consult the Act of

¹ *Ekradeshwari* (cited above).

² *Nitye v. Soondaree* (1868) 9 W.R. 475.

³ HAMA, s. 18 (2).

⁴ HAMA, s. 18 (3).

⁵ *Gopal v. Kallu* AIR 1960 Raj. 60.

1956 to discover what the Anglo-Hindu law on this and connected grounds should be.

270. The wife's right of maintenance does not cease at her husband's death. All widows of Mitakshara coparceners are entitled to maintenance out of their interests which pass by survivorship. The widow is a statutory dependant with claims on his estate, whether it passes by testamentary or intestate succession, unless she is a legatee of a share sufficient for her maintenance.¹ If she has no property or earnings, and neither her husband's estate nor the estates of her deceased parents (§ 661) nor the means of her living children nor their estates when they are dead, can maintain her, then her father-in-law must maintain her so long as she does not remarry. But the obligation extends only to coparcenary property, out of which the daughter-in-law has not obtained a share,² and such cases will be rare indeed after 1956. Where the father-in-law can well maintain his other dependants and himself out of his self-acquired property, the whole income, if necessary, of the ancestral property may be allotted to the daughter-in-law.³

271. Formerly the rights of the daughter-in-law extended, if at all, to the separate as well as the coparcenary property of the deceased father-in-law.⁴ It was unenforceable during the father-in-law's lifetime (being treated as a moral obligation), but upon his death it attached to his property as a legal liability. With the aid of the Pious Obligation (§ 504) maintenance for the three years prior to the father-in-law's death might be recovered from his male issue.⁵

272. Arrears of maintenance, if not waived or barred by limitation, are a debt of the husband, but the court has jurisdiction to decree arrears of maintenance at a lower rate than future maintenance if in its opinion it would not

¹ § 662. ² HAMA, s. 15. ³ *Jal v. Pala* AIR 1961 Pun. 391.

⁴ *Ambu v. Soni* [1941] Mad. 13, AIR 1940 Mad. 804 (FB); *Appavu v. Nallammal* [1948] 1 M.L.J. 110, AIR 1949 Mad. 24. It cannot be defeated by will: *Rangammal v. Echammal* (1899) 22 Mad. 305; *Gopal v. Kadambini* AIR 1924 Cal. 364 (cf. the opposite rule in Maharashtra and Gujarat: *Bai Parvati v. Tarwadi* (1901) 25 Bom. 263); or by gift: *Jeot v. Lauji* AIR 1929 All. 751.

⁵ *Rupa v. Sriyabati* AIR 1955 Or. 28.

be equitable to saddle the husband or his family with a lump sum at the higher rate.¹

For the court's jurisdiction to vary orders for maintenance see § 283.

MATRIMONIAL CAUSES

JURISDICTION AND PROCEDURE

273. Details of procedural rules are beyond the scope of this book. The Act lays down that the Code of Civil Procedure, 1908, shall, as far as may be, regulate proceedings under the Act.² The judges of the various High Courts have made Rules which regulate matrimonial causes and these differ considerably *inter se*.³ There are provisions of the Act itself which enable divorce practice to be compared favourably with the English model upon which it is based: the court may order a hearing to be *in camera* and it must be *in camera* if a party so desires.⁴ Only with the court's permission may matter in relation to such proceedings be printed or published, subject to a fine which may extend to Rs. 1,000.⁵ On the vexed question of the place of co-respondents in matrimonial proceedings under the HMA see below (§ 348).

274. The scheme of the Act is not exhaustive. Wherever a caste tribunal had in 1955 and continues to have thereafter jurisdiction to dissolve a marriage, that jurisdiction is preserved to it.⁶ The decision there given will be binding provided it is arrived at in accordance with the principles of natural justice. Those principles require that the members of the *panchayat* or tribunal shall have no pecuniary interest in the dispute, nor should be so connected with the parties or either of them as to give rise to a reasonable apprehension

¹ *Venkanna v. C. Satyanarayanamma* AIR 1957 An. P. 652, [1956] An. W.R. 694; *Rajamma v. Varadarajulu* AIR 1957 Mad. 198. But cf. *S. Sankaranarayana v. Lakshmi* AIR 1960 Mad. 294: where enhanced maintenance has been demanded the court may award arrears at an enhanced rate.

² HMA, s. 21.

³ Specimens are printed in Saksena, *Hindu Marriage Act*.

⁴ HMA, s. 22 (1). ⁵ HMA, s. 22 (1).

⁶ HMA, s. 29 (2). *Audumbar v. Sonubai* (1960) 63 Bom. L.R. 595. Rajkumari Agarwala in [1959] S.C.J. (Jour.) 242, 248-51.

that they might have difficulty in avoiding bias. They must act in good faith, listen fairly to both sides, and give reasonable opportunity to the parties adequately to present their cases and to correct or contradict any evidence prejudicial to their cases.¹ Similarly where under any unrepealed enactment a right to a divorce persists, e.g. under the Baroda Hindu Act, 1937, to the extent that it is not inconsistent with the HMA,² or under the various statutes applicable to matrilineal or bilateral castes in Kerala,³ the remedy may be pursued independently of the HMA. On the other hand a spouse within one of the Kerala statutes may petition for divorce under the HMA itself, for he enjoys a choice of remedies.⁴

275. The court's jurisdiction under the HMA is founded alternatively upon either (i) the place where the marriage was solemnized or (ii) the place where the spouses reside or last resided together. But where it is impossible to satisfy the requirements of s. 19 of the Act in this regard the ordinary Civil Court where the defendant resides or the cause of action arose has jurisdiction.⁵ Since Hindus are domiciled in India and not in a State of India,⁶ the Bombay City Civil Court, for example, will grant a divorce under the Travancore Nair Act to Nairs resident in Bombay.⁷ The court in question is the District Court, City Civil Court, or other court notified by the State government as having jurisdiction in respect of matters dealt with in the Act.⁸ Appeals may be brought from decrees and final orders as from any decree in civil proceedings, but not on costs only.⁹

¹ *Krishnasami v. Virasami* (1886) 10 Mad. 133; *Vallabha v. Madusudan* (1889) 12 Mad. 495. L. T. Kikani, *Caste in Courts* . . ., Rajkot, 1912, pp. x, xii. *Kishenlal v. Prabhu* AIR 1963 Raj. 95.

² But see HMA, s. 29 (2).

³ As for example the Travancore Nair Act and other Acts referred to below in §§ 390-1. *Vasappan v. Sarada* AIR 1958 Ker. 39.

⁴ *Chellappan v. Madhavi* AIR 1961 Ker. 311.

⁵ *Hariram Dhalumal v. Jasoti* (1962) 64 Bom. L.R. 712.

⁶ *State v. Narayandas* (1957) 59 Bom. L.R. 901, 905, AIR 1958 Bom. 68 (FB).

⁷ *Mrs Kamala Nair v. N. P. Kumaran* AIR 1958 Bom. 12, 59 Bom. L.R. 536.

⁸ HMA, s. 19 read with s. 3 (b). Misunderstandings on jurisdiction prior to 6 May 1960 were cured by the Hindu Marriage (Validation of Proceedings) Act, 1960, Act 19 of 1960.

⁹ HMA, s. 28.

276. An important feature of the Act is the provision for an order for maintenance *pendente lite* and the expenses of the proceedings in favour of either party¹ at any stage of the proceedings, if necessary to enable him or her to support himself or herself and bear those expenses. The court has discretion to fix the amount payable monthly according to the income of the opposite party, and the applicant's income, without reference to the merits of the cause. Since contumacious husbands are known to refuse to pay maintenance while prosecuting their own cross-petitions it is fortunate that the court retains jurisdiction (which it uses sparingly) to strike off the defence of any respondent whose failure to comply with an order for interim maintenance (as this type of maintenance-order is called) is due merely to contumacy.² It would be advantageous if such orders were themselves unappealable. Unfortunately the High Courts are not agreed and there is substantial authority for their appealability.³ In a suit for maintenance interim maintenance may be refused at the court's discretion if the defendant denies the plaintiff's right to maintenance *in limine*, but not where the defendant disputes the amount allowable, or the circumstances of the separation.⁴ In other cases it is seldom that the right to maintenance is denied, one of the rare exceptions being the defence of 'no marriage' filed in answer to a petition for divorce.

277. As we have seen (§ 210), the subsistence of marriages is the concern of the country and not merely of the spouses, and therefore in cases where there is any possibility of a reconciliation, and there is no ground why the marriage should be terminated if only one party can make reasonable adjustments, the court is under a positive duty (even on an appeal) to endeavour to bring about a reconciliation.⁵ This is feasible in many desertion or cruelty cases and there is no reason why the duty should degenerate into a hasty

¹ HMA, s. 24.

² *Mahalingam v. Amsavalli* [1956] 2 M.L.J. 289; *Prithvirajsinhji v. Shivprabhakumari* (1959) 62 Bom. L.R. 47, 52-3; *Sunder v. Manna* AIR 1962 Pun. 127.

³ Civ. Pro. Code, s. 2 (2), s. 104, O. XLIII, r. 1, construed in *Prithvirajsinhji* (cited above). Contra: *Tarlochan v. Mohinder* AIR 1961 Pun. 508.

⁴ *Mahomed v. Tajunnissa* AIR 1953 Mad. 420; *Muniammal v. P. M. Ranganatha* AIR 1955 Mad. 571, 67 M.L.W. 1186.

⁵ HMA, s. 23 (2). *Jivubai v. Ningappa* AIR 1963 Mys. 3.

formality as it has done in some continental countries. In guardianship matters the court already advises the parties in an objective, constructive, and often paternal fashion, and there is no reason why efforts made discreetly to bring the parties together at various stages of a matrimonial dispute should not often be successful. First and foremost, the popular notion that divorces may now readily be obtained if reckless allegations of cruelty and the like are hurled at the opposite party can be repelled by paternal firmness as well as sympathy from the bench. The new-found urge for liberty needs restraint as well as reasonable satisfaction.

278. Of importance are the provisions tending to prevent collusive divorces. It is not in the public interest¹ that marriages celebrated in a Hindu form should be terminated by agreement of the spouses, unless custom so permits (in which case the court is not the forum for the parties). The petition must warrant that no collusion has taken place,² and the court may not decree the relief petitioned for unless it is satisfied that the petition was not presented nor prosecuted in collusion with the respondent.³

279. No relief may be decreed where the petitioner is morally disentitled to relief, whether by unnecessary delay in presenting the petition,⁴ or by condoning an act of adulterous sexual intercourse or the 'living in adultery' of the respondent (§ 367), or by condoning the cruelty complained of, or by being an accessory to or conniving at acts complained of,⁵ or finally by relying upon his or her own wrong or disability for the purpose of obtaining relief. These provisions, the last of which is not paralleled in all countries of the Anglo-American tradition, require explanation at some length.

280. *Unnecessary delay.* A delay of seven years in presenting a petition for divorce was held to raise a presumption of connivance or condonation, and the burden was on the petitioner to explain the delay before he could be granted the divorce.⁶ Under the current procedure poverty must

¹ *Kishore v. Snehprabha* AIR 1943 Nag. 185, 187b, [1943] Nag. 474 (SB).

² HMA, s. 20 (1).

³ HMA, s. 23 (1) (c).

⁴ HMA, s. 23 (1) (d).

⁵ HMA, s. 23 (1) (b).

⁶ *Manohar v. Chandrawati* AIR 1936 Nag. 26, 11 I.C. 409 (SB).

rarely be a sufficient excuse for not pursuing a matrimonial cause promptly, but any reason which satisfies the court (e.g. that the petitioner was working for a reconciliation or protecting the children) will enable a petition to be granted even after a longer period than seven years, just as a much shorter period of inexcusable delay may well be fatal to the petition.

In *Teja v. Sarjit*¹ the wife left her husband between six and seven years before, since when he had neglected her completely. As soon as she obtained an order under s. 488 of the Civil Procedure Code (§ 263) he applied for restitution of conjugal rights. *Held*: the application would be refused for unnecessary and improper delay.

Condonation. Since jurisdiction in matrimonial causes is founded on what are loosely called 'matrimonial offences', 'grounds' for relief, it follows that where the aggrieved party has forgiven the fault it would not be equitable or consistent with a good conscience, nor suited to the stability of married life for him or her to present the petition. Condonation is not possible in relation to *all* matrimonial offences (§§ 379, 382, 386). Condonation may be by express terms, or by conduct. A full reinstatement of the other spouse in his or her former position is essential,² and mere words of forgiveness will not suffice. To condone one must be aware of the matrimonial offence.³ Continuance with the other spouse in ignorance of the wrong that has been committed cannot be condonation by conduct. In *Sayal v. Sarla* this was clearly shown.⁴

The wife poisoned her husband with 'love potions' and he continued to live with her for two or three years thereafter until the full effects of the poison, and his true predicament, were known. At that point she showed abject contrition. His continuance of cohabitation during this period was held not to be evidence of condonation.

The fact that the parties have resumed marital intercourse may be evidence of condonation, provided both parties are in possession of full knowledge of the fault which is to be condoned. This is the case even where the aggrieved party agrees to intercourse in response to the demands of the other. Casual intercourse, as on a single occasion, will not however

¹ AIR 1962 Pun. 195.

² *Crocker v. Crocker* [1921] P. 25; *Chandrabhagabai v. Rajaram* AIR 1956 Bom. 91, 57 Bom. L.R. 946.

³ *Bhagwan v. Amar* AIR 1962 Pun. 144.

⁴ AIR 1961 Pun. 125, 128.

necessarily operate as condonation of an existing desertion or break the statutory period of desertion.¹ In *Morley v. Morley*² it was held after an elaborate review of the authorities that cohabitation for as long as 48 hours and voluntary sexual intercourse did *not* condone the husband's cruelty since the wife's acts were in an attempt to effect a reconciliation and did not constitute a reinstatement by her of the husband to his former marital position. Intercourse alone does not amount to resumption of cohabitation, which puts an end to desertion.³ However, if the wife is guilty of adultery and the husband knowingly has intercourse with her his act reinstates her as his wife and amounts to conclusive evidence of condonation.⁴ Condonation may be inoperative if further offences, negating good behaviour upon which condonation is impliedly conditional, reopen the position, and the condoned offences may be relied upon as grounds.⁵ It is otherwise if, by agreement, the right to rely upon condoned offences is actually waived.⁶ To say that condonation must be unconditional and that thereby marital injuries are obliterated is, it is submitted, to go too far and the dicta to that effect are incorrect.⁷

281. *Accessories* are those who connive at the act complained of. *Connivance* is intentional concurrence in the conduct complained of.⁸ Acquiescence in a course of conduct incompatible with the legal duty of the other spouse may rebut the presumption against connivance.⁹ Spying, and giving an opportunity for an offence, do not come within the scope of connivance.¹⁰ Considerable delay in presenting a petition for divorce may raise a presumption of connivance or condonation.¹¹ At length we come to 'relying upon his

¹ *Mummery v. Mummery* [1942] P. 107; *Perry v. Perry* [1952] P. 203.

² [1961] 1 All E.R. 428.

³ *W. v. W.* [1961] 2 All E.R. 626, 630.

⁴ *Henderson v. Henderson* [1944] 1 All E.R. 44, [1944] A.C. 49 (HL). For the very rare exceptions see *Latey on Divorce*, 14th edn, p. 150, § 264.

⁵ *Premchand v. Bai* (1927) 51 Bom. 1026; *Stones v. Stones* (1934) 62 Cal. 541.

⁶ *Monk v. Monk* (1932) 60 Cal. 318, AIR 1933 Cal. 388.

⁷ *Chandrabhagabai* (cited above) at p. 93, col. b.

⁸ *Rogers v. Rogers* (1830) 3 Hag. Ecc. 57 = 162 E.R. 1079.

⁹ *Lloyd v. Lloyd* [1938] 2 All E.R. 480.

¹⁰ *Douglas v. Douglas* [1950] 2 All E.R. 748 (CA).

¹¹ *Manohar v. Chandrawati* AIR 1936 Nag. 26, 161 I.C. 409 (SB).

or her own disability'. The ancient concept of ecclesiastical law, namely that relief is not to be given where the petitioner is himself at fault, produces, *inter alia*, the notion that the petitioner must not be the party in whom the fault lies. So our Act says,¹ '... that the *respondent* was impotent ...'. Apart from this consideration it would be intolerable in India if a matrimonial relief were to be decreed on the basis of facts which the petitioner had himself brought about.² Where the wife is driven from the home the husband cannot claim that she had deserted him; where he authorized his younger brother to have intercourse with her he cannot accuse her of adultery.³ Nor where she had contracted virulent leprosy from him can he petition for divorce on the ground of her leprosy. Yet if she leaves home because he denies her intercourse she cannot defend herself from his petition by alleging that his denial of intercourse drove her into adultery with other men.

282. Finally, no decree is to be granted if there is any 'other legal ground why relief should not be granted'.⁴ The importance of this clause cannot be overestimated, as it authorizes the court to apply the learning accumulated in India or abroad which modifies or controls the bare rights to seek matrimonial relief set out in ss. 9-13 of the Act. To take an illustration of wide significance, it has been laid down in India that a petitioner for matrimonial relief must come to the court with clean hands, i.e. free from matrimonial misconduct. Thus a wife in desertion and living in adultery cannot assume that the court will exercise its discretion in her favour even if a matrimonial offence on her husband's part can be proved.⁵

283. At the time of passing the decree, or afterwards on application for the purpose, the court may pass an order for permanent 'alimony', i.e. maintenance, in favour of

¹ HMA, s. 12 (1) (a).

² See the evidence adduced in *Mandan v. Thimmi* AIR 1940 Mad. 135b, [1939] 2 M.L.J. 883.

³ See the principle acted upon in *Chintu v. Mt Chando* AIR 1951 Simla 202 (divesting of widow's estate under Punjab custom).

⁴ HMA, s. 23 (1) (c).

⁵ *Mato v. Sadhu* AIR 1961 Pun. 152, where Shamsher Bahadur, J., relied on *Latey on Divorce*, 14th edn, p. 182 and *Hill v. Hill* 47 Bom. 657, AIR 1923 Bom. 284.

either party. This may be for a lump sum, or a periodical sum. Remarriage of the person entitled to the alimony, or the death of the other party, terminates the order. The amount of alimony is to be determined having regard to the income and property of the party to be ordered to pay alimony, the income and property of the applicant, and the conduct of the parties,¹ upon which the trial judge may usefully comment in view of any subsequent proceedings for maintenance.² The court will follow at present English law as to the discretion it will exercise in withholding alimony from a guilty wife if she has means. If she is without means of her own an allowance will be ordered for her at the innocent husband's expense in order that she may be saved from depravity due to poverty.³ In *Amar Kanta v. Sovana*⁴ the marriage was dissolved for the wife's adultery, and the wife attempted to hide the fact that she was earning. It was held that had she not been earning she would have been entitled to a bare maintenance to prevent her starving, but that her adequate earnings caused her right to maintenance altogether to fall into abeyance. The order may be varied or rescinded to meet changes in the circumstances of either party.⁵ Naturally where the change of circumstances has been brought about by the voluntary act of the applicant himself it would not be just to vary the order.⁶ But a general rise in the standard of living will be taken into account.⁷ The order must be rescinded if it is shown that the party receiving or entitled to alimony has had sexual intercourse.⁸ No husband may agree that his former wife may be unchaste and limit his right to raise her unchastity as a bar to maintenance.⁹ Like any other right to maintenance it may be secured by a charge on the immoveable property of the person liable to pay it; and it is not assignable or capable of being attached. If the spouses cohabit again, even if they

¹ HMA, s. 25 (1).

² *Per* Denning, L. J. (as he then was), in *Trestain v. Trestain* [1950] P. 198, 202-3 (CA).

³ *Ashcroft v. Ashcroft and Roberts* [1902] P. 270; *Squire v. Squire and O'Callaghan* [1905] P. 4.

⁴ AIR 1960 Cal. 438.

⁵ HMA, s. 25 (2). See also HAMA, s. 25.

⁶ *Ratcliffe v. Ratcliffe* [1962] 3 All E.R. 993 (CA).

⁷ *Saraswati v. Rupa* AIR 1962 Or. 193.

⁸ HMA, s. 25 (3).

⁹ *Audumbar v. Sonubai* (1960) 63 Bom. L.R. 595, 598.

subsequently separate, the order automatically terminates (§ 263).

284. During the proceedings and in the final decree the court may make orders for the custody, maintenance, and education of minor children. Children of the marriage and other children of the spouses, whether or not legitimate, are comprehended in this phrase,¹ though the court will not make orders in respect of children outside the jurisdiction,² just as when the child is within the jurisdiction its paramount responsibility for the child's welfare justifies it in refusing to be bound by a foreign decision in the matter.³ This right persists even after the decree, and the order may be revoked or suspended or varied upon application of the child through his next friend, or of the legal guardian or parent entitled to custody. Here, as elsewhere, the court's jurisdiction is free to make such orders as shall be in the best interests of the children, whose wishes, the Act tells us, the court should, if practicable, consult.⁴ In *Avinash v. Khazan*⁵ the father claimed custody of his son on the ground of his being the natural guardian. He had not been held unfit to have the guardianship and the father's preeminent rights still subsisted (§ 50). However as he had remarried, was guilty of legal cruelty to the mother and of desertion, and was shown to have no particular paternal attachment to the child the court ordered that, while the father continued to be responsible for the child's maintenance and education, custody should be with the mother.

285. The disposition of wedding presents, property jointly belonging to husband and wife, may also form part of the decree,⁶ since in such disputes there is frequently a reluctance to agree to a division of them. A settlement in trust for the children of the marriage may be desirable, and the decree may be suspended until a settlement approved by the court has been made.⁷ In many communities presents are made

¹ *Galloway v. Galloway* [1955] 3 All E.R. 429 (HL), discussed by Sri Paras Diwan at (1961) 5 Y.B. Leg. St. (Madras), 75ff, 135.

² *Harten v. Harten* [1957] 1 All E.R. 379. Paras Diwan (cited above), at p. 143.

³ *McKee v. McKee* [1951] A.C. 352 (PC).

⁴ HMA, s. 26.

⁵ AIR 1960 Pun. 326.

⁶ HMA, s. 27.

⁷ See the comparable order in *Bent v. Bent and Footman* (1861) 2 S. & T. 392 = 164 E.R. 1047.

to the husband or to the wife individually and even where there is a fundamental assumption that the gifts will tend to the advantage of the couple and their children they will not come within this section for it applies only to presents that 'belong jointly' to both spouses. Since there is no presumption of law that wedding presents are joint presents to both spouses, presents 'belong jointly' only where it can be shown that the intention of the donors was that they should be joint property, or the subsequent conduct of both spouses has removed all possibility of doubt but that they are joint property.¹ Customary rules applicable to such cases² will receive appropriate consideration. In all other cases the court will consider whether the maxim 'equality is equity'³ should not apply, and divide the presents equally between the two.

NULLITY

The declaratory decree

286. Marriages solemnized after 18 May 1955 may be declared void (i.e. always to have been void) *ab initio* if a party had a spouse living, or if the parties were within the prohibited degrees as set out above (§ 239). Though a void marriage, appropriately the subject of such a decree, may be ignored by all the world, only an actual party to it may present a petition.⁴ It is desirable that void marriages should be declared void, though such a decree is not necessary in order that they may be ignored or treated as non-existent. Quite apart from questions of alleged bigamy or illegitimacy it is advantageous to utilize evidence which might later cease to be available. Though both parties knew that the marriage was bigamous neither is estopped from petitioning, and a decree declaring it void will be granted to either.⁵

¹ *Samson v. Samson* [1960] 1 All E.R. 653 (CA).

² In *P. Parandhamayya v. P. Navarathna* [1949] 1 M.L.J. 467, AIR 1949 Mad. 825, it was held that amongst the Kammas dowry and presents made to the bridegroom go back with accumulated interest to the bride on estrangement, and *a fortiori* the same would apply upon a divorce.

³ As in *Macdonald v. Macdonald* [1957] 2 All E.R. 690.

⁴ HMA, s. 11. *Lakshmi v. Ramaswami* AIR 1960 Mad. 6, [1959] 1 M.L.J. 333.

⁵ *D. K. R. Chinnasamy v. Rajamba* [1961] 1 M.L.J. 381.

Such a marriage cannot escape a declaration of nullity, once this has been petitioned for, merely because, for example, in maintenance litigation, the petitioner had admitted the validity of the marriage, whether or not he knew at the time that the former spouse was still alive. No estoppel can deprive the court of its jurisdiction to inquire into the facts, and where the truth is known it must be declared and the error corrected.¹ Though a decree of nullity cannot be pronounced after the death of one party, a marriage may well be held to be void if its validity was an incidental issue, for example, in a dispute over a succession.²

287. Marriages solemnized before 18 May 1955 may be declared void upon any of the grounds known to the former law at that date, since the case is not provided for in the statute and s. 4 saves the former law.

288. Formerly (i.e. between 15 April 1949 and 18 May 1955) a marriage between Hindus at Hindu law might be declared void for (i) contravention of the law relating to sapindaship and *viruddha-sambandha*, subject to customary modifications (§§ 242-6); (ii) marriage while a former spouse of the bride still lived; (iii) a defect in the marriage ceremony extending to the essential features thereof (§ 258); and (iv) absence of intention on the part of a party to marry the other by reason of mental defect or mistake going to the root of the marriage (§ 234). For additional grounds whereby a marriage might be void but for the British Indian statutes of 1856, 1946, and the central Indian statute of 1949 see above (§§ 229-53), and note the Arya Marriage Validation Act (App. III) and the Anand Marriage Act,³ the details of which are beyond the scope of this book.

289. Can marriages solemnized under the HMA be declared void for *want of consent* on the part of either or both parties? It is submitted that s. 11 of the Act is not to be construed according to the maxim *Expressio unius est exclusio alterius*, i.e. the particular mention of contraventions of clauses (i), (iv) and (v) of s. 5 is not to be supposed to

¹ *Hayward v. Hayward* [1961] 1 All E.R. 236.

² *Gowri Ammal v. Thulasi* AIR 1962 Mad. 510.

³ Act No. VII of 1909.

exclude other grounds for nullity *ab initio*. The question of consent is especially difficult because so many marriages are arranged by parents or guardians in disregard of the parties' feelings and preferences. Nevertheless it is certain (§ 234) that the pre-1955 law understood the need for *sankalpa* or intention on the part of the bridegroom to accept or acquire the bride and any lack of specific capacity to intend to marry might be made up in the case of a minor bridegroom by the intention of his guardian properly exercised on his behalf. We have seen that defects in this intention, if not cured by subsequent acquiescence, went to the root of the marriage. 'A marriage . . . whatever else it is . . . is undoubtedly a contract.'¹ To this extent a similarity between western nullity law and that of the Anglo-Hindu system is discernible. The same trend may be observed in s. 12 (1) (c) of our Act. A marriage is voidable, in certain circumstances, if the consent of the petitioner was obtained by force or fraud (§ 299). The implication is, it is submitted, that where there was no consent at the time, and a party had no intention of marrying the other, the marriage is void and not merely voidable. That this is so in English law is clear, since mistakes in the identity of the person and misapprehension as to the nature and purpose of the ceremony go to the root of the matter.² The question, however, whether this is equally the case in modern Hindu law is complicated by the fact that the acquiescence of the supposed spouses in the marriage that has been arranged for them has always³ been treated as curing the defect in intention at the time of the wedding. To take for example the case where the bride is a major, her aversion from her intended husband, or vice versa, may be so violent as to eliminate consent, for consent, in a major, must be free. The marriage may be set aside for lack of intention to marry, until their living together puts it beyond doubt that they have approved the marriage.

¹ *Per Sankaran Nair, J.*, in *Muthuswami v. Masilamani* (1910) 33 Mad. 342, 355. See also *A v. B.* (1952) 54 Bom. L.R. 725, [1953] Bom. 487.

² Jackson, pp. 200-4. See *Appibai v. Khimji* (1934) 60 Bom. 455, 468, where B. J. Wadia, J. in *obiter dicta* applied English law regarding consent to a Hindu matrimonial dispute.

³ *B. Ankamma v. B. Bamanappa* AIR 1937 Mad. 332, [1937] 1 M.L.J. 334. Free intention to marry is essential to the fundamental validity of the marriage (*per Varadachariar, J.*); but if the parties had lived together after the ceremony the decree could not have been granted.

290. It seems that we have here the very rare phenomenon of a void transaction which is capable of being rendered valid by subsequent adoption or 'ratification'.¹ The distinction must be drawn carefully between (a) the case where there was no consent to the marriage: the marriage is void *ab initio* but is capable of becoming unimpeachable when the non-consenting party or parties consent to the *de facto* marriage, and the marriage may be declared void so long as both parties have not consented by cohabitation or otherwise; and (b) the case where consent existed, but was induced by force or fraud, for though this would make a marriage void in English law and therefore by Anglo-Hindu law it is, by statute, voidable only in modern Hindu law (§ 299).

G, a minor Hindu girl, is brought to a *pandal* to marry a man whom she has never seen and whose name she does not know. A man is sat down near her, and later she sees him and hates him at sight. Fearing to displease her parents she goes with this man, after the ceremony is completed, to a place where they are left together. They are both equally miserable, but he induces her to have intercourse with him. Afterwards G learns that he suffers from defects which alienate him from her completely. It is submitted that she cannot obtain a decree of nullity on the ground of want of consent; for she consented to marry him at the ceremony, and if she had not so consented she had cured the defect by subsequent approval of the marriage.

291. In no case can lack of consent by reason of *mistake* as to the quality of the other party, in respect of virginity, for example, or caste, or wealth, or state of health, be adduced as a ground for a declaration under s. 11 of the HMA.² A decree of declaration of nullity may be given, however, where a party lacked capacity by reason of a recent divorce (§ 255) or the subsistence of a voidable marriage.³

292. Where a parent or next friend applies for a declaration that a minor's marriage is null and void it is improper to inquire the minor's view on the question, since plainly it cannot be in the minor's interest to continue in a void marriage and no acquiescence on the minor's part can render a void marriage valid, unless it be in circumstances

¹ Jackson cites valuable English authorities at p. 81. With what he says thereafter cf. *Hayward* (cited above) which clarifies a distinction between 'ratification' and estoppel.

² § 300.

³ *Battie v. Brown* (1913) 38 Mad. 452.

set out above in § 290.¹ This applies, indeed, whether the marriage is void or voidable.

Decrees annulling the marriage

293. When a marriage is annulled on any ground specified in s. 12, which appears to be not only retrospective (any marriage between Hindus except those under the Special Marriage Acts may be annulled thereunder) but also exhaustive, the marriage becomes void *ab initio*. But until that step is taken, a step exclusively within the province of a court of competent jurisdiction,² the marriage is valid. The burden of proof that a marriage validly performed and subsisting *de facto* is voidable for one or more of the prescribed reasons is heavy, for *omnia praesumuntur pro matrimonio*, the law leans in favour of a marriage. The same is the position when nullity is petitioned for as part of a defence to a petition for restitution or divorce.³

294. The grounds provided in s. 12 (1) are much less simple than they seem.

The provision in s. 12 (1) (b), *lunacy*, etc., *at the time of the marriage*, relates to a problem discussed above (§ 234): consent or intention are missing and therefore the marriage may be avoided at modern Hindu law at the petition of the other spouse, who has, under traditional Indian social conditions, a right to approve the marriage. In these circumstances it is not open to that spouse to resile from his or her position and to petition, perhaps after several years, merely on the ground of lunacy, etc., at the time of the marriage. If the Act had provided (comparably with English and Anglo-Hindu law) that a marriage would be void for lunacy, etc., the position would have been otherwise. As it is the valuable s. 23 (1) (c) comes into play, and the

¹ *Santosh v. Chimanlal* AIR 1950 Bom. 307, 52 Bom. L.R. 394.

² That a caste tribunal cannot annul (as contrasted with *dissolve*) the marriage of a caste-member is established in *Bai Ganga v. Emp.* AIR 1916 Bom. 97, a decision which, although apparently too widely expressed, is saved by *stare decisis*. The caste's jurisdiction to pronounce decrees of divorce on grounds, consistently with natural justice and good morals, is not in question: *Keshav v. Bai Gandhi* (1915) 39 Bom. 538.

³ *S. v. S. and R.* [1912] P. 16.

doctrine of 'approval' of a marriage¹ will hinder petitions under s. 12 (1) (c) as it would petitions under s. 12 (1) (a).

Where a spouse was insane at the time of the marriage but subsequently regained sanity and consented to the marriage it would be against public policy, it is submitted, to allow a petition under s. 12 (1) (b).²

295. *Impotence* at the time of the marriage and continuing until the presentation of the petition is the ground under 12 (1) (a). In both parties impotence amounts to the same defect, namely incurable inability physically to consummate the marriage by normal coitus with or without orgasm in the female.³ It is sufficient if the one party is impotent in relation to the other.⁴ Impotence which is curable only with all the risk of a dangerous operation, or when the respondent refuses to submit to a remedy, is 'incurable' for this purpose.⁵ It is to be observed that wilful refusal to consummate, as distinct from inability (whether due to physical or mental causes) to consummate, is not a ground for nullity in India. Impotence may be due to physical malformation,⁶ whether curable by operation or not, to hysteria or other mental or psychological inhibition (including invincible repugnance),⁷ to injury, disease, or to old age. Where the fact of impotence is disputed the court has jurisdiction to order a medical examination, which may be refused by the respondent at the risk of the court's drawing the inevitable conclusion. The court's jurisdiction stems from the practice of English ecclesiastical courts, but is authorized by a text of the *Naradasmriti*.⁸ Where intercourse has not taken place over

¹ *G. v. M.* (1885) 10 A.C. 171 (H.L.). In modern English law 'sincerity' has replaced 'approbation': see Jackson, pp. 80f.

² § 297, and Jackson, pp. 81-2.

³ *G. Venkateswararao v. G. Nagamani* AIR 1962 An. P. 151; *Baxter v. Baxter* [1948] A.C. 274; *Cackett v. Cackett* [1950] P. 258. A review of English and American and Indian authorities on impotence is made in *T. Rangaswami v. T. Aravindammal* AIR 1957 Mad. 243, 245-8.

⁴ *Wilson v. Wilson* AIR 1931 Lah. 245; *Kishore v. Snehrabha* AIR 1943 Nag. 185, 191^a, [1943] Nag. 474 (SB).

⁵ Law reviewed in *S. v. S.* [1954] 3 All E.R. 736.

⁶ Unduly large male organ: *Kanthy v. S. Harry* AIR 1954 Mad. 316, [1953] 2 M.L.J. 689 (FB); abnormally shaped, or missing female organ: *A. v. B.* (1952) 54 Bom. L.R. 725, [1953] Bom. 487.

⁷ *Kishore v. Snehrabha* AIR 1943 Nag. 185 (SB) (cited above).

⁸ XII, 8 (see *A. v. B.* (1952) 54 Bom. L.R. 725, 746).

a long period the court may presume the presence of impotence.¹

296. Where the formerly impotent spouse is operated upon, so that it is *probable* that normal intercourse may take place, in the interval between the commencement of proceedings and the hearing, the judge has discretion (notwithstanding the words of HMA, s. 12 (1) (a)) to refuse the decree, for there is a legal ground why relief should not be granted within the meaning of HMA, s. 23 (1) (e). A mere possibility of intercourse if treatment is persisted in by the respondent will not suffice to dispose of the petition;² yet where surgery could enable the marriage to be consummated, though with an artificial vagina, it could hardly be said that the impotence was incurable, and the decree of nullity must be refused.³

297. Where the marriage of an impotent person has produced benefit for the other party, where the latter has approved the marriage, or, especially in cases of the advanced age of one or both parties, the marriage was consented to in full knowledge that sexual enjoyment would be gravely curtailed or precluded, that party is prevented from presenting a petition on the ground of impotence, as it would be against the public interest and hardly consonant with justice. The rule of 'approval' extends even to hard cases, as where the husband was able to obtain sexual relief from the vagina of the wife, though the latter was only $1\frac{1}{2}$ inches deep and normal penetration was impossible. The benefits obtained from the marriage even in non-sexual contexts, the length of time that has elapsed before the petition is presented, and the date when the petitioner first learnt of his legal rights will weigh with the court in deciding whether the petitioner is precluded by 'insincerity' or otherwise under s. 23 (1) (e) from succeeding because of the 'legal ground', namely approbation of the marriage, why the decree should not be granted.⁴

¹ *F. v. P.* (1896) 75 L.T. 192.

² *S. v. S.* (orse *W.*) [1962] 1 All E.R. 33.

³ *S. v. S.* (orse *W.*) (no. 2) [1962] 3 All E.R. 55 (CA).

⁴ § 282. On what is meant by 'sincerity' see *Nash v. Nash* [1940] P. 60. *Tindall v. Tindall* [1953] P. 63, [1953] 1 All E.R. 139 (wife applied for maintenance), and *W. v. W.* [1952] P. 152 (CA) (husband

298. Formerly nullity could be obtained for impotence,¹ but what constituted impotence was not known with certainty, though it was believed that the English law relating to impotence was part of Hindu law.²

299. When *consent* of a major spouse or consent of the guardian in marriage of a minor bride, or (though this is naturally not expressly mentioned in the Act) the consent of the guardian of a minor bridegroom whose marriage is validated by the maxim *factum valet* (§ 238), was obtained by force or fraud the marriage is voidable³ under s. 12 (1) (c) provided (a) that the petition has been presented within one year after the force ceased to operate or the fraud was discovered and (b) that the defect has not been cured by the party's subsequently approving or adopting the marriage by 'living with the other party' with his or her full consent.⁴ It does not matter if the consent to betrothal was vitiated, and the marriage subsequently took place without any further employment of force or fraud, if either of these eliminated free and full consent at the ceremony.⁵

But what is meant by 'force' or 'fraud'? The differences in wording between s. 25 (iii) of the Special Marriage Act, 1954, and our own section do not appear to be significant: we are not however constrained to define 'fraud' by reference to any particular statute as is the case there. Instances of marriage being annulled for the absence of consent due to force, including the overawing of the prospective bride or bridegroom by threats of violence or of parental punishment, etc., are happily rare, but the principles are clear enough: where the petitioner has been reduced to a state in which he or she was incapable of offering resistance to coercion and threats there is no consent such as

obtained an adoption order) were cited (? inappositely) in *Chandrabhagabai v. Rajaram* AIR 1956 Bom. 91, 57 Bom. L.R. 946. In *S. v. S.* (orse *W*) (see p. 190, n. 2) the petitioner's ignorance of the law enabled the marriage to be annulled even after 16 years.

¹ *K. Malla Reddy v. Subbama* AIR 1956 Andh. 237, [1956] An. W.R. 590. *Kantilal v. Vimla* AIR 1952 Sau. 44, which is to the contrary effect, is incorrect.

² *T. Rangaswami v. T. Aravindammal* AIR 1957 Mad. 243.

³ As, it seems, in English law: *Parojcie v. Parojcie* [1958] 1 W.L.R. 1280, 1283, *per* Davies, J.

⁴ HMA, s. 12 (2) (a).

⁵ See observations of Gupte, *Hindu Law of Marriage*, § 145 on *Anath v. Lajjabati* AIR 1959 Cal. 778.

the law requires for contracting a marriage,¹ and the marriage is voidable provided that it has not been 'approved'. English law on the effect of an absence of real consent was cited in a dispute between Hindus as far back as 1934: *Appibai v. Khimji*.² And as far back as *Aunjona v. Prahlad*³ in 1870 Norman, J., assumed that the (real) consent of the 'necessary parties' was an essential of a valid marriage. Fraud is more difficult. Indian cases are few and their reasoning unclear. It may well be that *Shireen Mall v. Taylor*,⁴ a recent case from the Punjab (a High Court to which we owe many constructive decisions in the law relating to matrimonial causes), will prove to be influential. Nullity was there decreed for want of consent. The recent history of the husband, his behaviour towards the wife before and after the ceremony, and his circumstances in general were investigated minutely. It appeared that he intended to make use of his fiancée, that the marriage was envisaged by him as a temporary convenience, that he never intended to regard it as a true conjugal union, whatever he said at the time, and that, upon those findings, he must have obtained the unfortunate girl's consent by fraud. It is to be observed that a distinction will be drawn between an infatuation followed by a hasty marriage, by which both parties will have to abide, for their consent was a real consent however induced ('All is fair in love and war'), and, on the other hand, a deliberate scheme to induce a person to marry without any intention to enter, through the marriage ceremony, into the reciprocal bonds of matrimony. Taylor cheated Shireen, whom he intended to abandon from the first. The court could find this as a fact from his situation and hers. It will not often be easy to find that a spouse who has run away from his bride (or vice versa) did not intend to live as man and wife with her from the betrothal onwards. But wherever this can be found, it seems, s. 12 (1) (c) can be relied upon. It appears that 'fraud' does not include fraud practised on a third party (excluding the guardian in marriage) nor a fraud which, while it persuades, does not preclude the possibility of withholding

¹ *Bartlett v. Rice* (1895) 72 L.T. 122; *Parojic v. Parojic* [1958] 1 W.L.R. 1280, 1287; for *B. Ankamma's* case see above, § 289.

² (1934) 60 Bom. 455, 468.

³ 6 Ben. L.R. 243.

⁴ AIR 1952 Pun. 277, 279.

consent to the marriage with the person as a person.¹ But fraud which will not necessarily go to the root of the marriage may well disentitle the guilty party to equitable relief in matrimonial causes.²

300. If a guardian in marriage or an intending spouse is induced by dishonest misrepresentation of the identity or quality of the other party to agree to the marriage it is a question of law in each case whether the point which was misrepresented is or is not material. Did the misrepresentation go to the root of the marriage? This is a consideration which may vary in detail with the circumstances of the parties and the habits of their society. If in fact the marriage would have been agreed to even had the facts been known it seems that the marriage cannot be annulled, nor, it seems, in even stronger cases where full disclosures would have prevented the marriage; for fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage in question.³ Yet in one case misrepresentation of the legitimacy and status of the boy was held to be fatal to the marriage.⁴ In others, misrepresentation of the respondent's religion was held to be a fraud rendering the marriage 'void', or, more correctly, 'voidable'.⁵ In general the Anglo-American systems are divided into two camps: in one, in which the English tradition predominates, nullity will not be decreed unless the fraud negatives consent to marry the human being to whom the petitioner was married.⁶ The error must be as to the person and not, as the ecclesiastical lawyers put it, 'fortune' or 'quality'.⁷ In cases of impersonation the remedy is readily available,⁸ but

¹ *Moss v. Moss* [1897] P. 263; *Consterdine v. Smaime* AIR 1918 Low. B. 83, 47 I.C. 544. The rule in the first citation is not itself applicable to India.

² *Rukmani v. T. R. S. Chari* AIR 1935 Mad. 616, 619a, 69 M.L.J. 210.

³ *Appibai* (cited at § 289).

⁴ *Bimla Bai v. Shankerlal* AIR 1959 M.P. 8, a case discussed and criticized at 61 Bom. L.R. (J.), 82-7.

⁵ *Ayut v. Ayut* AIR 1940 Cal. 75, 76a, [1939] 2 Cal. 60; *Vermani v. Vermani* AIR 1943 Lah. 51, 52 col. i. ⁶ *C. v. C.* [1942] NZLR 356.

⁷ *Swift v. Kelly* (1835) 3 Knapp 257=12 E.R. 648. See Jackson, pp. 203-4.

⁸ *Allardye v. Mitchell* (1869) 6 W.W. & A'B. (Ins., Ecc. & Mat.) 45 (Austr.); Jackson, 204.

it is not safe to proceed much further. Even concealment of incurable diseases has been held not to be fatal to a marriage.¹ In the other camp nullity is available for misrepresentation as to chastity, health, financial responsibility, the fact of pregnancy, and character as a law-abiding citizen.² It seems on general considerations of public policy undesirable that the decision in *Bimla Bai v. Shankerlal*,³ where misrepresentation as to caste was held fatal to the marriage even after a delay longer than that allowed under the HMA, should be followed or approved in India. The traditional Indian view that once a marriage is consummated all defects in the consents of the parties are cured,⁴ should be allowed here to support the English rather than the peculiarly American viewpoint. Nevertheless *factum valet* does not operate since 18 May 1955 in respect of marriages voidable for 'force' or 'fraud' as understood in modern Hindu law.

301. The last prescribed ground under which a nullity petition may be presented is one introduced directly from England,⁵ being a special case of fraud.⁶ The respondent must have been pregnant at the time of the marriage by some person other than the petitioner, and this latter ingredient must be proved beyond reasonable doubt. 'In matrimonial proceedings,' said Patel, J., in *Sushila v. Mahendra*,⁷ 'there can be no judgment by default or admission'. He quoted the words of Lord MacDermott in *Preston-Jones v. Preston-Jones*,⁸ 'In divorce, as in crime, the court has to be satisfied beyond reasonable doubt,' and applied it to concealed-pregnancy cases, 'where the consequences to the woman are very serious'. Proof may consist in part of evidence from the spouses' blood groups that the husband could not be the child's father.⁹ The petitioner must,

¹ *N. v. E.* [1945] Que. S.C. 109. Tuberculosis was concealed in *Anath v. Lajjabati* AIR 1959 Cal. 778, where it was held that consent at the time of solemnization is the material consent.

² *Coppo v. Coppo* (1937) 297 NYS 744, 750-1; 163 Misc. 249; Jackson, 205 n. (p).

³ Cited above.

⁴ *Aunjona* (cited above); *Kshitesh v. Emp.* [1937] 2 Cal. 221, AIR 1937 Cal. 214 (FB); Kane, *Hist. of Dharmas.*, II, 538-9.

⁵ Matrimonial Causes Act, 1950, s. 8 (1) (d); Jackson, 205-6.

⁶ HMA, s. 12 (1) (d).

⁷ AIR 1960 Bom. 117, 119b, 61 Bom. L.R. 431, 433.

⁸ [1951] 1 All E.R. 124, 138, [1951] A.C. 391.

⁹ *Liff v. Liff* [1948] W.N. 128.

naturally, have been unaware of the facts at the time of the marriage; proceedings must have been commenced within one year of the marriage or of the commencement of the HMA, whichever is earlier, and marital intercourse with the consent of the petitioner¹ must not have taken place since the discovery of the pregnancy in question,² for this would amount to condonation in most cases (§ 280). These requirements are important since, as has happened in India, pregnancy at the time of marriage due to the petitioner himself may be relied upon by the latter at the instigation of third parties or under a sense of humiliation, and it is therefore essential for the petitioner not merely to prove the pregnancy by another but also that he did not know of the pregnancy at the time of the marriage and had no intercourse with the respondent after knowing the facts from which a reasonable man would conclude that his wife was pregnant at their marriage by another man. If the burden of proof of the conditions laid down in s. 12 (2) (b) were to lie on the respondent, the purpose of the provision would be frustrated.³

Legitimacy of children of annulled marriages

302. We have already seen the special provision by which the HMA accords a qualification approaching legitimacy to the children of a marriage annulled. Precedents for this type of relief existed in India from 1869,⁴ but much more widely applicable safeguards were introduced by s. 26 of the Special Marriage Act, 1954, which broadly corresponds to the modern English law on the subject. By an unfortunate slip the wording of that section was copied, in part, in s. 16 of the HMA, with the result that children of void marriages solemnized on or after 18 May 1955 appear to be capable of being relieved against total bastardization.⁵ This however is impossible, and the true effect of the section is to give a

¹ Superfluous words in view of the dicta in *Henderson v. Henderson* [1944] 1 All E.R. 44, [1944] A.C. 49 (HL).

² HMA, s. 12 (2) (b).

³ *P. S. Sivaguru v. P. S. Saroja* AIR 1960 Mad. 216, relying on Jackson, 205, and Latey on Divorce, 14th edn, 215-16.

⁴ Indian Divorce Act, s. 21.

⁵ *Obiter dicta* in *Gowri Ammal v. Thulasi* AIR 1962 Mad. 510, 512. Gupte, *Hindu Law of Marriage*, § 175.

qualified statutory legitimacy to children begotten or born before the nullity decree to the wife whose marriage was *voidable*.¹ Children of persons who marry bigamously or who are within the prohibited degrees are outside the scope of this relief since they would not have been 'legitimate children of the parties to the marriage if it had been dissolved instead of having been declared null . . . or annulled', for of course a void marriage cannot be dissolved. This disposes of the contention that has been made that as decrees granted under s. 11 are specifically mentioned in s. 16 void marriages must also be contemplated. In fact those embarrassing words are present as a result of the mere copying of s. 26 of the Special Marriage Act, where in fact impotence is a ground for a decree declaratory of nullity *ab initio*, so that the anomaly was there (alone) justified. Children of void marriages which are *not* declared void are plainly not within the section.²

303. Children of a marriage annulled for impotence are certainly within the contemplation of this section as an impotent man's wife, who, with or without his permission, has conceived by another, may be sure that so long as the marriage subsists the presumption of legitimacy (§ 31) will operate in her child's favour.

304. On the limitations within which this statutory qualification is circumscribed see above, § 34.

305. Until the passing of the HMA the children of a marriage annulled for impotence at Anglo-Hindu law were rendered illegitimate by the decree, without relief of any kind.

RESTITUTION OF CONJUGAL RIGHTS

306. The spouses are bound to cohabit, that is to say, to share a common *consortium* not only in terms of marital intercourse, where possible, but also in terms of everyday life.³ Each is bound not to withdraw without reasonable

¹ Supported by a dictum in *Kanwal Jit v. N. K. Singh* AIR 1961 Pun. 331.

² *Gowri Ammal* (cited above).

³ *Binda v. Kaunsilia* (1891) 13 All. 126.

excuse from the society of the other, and unless the husband is dependent on the wife or tribal custom provides otherwise, the latter is legally bound to follow the former wherever he chooses to reside.¹ A husband cannot release her from this obligation by ante-nuptial agreement.² This was the rule of the *sastra* and is enforced since the early British period by the action (now petition) for restitution of conjugal rights. The decree is not nowadays enforced by attachment of the person of the spouse who declines to obey, but he or she is liable to penalties for contempt, and his or her property may be attached.³ The practical utility of the remedy is little in contemporary England, but in India, where spouses separate at times due to misunderstandings, failure of mutual communication, or the intrigues of relatives, the remedy of restitution is still of considerable value, especially when coupled with the right under s. 491 of the Criminal Procedure Code to recover (under certain circumstances) custody of a minor bride, and in the light of the rule that where restitution has been ordered a decree for separate maintenance cannot, without proof of new facts, issue in favour of the respondent.⁴

307. The former law has been codified in s. 9 of the HMA. Subsection (2) of this section was inserted in imitation of a comparable provision of the older English law, in which restitution played a more restricted role,⁵ and remains little more than an embarrassment, being in fact meaningless in its context.

308. The petition may be filed in the District Court by either husband or wife when the other spouse has without reasonable excuse withdrawn from his or her society.⁶ 'Withdrawal' does not necessarily mean removal from the house — refusal of conjugal rights is sufficient.⁷ Whether such withdrawal is without reasonable cause is a question of fact in each case. Naturally where the petitioner urged

¹ *Tekait v. Basanta* (1901) 28 Cal. 751. § 331.

² *Tekait* (above); compare *Arumuga v. Viraraghava* (1901) 24 Mad.

255.

³ *Bai Jivi v. Narsingh* (1927) 51 Bom. 329, 339.

⁴ *K. S. Deenadayalu v. Lalithakumari* AIR 1953 Mad. 402.

⁵ *Gurdev v. Sarwan* AIR 1959 Pun. 162. Latey on Divorce, § 336.

⁶ HMA, s. 9 (1).

⁷ Gupte, p. 130; Ragh., p. 898, citing *Wily v. Wily* [1918] P. 1.

the respondent to leave him, or has not done his best sincerely to induce the respondent to return, the petition will not lie.¹ The court even before 1955 refused to decree restitution where in the court's opinion the spouse withholding conjugal rights was entitled to do so as, for example, where the other has changed his religion,² where he suffers from a loathsome disease,³ where he has treated his wife in a manner amounting to legal cruelty (§ 337),⁴ or it would be unsafe for her to live with him,⁵ or where there was a great disparity in age and the girl declined to consummate,⁶ or where his conduct amounted to a matrimonial offence without cruelty, as where he had persistently committed adultery,⁷ or where the respondent had herself not reached puberty and residence of immature brides with their husbands was not customary.⁸

309. In all cases the court has a wide discretion, and may refuse the decree on the ground that the marriage was brought about upon the basis of fraudulent misrepresentations by the petitioner,⁹ or on any other equitable ground. Though the trend of modern decisions is distinctly to leave the more antiquated notions of female dependence and obedience for a more cosmopolitan concept of what a spouse ought to endure,¹⁰ it by no means follows that a defence that would succeed in Europe would succeed in India. Thus the petitioner's marrying a second wife was thought, until the passing of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, an

¹ *K. S. Deenadayalu v. Lalithakumari* AIR 1953 Mad. 402.

² *Paigi v. Sheonarain* (1886) 8 All. 78.

³ *Shinappayya v. Rajamma* AIR 1922 Mad. 399, 45 Mad. 812, 814.

⁴ *Yamunabai v. Narayan* (1876) 1 Bom. 164. *Mallawa v. Shiddappa* AIR 1950 Bom. 112, 51 Bom. L.R. 811: bringing a concubine home is mental cruelty.

⁵ *Dular v. Dwarka* (1905) 34 Cal. 971.

⁶ *Gurmukh v. Harbans* AIR 1928 Lah. 902, 113 I.C. 777.

⁷ *Chilha v. Chhedi* AIR 1929 Oudh 121, 4 Luck. 355.

⁸ *Santosh v. Gera* (1875) 23 W.R. 22. Contra: *Navanital v. Purshottam* AIR 1926 Bom. 228, 28 Bom. L.R. 143.

⁹ *Rukmani v. T. R. S. Chari* AIR 1935 Mad. 616, 619a, 69 M.L.J. 210.

¹⁰ *Gurcharan v. Waryam* AIR 1960 Pun. 422, 425b, per I. D. Dua, J., 'new rules of social behaviour and conduct must . . . be recognized by the courts in determining what would amount to cruelty in the present set up'.

insufficient ground for refusing restitution.¹ The view that adultery and insanity were not in themselves sufficient grounds was expressed by Mahmood, J., in *Binda v. Kaunsilia*,² but the doubts of Venkatasubba Rao, J., in *Shinappaya v. Rajamma*³ seem conclusive against it. The Act of 1946 (§ 269) somewhat altered the situation, as we have seen, and in particular left the residual clause, 'for any other justifiable cause': under this heading have appeared major differences between the spouses and the respondent's filing a criminal complaint.⁴ On the basis that a subsisting decree for separate maintenance in favour of the respondent would normally negative a decree for restitution, restitution would usually not be granted wherever separate maintenance might be awarded under the Act.

310. The effect of subsection (2) of s. 9 we have seen is minimal. It does however confirm that where a ground exists upon which the respondent might petition for nullity, judicial separation or divorce that ground may, or indeed should, be pleaded in answer to the petition for restitution. Yet it does not follow that other defences are not open. Obviously the defence that there was no marriage, or that the marriage was terminated by a tribunal or court of competent jurisdiction, must be pleaded. So also where a ground exists for an order for separate maintenance under the HAMA (which replaced the Act of 1946), or an order either under the older or the current statute still subsists. So also where the spouses entered into a separation agreement, the agreement containing a covenant not to petition for restitution, it can be pleaded as a defence.⁵ So also where, though not affording a ground for any of the matrimonial remedies mentioned in subsection (2) of s. 9 of the HMA, the conduct or condition of the petitioner provides a 'reasonable excuse' for the withdrawal of *consortium* and thus a 'legal ground' under s. 9 (1) 'why the application should not be granted'. Thus in *Gurdev v. Sarwan*⁶ A. N. Grover, J.,

¹ *Kishan Dei v. Mangal* AIR 1935 All. 927, 158 I.C. 1016. That it was a ground is asserted in very strong dicta in *Nagendramma v. Ranakotayya* (cited at § 263). ² (1890) 13 All. 126.

³ AIR 1922 Mad. 399, 401a, 45 Mad. 812.

⁴ *Roshan v. Kallo* AIR 1955 NUC 3582 (All.).

⁵ *Marshall v. Marshall* (1879) 5 P.D. 19; *Clark v. Clark* (1885) 10 P.D. 188. ⁶ AIR 1959 Pun. 162.

refused a decree because on complaints that the petitioner had injured the respondent's sight and caused her to cohabit with other men a magistrate had made an order for her custody under s. 100 of the Criminal Procedure Code, 1898. And in *Gurcharan v. Waryam*¹ I. D. Dua, J., refused on the ground that, whether or not the petitioner had assaulted his wife, he had shown regrettable disinterest in her delivery, had repudiated paternity of their child, and accused her of adultery. In *Mango v. Prem*² the husband was of subnormal intellect; his father made a fool of him, and he was not fit to keep a wife, against whom his father was obviously plotting. It is submitted that the decision in *Rukman v. Faquir*³ that desertion may not be pleaded as a defence unless it has lasted two years (when it would come literally within s. 9 (2)) is sound on the facts, but in so far as the *ratio* suggests that all defences must be grounds for matrimonial relief under that subsection it is *per incuriam*.

SEPARATION BY AGREEMENT OR DECREE

Separation by agreement

311. The HMA does not mention this extremely important feature of the law of husband and wife. The Anglo-Hindu law, which in fact borrows extensively from English law, is therefore still in force. The usefulness of separation by agreement in India cannot be overestimated. 'Permanent alimony' under the HMA is forfeited for unchastity in the wife or sexual intercourse in the husband: spouses who wish to separate and live free of each other without the risk of forfeiting alimony are well advised to seek separation by agreement. The problem whether alimony secured by a separation-deed is forfeited by unchastity will be considered below.

312. A separation deed must relate to a present separation. An agreement entered into before marriage to the effect that the intended spouses shall live separately is void, being

¹ AIR 1960 Pun. 422. These cases were agreed with in *Shakuntalabai v. Baburao* AIR 1963 M.P. 10, where it was the husband that was ill-used, and the wife's complaints were not *bona fide*.

² AIR 1962 All 447.

³ AIR 1960 Pun. 493.

contrary to public policy. A valid separation deed evidences a contract between husband and wife through the intervention of a third party, namely the trustee, or without the intervention of a trustee. It must contain no illegal consideration, such as an agreement to facilitate divorce proceedings¹ or to enable a party to commit adultery.² Actual separation is essential.³

313. A separation arrangement whereby the spouses exchange a covenant to allow each other to live apart, and not molest each other or seek for restitution of conjugal rights, will be enforced, but it is not an absolute bar to proceedings for restitution. If the petitioner is sincere and the respondent does not rely upon the deed,⁴ or the agreement has been repudiated by the other party, as by refusing to pay the agreed maintenance,⁵ the court may grant restitution. Specific performance of the contract is available.⁶ The court will restrain the parties from molesting each other.⁷ Breach of the covenant by one will not release the other from his or her covenant, unless the agreement is utterly repudiated.⁸ The covenant not to molest is a defence to a petition based on desertion even though the respondent is in breach of, for example, his liability to pay alimony.

314. A covenant not to molest has been thought to be wide enough to include a promise not to set up any claim hostile to the other party's interest, for example, the wife's giving birth to a bastard and pretending that it was the husband's heir.⁹ 'Molestation' has been held to imply not merely annoyance but an intention to annoy, and even proceedings to obtain a divorce have been held not necessarily to amount to molestation.¹⁰ If the deed does not contain a clause terminating the alimony for unchastity (the so-called *dum casta* clause) and such a condition is not to be inferred from the

¹ *Hope v. Hope* (1857) 26 L.J. Ch. 417.

² *Evans v. Carrington* (1860) 2 De G.F. & J. 481, 29 L.J. Ch. 330.

³ *Bindley v. Mulloney* (1869) L.R. 7 Eq. 343.

⁴ *Williams v. Williams* [1921] P. 131, 90 L.J.P. 97.

⁵ *Waller v. Waller* (1910) 26 T.L.R. 223.

⁶ *Wilson v. Wilson* (1848) 1 H.L.C. 538.

⁷ *Sanders v. Rodway* (1852) 22 L.J. Ch. 230.

⁸ *Fearon v. Earl of Aylesford* (1884) 14 Q.B.D. 792, 54 L.J. Q.B. 33.

⁹ *Fearon* (cited above).

¹⁰ *Hunt v. Hunt* [1897] 2 Q.B. 304, 67 L.J.Q.B. 18.

terms of the deed generally, adultery even resulting in the birth of a child does not disentitle to the alimony.¹ The Indian cases which appear to divide on the question whether a wife is entitled to maintenance, when this is secured by agreement, notwithstanding her unchastity are to be reconciled in this manner: where the intention was (as is usual) that she should be maintained *dum casta* ('so long as she is chaste') her right to maintenance ceases, but where the allotment of property or assignment of income for maintenance (irrespective of her actual entitlement to it at law) was made absolutely she may retain it in spite of her unchastity.² Despite a suggestion to the contrary,³ she is no better placed merely because she releases *other* existing rights besides maintenance as a consideration for the deed.

A wife, widow, or divorcee has no right to be maintained if she is unchaste (§ 264). Her position cannot be improved by her rights being dealt with in an agreement entered into with those liable to maintain her while she was chaste. Thus in *Bhikubai v. Hariba*⁴ a widow, proved unchaste, was held not entitled to rely upon an agreement with her husband's relations. Likewise in the recent case of *Audumbar v. Sonubai*,⁵ where a woman, divorced according to customary law, was held disentitled to rely upon the divorce arrangement, under which she had been awarded Rs. 30 per mensem until her death or remarriage, the Bombay High Court held that unchastity defeated the right of maintenance even where it was derived solely from an agreement. It was observed that in *Shivlal*⁶ the woman had been allowed to keep her maintenance because at the time of the agreement she had an interest in the property independently of her right to maintenance as a wife. In *Audumbar* the former wife had no interest in her husband's property after the divorce, and indeed the custom which allowed the divorce did not provide for maintenance at all. Thus, it is submitted, a *dum casta* provision was there to be imported as an implied condition under the general sense of the Hindu law.

315. Gross misconduct on the part of *either* party may disentitle him or her to rely upon the bargain made between them for alimony, whereupon action to secure maintenance

¹ *Sweet v. Sweet* [1895] 1 Q.B. 12, 64 L.J.Q.B. 108.

² Cases disallowing her despite the deed: *Sathyabhama v. Kesavacharya* (1915) 39 Mad. 658; *Kisanji v. Lakshmi* AIR 1931 Bom. 286, 33 Bom. L.R. 510; cases allowing her right despite the unchastity: *Shivlal v. Bai* AIR 1931 Bom. 297, 33 Bom. L.R. 490; *Subbayyan v. T. R. Ponnuchami* AIR 1941 Mad. 727; *Thakur v. Dharam* AIR 1953 All. 134; *Darasikrishnayya v. Darisi* AIR 1955 NUC 671 (Mad.).

³ *Audumbar v. Sonubai* (1960) 63 Bom. L.R. 595.

⁴ (1924) 27 Bom. L.R. 13, 17, 18, AIR 1925 Bom. 153.

⁵ Cited above.

⁶ Cited above.

independently of the agreement may be open to the other.¹

316. To commence divorce proceedings may be a breach of a covenant not to molest,² but a petition for judicial separation may not be a breach³ unless the covenant is plainly not to undertake judicial proceedings in any event, so long as the agreement is in force. A spouse is naturally not precluded from petitioning on the basis of matrimonial offences arising subsequently to the agreement and not within its contemplation.

317. A covenant not to take proceedings in respect of past matrimonial offences will be enforced, and may have the effect of preventing subsequent misconduct reopening the former offences, so as to enable a petition to be presented in respect of earlier offences (§ 280), if it can be coupled with other facts so as to amount to condonation.⁴ The bare covenant itself is not condonation for this purpose, for condonation means forgiveness evidenced by conduct (§ 280), and does not take away the right to rely upon the past matrimonial offences in a defence to proceedings commenced on grounds arising after the covenant.⁵

318. When a matrimonial cause is compromised, the parties entering into a deed of separation, the charges being withdrawn, and the withdrawal appearing in the deed as a consideration for the separation, the charges cannot be revived for the purpose of further proceedings. It is otherwise if the charges are in fact not withdrawn.⁶

319. The husband's covenant to pay alimony to the wife is usually supported by the wife's covenant to indemnify the husband against her debts. Other sufficient consideration includes forbearance to petition for matrimonial relief. The covenants as to maintenance or alimony are subject to a statutory provision from which, it seems, somewhat

¹ As in *Thomas v. Everard* (1861) 6 H. & N. 448 = 158 E.R. 184, 30 L. J. Ex. 214, a decision upon the meaning of a particular covenant.

² *Hunt*, cited at § 314.

³ *Thomas*, cited above.

⁴ *Rose v. Rose* (1883) 52 L.J.P.M. & A. 25.

⁵ *Gooch v. Gooch* [1893] P. 99, 62 L.J.P. 73.

⁶ *H. v. H.* [1938] 3 All E.R. 415; *Goldblum v. Goldblum* [1939] P. 107.

unusually, the person protected (that is, in this case, the wife) cannot contract out. The Hindu Adoptions and Maintenance Act, 1956, provides by s. 25 that 'the amount of maintenance, whether fixed by a decree of court or by agreement, either *before* or *after* the commencement of this Act, *may* be altered subsequently if there is a material change in the circumstances justifying such alteration'. It has been held that agreements securing maintenance can be modified in reliance upon this section.¹ Formerly, as in *Purushottamdas v. Rukmini*,² if the maintenance was secured to the wife out of a definite and fixed fund, and it was agreed that there should be no claim for enhanced maintenance, the wife might fail to obtain enhanced maintenance when the value of her fund fell or the cost of living increased. The court may still find that the merits of the wife's claims are small, and that it would in the circumstances be unjust to decree to her a relief which she willingly abandoned prospectively in the actual separation agreement. However the court is not prevented from awarding a higher rate of maintenance than that provided for in the agreement, even if the agreement specifies the amount *in any event* (and *a fortiori* where the agreement was to be void if the marriage is dissolved) in proceedings for judicial separation or divorce against the party liable for maintenance as part of the decree.³ The position would appear to be the same in India even where the marriage is annulled. A separation deed can be avoided for mistake where the husband and wife executed it in ignorance that the marriage was *void*, but not where it was *voidable*,⁴ the husband's obligation to the wife subsisting at the time of the agreement.

320. The court's jurisdiction to provide for the custody of minor children (§ 284) is not affected by previous separation agreements. Under 'justice, equity and good conscience' a separation deed may validly provide for the father to give up custody of his minor children to their mother, provided that in the court's opinion such arrangement is for the

¹ *S. Kameshwaramma v. S. Subramanyam* AIR 1959 An. P. 269.

² AIR 1937 Bom. 358, 39 Bom. L.R. 458. See also *Mohiesterwara v. Durgamba* AIR 1924 Mad. 687, 688, 47 Mad. 308.

³ *Bishop v. Bishop* [1897] P. 138.

⁴ *Adams v. Adams* [1941] 1 K.B. 536, 110 L.J.K.B. 241.

benefit of the minors.¹ Separation agreements cannot oust the court's jurisdiction in this respect either.²

321. Where a separation agreement does not provide for maintenance to be paid to the wife, and no other proof of agreement to maintain can be tendered by the wife, the husband cannot be forced to maintain her at Hindu law. It is possible, however, that if a fresh need arises and the husband, on receipt of notice of it, refuses to maintain her, he may be liable notwithstanding the agreement, which was arrived at upon a different state of facts and at a time when the fresh need was not in the parties' contemplation.³

322. Reconciliation and resumption of cohabitation puts an end to rights secured by a separation deed,⁴ though not a right to arrears of maintenance covenanted for and accruing prior to the reconciliation.⁵

Judicial separation

323. Where the spouses are unwilling or unable to come to terms, whereupon a separation agreement might be concluded between them, and even where such an agreement exists or where a decree subsists for separate maintenance under the HAMA (§ 268), a decree of judicial separation may be prayed for (in the District Court whether by petition or along with the defence to a petition for restitution).⁶ Judicial separation terminates the duty of the spouses to cohabit together⁷ and the decree is not (like a decree for maintenance) automatically vacated by their actually being reconciled and cohabiting again. A decree of judicial separation is a judgment *in rem* and a petition for such relief cannot be barred by a previous order for separate maintenance, which is, after all, only a decision between the parties.⁸ In such a decree the court has jurisdiction to deal,

¹ The English authority is Custody of Infants Act, 1873 (36 Vict. c. 12, s. 2).

² *Bishop v. Bishop* (cited above).

³ *Pinnick v. Pinnick* [1957] 1 All E.R. 873 (general principles).

⁴ § 263. *Nicol v. Nicol* (1884) 31 Ch. D. 524, 55 L.J. Ch. 437.

⁵ *Macan v. Macan* (1901) 70 L.J. K.B. 90.

⁶ HMA, s. 10 (1).

⁷ HMA, s. 10 (2).

⁸ *S. Siddaiah v. S. Penchalamma* [1962] 2 An. W.R. 259.

also, with custody and property questions which it has not in cases where separate maintenance is applied for under the HAMA. This is a further distinction between two remedies which are superficially much alike. Moreover, after the decree of judicial separation has been in existence for two years the situation thus confirmed serves as a ground for divorce under HMA, s. 13. If the spouses wish to resume cohabitation, and the court is satisfied as to the sincerity of the formerly offending spouse, the decree of separation may, in its discretion, be rescinded.¹ The court is required to promote reconciliations,² and the decree will normally be rescinded wherever the spouses have actually returned to cohabitation, unless there is a suspicion that one of them has an ulterior motive (as for example to escape from one of the conditions imposed upon him by the decree), and there is no genuine intention of resuming normal married life. There is a possibility that the court may rescind a decree in favour of a more equitable separation agreement, upon proof that the terms are more satisfactory to the spouses and their children, if any, and upon inspection of the agreement itself, which the court must naturally have jurisdiction to enforce by injunction or otherwise (§ 313).

324. Judicial separation is valuable in India even without reference to a possible petition for divorce, since it is the remedy appropriate to spouses in communities where divorce and remarriage are still disliked or are socially or economically impracticable. The remedy is, after all, a virtual superimposition of a western method of mitigating marital hardship (introduced first in Bombay in 1947) upon the traditional concept of marriage as a lifelong union.

Judicial separation is available upon grounds, which may be called collectively 'matrimonial offences', and the petitioner must prove beyond reasonable doubt that the relevant offence exists. We may study them in the order in which they appear in s. 10 (1) of the Act.

325. Desertion. The respondent must have deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.³

¹ HMA, s. 10 (2).

² HMA, s. 23 (2).

³ HMA, s. 10 (1) (a). *Sitabai v. Ramchandra* AIR 1958 Bom. 116, 59 Bom. L.R. 885.

Desertion must not have ceased, for example, by the respondent's *bona fide* offer to return to his or her matrimonial duty, prior to the presentation of the petition, for however long he or she might have been in desertion prior to that offer. Naturally an offer made with the sole intention of defeating the petition will not serve to terminate desertion.¹ Desertion is defined in the explanation to s. 10 (1) as 'desertion of the petitioner by the other party to the marriage without reasonable cause or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage'.

326. Desertion is a course of conduct. It is in essence a separation indicating the repudiation of the duties inherent in marriage, or a determination to put an end to the matrimonial relationship as a living reality.² Mere removal from the house, or disinclination to meet the other spouse out of shame³ or want of proper solicitude⁴ is not enough. One may be in desertion though he satisfied any or some of the rights to which his spouse is entitled, if he deprives her of one of these.⁵ It is not to be supposed, however, that mere refusal of marital intercourse, without wilful neglect, will amount to desertion.⁶ Desertion is voluntary; one cannot be in desertion, as one cannot be guilty of cruelty, unless one is legally responsible for one's conduct, though the degree of responsibility insisted upon by the law is not heavy — so that a paranoid schizophrenic, who has manic periods, or a wife suffering from acute neurosis, may still be able to be in desertion, as also to be guilty of cruelty.⁷ For convenience desertion is divided into *actual* and *constructive* desertion: the former includes abandonment of the spouse physically and locationally; the latter includes conduct of such a character that the spouse is either forced to depart or forced to remain without enjoyment of a constituent right to which

¹ *Ware v. Ware* [1941] P. 49. § 330 below.

² *T. Rangaswami v. T. Aravindammal* AIR 1957 Mad. 243; *Meena* (cited below).

³ *Bipinchandra* (cited below).

⁴ *Meena v. Lachman* (1959) 61 Bom. L.R. 1549, AIR 1960 Bom. 418.

⁵ *Smith v. Smith* [1940] P. 49.

⁶ *Weatherley v. Weatherley* [1947] A.C. 628; *Scotcher v. Scotcher* [1947] P. 1. Cf. § 330.

⁷ § 337. *Crowther v. Crowther* [1951] A.C. 723, 731 (HL); *Lilley v. Lilley* [1959] 3 All E.R. 283, 290 (CA).

he or she is entitled by virtue of the marriage (§ 330). In *Bipinchandra v. Prabhavati*,¹ in which the law of desertion was thoroughly examined by the Supreme Court in the light of English cases, Sinha, J., (as he then was) said :²

If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (i) the factum of separation, and (ii) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent, and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner . . . bears the burden of proving these elements in the two spouses respectively. . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. But it is not necessary that they commence at the same time.

327. Desertion must last until the filing of the petition and during the whole of that period the petitioner must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.³ A spouse who rejects a genuine offer of resumption by the other spouse who is in desertion will himself be guilty of desertion thereby;⁴ and desertion is in any case terminated, and cannot be relied upon for the purposes of matrimonial relief where the deserted spouse decisively declares that he or she will not resume cohabitation and makes it practically impossible for reconciliation to take place.⁵ Refusal to resume is, however, perfectly justified where the offer by the deserter is not *bona fide*, as, for example, where he intends to live polygamously or to retain a concubine against his wife's wishes.⁶ And a spouse may refuse to reinstate the offender and to resume cohabitation where he or she apprehends that the offence or cause of desertion (for example, incestuous behaviour) continues.⁷

¹ AIR 1957 S.C. 176, [1956] SCR 838, 59 Bom. L.R. 322 (SC).

² AIR 1957 S.C. 176, 183. ³ *Bipinchandra* (cited above) p. 184a.

⁴ P. 183b.

⁵ *Barnett v. Barnett* [1955] P. 21.

⁶ Cf. *Edwards v. Edwards* (1893) 62 L.J. P. 33 relying on *Garcia v. Garcia* (1888) L.R. 13 P.D. 216.

⁷ *W. v. W.* [1961] 2 All E.R. 626.

328. Where a spouse is in desertion and has no intention of resuming, the deserted spouse's refusal of reconciliation will not end the desertion of which he complains if, in the circumstances, that refusal would have no effect whatever on the deserting spouse.

In *Brewer v. Brewer*¹ the husband, who was in the Armed Forces, repeatedly asked his wife to live with him at the stations to which he was posted. She perpetually refused, on the ground that they and their child should live in a house near her parents. After she had written indicating her settled intention not to live with him at his service station he wrote that he had decided never to live with her again. He had in fact commenced living with another woman. It was held that he had not brought his wife's desertion to an end by his letter, for she had already formed a fixed intention to desert.

329. Corroboration of evidence of desertion is required as a matter of precaution.² In *Bipinchandra's case* notwithstanding the suspicions of misconduct on the wife's part, the doubtful state of the evidence as to the desire of both parties to resume normal relations was held to negative the petitioner's claim to matrimonial relief on the ground of desertion.

330. 'Constructive' desertion (we have seen) is established in India as in England.³ If one spouse by his words and conduct compels the other spouse to leave the matrimonial home, the former would be guilty of desertion, though it is the latter who physically separates from the other and leaves the marital home.⁴ A mere wish to expel does not amount to constructive desertion.⁵ The intention, judged overall, to bring married life to an end is required to prove desertion,⁶ though according to another, somewhat less approved, school of thought bad behaviour may amount to constructive desertion in law even though no overall intention of ending married life existed, on the maxim that a man must (rather than 'may') be presumed to intend the natural and probable consequences of his act.⁷ To agree to live together as before, but on the condition that inter-

¹ [1961] 3 All E.R. 957, 965.

² *Bipinchandra* (cited above) at p. 184a.

³ *Bipinchandra*, p. 188a, citing *Lang v. Lang* [1955] A.C. 402, 417.

⁴ *T. Rangaswami v. T. Aravindammal* AIR 1957 Mad. 243, 249-50.

⁵ *Buchler v. Buchler* [1947] P. 25, 45.

⁶ *Hosegood v. Hosegood* (1950) 66 T.L.R. 735 (CA), *per* Denning, L.J. (as he then was).

⁷ *Sickert v. Sickert* [1899] P. 278; *Edwards v. Edwards* [1948] P. 268.

course should not take place, is to be guilty of desertion — that is, unless the refusal of intercourse could be justified on medical grounds.¹ Where a spouse allows the other reasonably to believe that he has committed adultery, even though that adultery does not persist, he may be in constructive desertion and the other may be fully justified in leaving the matrimonial home.² Mere slovenliness and incompetence in managing the home and caring for the children does not amount to constructive desertion unless the wife intends to bring *consortium* to an end.³ Habitual drunkenness amounts to desertion only if its effects are so grave as to amount to expulsion of the petitioner from the home.⁴ Wilful neglect is possible even where intermittent visits take place. It may be proved by instances of *wilful* failure to provide maintenance within his means.⁵ The terms of the explanation do not however enable the legal definition of 'desertion' to be enlarged by recourse to allegations of 'wilful neglect' not amounting to desertion.

331. The intention to desert is presumed to continue unless the deserter proves genuine and voluntary repentance and reasonable attempts to resume marital relations,⁶ in other words evinces an *animus revertendi*. Desertion does not come to an end merely because the deserted spouse petitions for matrimonial relief against him.⁷ Nor because the deserted spouse properly refuses his requests to resume cohabitation.⁸

'Without reasonable cause' means that a reasonable person would not have formed the intention to desert, as explained above, in the circumstances which actually

¹ *Hutchinson v. Hutchinson* [1963] 1 All E.R. 1. A vow to abstain from intercourse would certainly be evidence of desertion, if not of cruelty.

² *Baker v. Baker* [1953] 2 All E.R. 1199; *Kemp v. Kemp* [1961] 2 All E.R. 764. Whether a wife's discovery that her husband formerly carried on an adulterous association will by itself justify her claim that he constructively deserted her from the time of the discovery seems doubtful even in England, and such a view may not recommend itself in India.

³ *Bartholomew v. Bartholomew* [1952] 2 T.L.R. 934 (CA).

⁴ Compare *Hall v. Hall* [1962] 2 All E.R. 129 with *Beer v. Beer* (1906) 94 L.T. 704.

⁵ *Gidem v. Gidem* AIR 1955 All. 8, [1954] All. L.J. 688 (SB).

⁶ *Bartram v. Bartram* [1950] P. 1; *Bipinchandra* (cited at § 326) at p. 190b.

⁷ *Cohen v. Cohen* [1940] A.C. 631; *W. v. W.* [1954] P. 486 (note there are no decrees nisi at Hindu law).

⁸ *W. v. W.* [1961] 2 All E.R. 626.

prevailed. Where a decree for separate residence and maintenance has been given against the petitioner without proof of continuing desertion by the respondent independently of the decree,¹ or a decree of judicial separation, or a separation agreement has been entered into, no relief can be obtained on the ground of desertion.² 'Reasonable cause' need not amount to a matrimonial offence.³ But if for example the husband has another wife living, so that the wife would be entitled to separate residence and maintenance under s. 18 (2) (d) of the HAMA, she cannot be in desertion if she lives separately from him.⁴ A confession of adultery, if believed, may be such a cause,⁵ though not gossip⁶ nor even a pregnancy leading to a birth unusually long after the last possible date of intercourse between the spouses, unless the period of gestation must have been inordinately beyond the judicially recognized maximum.⁷ A 'reasonable cause' would include any cause (such as keeping a concubine in the house⁸) which would justify the refusal of a petition for restitution of conjugal rights (§ 308). Refusal on the husband's part to live with or near his wife's parents is not a reasonable cause,⁹ for, on the contrary, it is her duty to reside where he chooses to live,¹⁰ provided that the circumstances do not amount in fact to cruelty (§ 336). Nor is the refusal of marital intercourse after it has once taken place, by itself necessarily a reasonable cause;¹¹ though all circumstances must be taken into consideration. Where for example the wife suffered from neurosis, the only practicable recommended cure for which was a pregnancy, and the husband, desiring to be rid of her, refused

¹ *Kuppanna v. Palaniammal* AIR 1955 Mad. 471, [1956] Mad. 138.

² *Rozario v. Rozario* AIR 1941 Bom. 372, 43 Bom. L.R. 830.

³ *Meena v. Lachman* (1959) 61 Bom. L.R. 1549, AIR 1960 Bom. 418; *Edwards v. Edwards* [1950] P. 8.

⁴ *Bhagwanti v. Sadhu* AIR 1961 Pun. 181, 183.

⁵ *Faulkes v. Faulkes* (1891) 64 L.T. 834.

⁶ *Beer v. Beer* [1948] P. 10.

⁷ *Wood v. Wood* [1947] P. 103; *Preston-Jones v. Preston-Jones* [1951] A.C. 391. Indian Evidence Act, s. 112, which, we have seen above (§ 31), provides a presumption in favour of legitimacy, cannot help here as it does not establish what a husband may reasonably believe.

⁸ *A. Kuppuswami v. Alagammal* AIR 1961 Mad. 391.

⁹ *Rajaya v. Venkata* [1955] An. W.R. 215 (HC). Rayden on Divorce p. 142, was there cited.

¹⁰ *W. v. W.* [1954] P. 486, 515. § 306.

¹¹ *Beevor v. Beevor* [1945] 2 All E.R. 200.

intercourse or refused intercourse without the use of contraceptives, her leaving him would possibly not be a desertion without reasonable cause.

332. Though his spouse may be asking for matrimonial relief against him, such as nullity, judicial separation, or divorce, it does not follow that his desertion of her ceases to be 'without reasonable cause' if it so commenced and no other factor has supervened.¹ Service of the petition in question does not terminate his continuing duty to cohabit with his spouse — on the contrary it gives him an opportunity finally to review his conduct and its consequences. The court does not exist to dissolve marriages, but to discharge, if need be, the painful duty of dissolving them, or of limiting the mutual duties of the spouses, when all reasonable hope of reconciliation is at an end.²

333. 'Against the wish of the petitioner' implies that the desertion was neither instigated, induced, caused, desired or allowed by the other party. Where the husband compromised a suit for maintenance brought by his wife under s. 488 of the Criminal Procedure Code, allotting her a separate room in which she lived, she could not be said to be in desertion.³

As a result of a disagreement between the parents of *W* and her husband's parents, *W*'s father obtained the husband's consent to *W*'s living apart from the latter 'for a short time'. This was in 1959. In 1961 *W* wrote from her parents' house saying that she would not return to her husband or live with him again as his wife. If it can be shown that her act was voluntary, she may be held to be in desertion from 1961. But the husband's acquiescence in *W*'s removal in 1959 prevents his petitioning for relief on the ground of desertion. His position is not improved by pleading that *W* originally left under the influence of her parents.⁴

334. However, there is no breach of this condition merely because in the circumstances the petitioner was glad the guilty party left the house.⁵ Where a separation-agreement is repudiated as, for example, by refusal to pay the agreed

¹ *Cohen v. Cohen* [1940] A.C. 631.

² See *Cohen* (cited above) at p. 645.

³ *Bhagwanti v. Sadhu* AIR 1961 Pun. 181, 183.

⁴ See *K. Suryaprakasa v. K. Venkata* AIR 1961 An. P. 404.

⁵ *Harriman v. Harriman* [1909] P. 123, 148.

alimony, desertion may commence;¹ and acquiescence in the repudiation of the agreement is not acquiescence in the desertion.² Where the petitioner allowed the respondent to depart and, owing to absence of evidence of the respondent's having formed an *animus deserendi*, it could not be established that she refused to return to her marital home, the case that she was in desertion could not be made out.³ Parties to a marriage are not entitled to matrimonial relief merely because they have become pawns in a quarrel between the two families. The law requires a sense of responsibility for their marriage on the parts of both spouses. While the petitioner must throughout not actively have acquiesced in the desertion he is in no way obliged to take the initiative in inducing the deserting spouse to return. Desertion is not terminated merely because the deserted spouse takes no steps to recall the other.⁴ But where he visits her frequently where she stays the desertion may be terminated by the separation becoming consensual.⁵

Where the wife has already spontaneously left her husband on account of, for example, his drunkenness, and he later leaves her for another woman, she cannot obtain relief on the grounds of desertion against her will.⁶ In *Mato v. Sadhu*⁷ the wife demanded intercourse with the threat that if she did not receive it she would get it from other men. The husband refused. She left him and petitioned for judicial separation on the ground, *inter alia*, of desertion, alleging that his refusal led to her adultery with one or more persons. The petition was rejected.

335. The theory that constructive desertion cannot be 'condoned' is reasonable in that full reinstatement and resumption of cohabitation are necessary to terminate such desertion; but where cruelty accompanies the desertion condonation of the cruelty should amount to condonation of the desertion, and further refinement is more confusing than helpful.⁸

¹ *Pardy v. Pardy* [1939] P. 288. ² *Pardy* (cited above) at p. 308.

³ *Rajalakshmi v. W. Jambulinga* AIR 1956 Mad. 195, 197, [1955] 1 M.L.J. 467.

⁴ Halsbury's Laws of England, 3rd edn, vol. 12, s. 457, cited in *Bipinchandra* (cited above) at p. 189b; *Rajalakshmi* (cited above).

⁵ *Pizey v. Pizey* [1961] 2 All E.R. 658.

⁶ *Glancy v. Glancy* AIR 1915 Low. B. 71.

⁷ AIR 1961 Pun. 152. ⁸ *W. v. W.* [1961] 2 All E.R. 626, 629.

336. Cruelty. The respondent must have been proved to have treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party:¹ a definition of cruelty which is for practical purposes identical with the definition of 'legal cruelty' in English matrimonial law.² It should not lightly be assumed however that acts which would amount to cruelty in English law are necessarily 'cruel' at Hindu law, nor that acts which in England would not amount to cruelty would be excluded from the scope of 'cruelty' in India. In particular, one who proposes to rely upon 'cruelty' and would support the plea with reference to English cases must bear in mind that in England there obtains a most subtle distinction between conduct which a reasonable man would know might have an injurious effect on the wife's health (which is not in all circumstances 'cruelty') and conduct which is done with an intention to injure.³ The emphasis on the motive or intent of the respondent is totally lacking from the Indian statute, and many English cases must be distinguished as a consequence. But apart from a difference in legal formulation we must take note of the conditions to which the law must apply, in fact of the social climate in India and of the standard of behaviour, comfort, and general environment which a Hindu spouse will be brought up to expect in accordance with general, or even caste, custom. A husband who never speaks to his wife, or who insists on her remaining where his mother and sisters continually tease her, or a husband who insists on his wife's doing hard manual work while he sits idly by, and occasionally beats her, might be guilty of cruelty in England and in certain sections of Hindu society, but, it is submitted, by no means generally in India.⁴ However standards gradually develop, new rules of social behaviour and conduct towards women are to be recognized in modern India,⁵ and what would once be tolerated is no longer thought consistent with a spouse's health and peace of mind. More delicacy is now attributed to spouses than was once usual, and cruelty may be mental as well as

¹ HMA, s. 10 (1) (b).

² *Russell v. Russell* [1895] P. 315 (CA); *Soosannamma v. Varghese* AIR 1957 T.C. 277; *Tamunabai v. Narayan* (1876) 1 Bom. 164.

³ *Gollins v. Gollins* [1962] 2 All E.R. 366.

⁴ *Jogendro v. Hurry* (1880) 5 Cal. 500 (a general warning).

⁵ *Kaushalya v. Wisakhi* AIR 1961 Pun. 521, per I. D. Dua, J.

physical, subtle as well as brutal, in India, and amongst Hindus of all classes, as well as in England.

A peculiarity of Hindu law is that intentional omission to protect the spouse from ill-treatment is as much cruelty as if the respondent were himself guilty of that treatment. A wife is entitled to insist that her husband protect her from, e.g., his relations. In *Shyamsundar v. Shantamani*¹ they locked her up, kept her without food (she had brought no dowry) and otherwise ill-treated her, while he stood idly by. After she had been rescued with the aid of the police his reaction was to threaten to marry again. He was guilty of cruelty.

337. The question before the court in cruelty cases is whether the innocent party can with safety to life and health live with the guilty party.² Before a court can find a spouse guilty of legal cruelty it is necessary to show that he or she has either inflicted bodily injury upon the other, or has so conducted himself or herself towards the other spouse as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health.³ This is how 'reasonable apprehension' is made out. What is cruel to *A* may not be cruel to *B*; the court will take into consideration the mental and physical powers of the petitioner to sustain the treatment complained of. No behaviour is judicially held to be 'cruel' *per se*, and even atrocious behaviour may not be 'cruelty' if it is unconnected with the marital relationship and no reasonable spouse would apprehend harm or injury therefrom. To be guilty of cruelty, it should be noted, it is not necessary that the respondent should have deliberately intended to hurt:⁴ indeed if he studiously attempts to keep the fault from his spouse or seeks to maintain the marriage despite the irregularity in question, he cannot be guilty of 'cruelty';⁵ but it is sufficient if in the circumstances the behaviour was such as would cause the reasonable apprehension referred to above, having regard to the nature and powers of endur-

¹ AIR 1962 Or. 50 (a case under the Act of 1946 and the HAMA).

² *Lissack v. Lissack* [1951] P. 17; *Kondal v. Ranganayaki* AIR 1924 Mad. 49, 46 Mad. 791.

³ *Evans v. Evans* (1790) 1 Hagg. Con. 35 app. in *Russell* (cited above).

⁴ *Jamieson v. Jamieson* [1952] A.C. 525; *Cooper v. Cooper* [1955] P. 99. On intention see § 336 above.

⁵ *Bohnel v. Bohnel* [1960] 1 W.L.R. 590.

ance of the petitioner¹ — *always provided* that the behaviour is not involuntary and did not take place during a period of inability to know the nature and quality of the acts or of ignorance, if he knew their nature and quality, that they were wrong.² For even the statutory provision (§ 336) relates to 'cruelty', and a lunatic cannot be cruel, even if his conduct causes (as it often may) apprehension such as the Act requires.

338. The law readily accepts proof of 'reasonable apprehension' where in fact evidence is led showing that the mental or physical health of the petitioner has been affected by the acts complained of, but the court will be quick to observe the difference between symptoms of pique or frustration on the one hand and the results of cruelty on the other. In *Sayal v. Sarla*³ the wife gave her husband a poison intending it as a love potion. When his health broke down completely as a result of the poisoning she showed great concern. It was held that the husband, though he knew of his wife's remorse, was justified in feeling apprehension for his future safety and that a decree for judicial separation must be granted to him.

339. It is cruelty if the husband violently assaults his wife for neglecting unreasonable orders.⁴ Similarly secret intrigues, nagging, and even sulking have been held to amount to cruelty upon the basis that the close relationship between husband and wife in the small family homes usual in England is incompatible with such behaviour. Whether such treatment might amount to cruelty in India has not been determined. In view of the traditional submissiveness of Indian women the absence of medical certificates and widespread complaints will not discredit a wife's evidence of physical violence inflicted upon her.⁵

340. Assaults upon the petitioner's children, drunkenness, perseverance in crime, persistent behaviour suggestive of

¹ What is injurious and cruel nagging to one spouse might be of little concern to another: *King v. King* [1953] A.C. 124.

² *Palmer v. Palmer* [1955] P. 4; *Williams v. Williams* [1962] 3 All E.R. 441 (C.A.). The M'Naghten rules (see (1843) 10 Cl. & Fin. 200=8 E.R. 718) apply to pleas of insanity as defences to a charge of cruelty.

³ AIR 1961 Pun. 125, § 280. ⁴ *Meacher v. Meacher* [1946] P. 216.

⁵ *Kaushalya v. Wisakhi* AIR 1961 Pun. 521.

an adulterous association, unnatural sexual behaviour or indecent assaults on third parties, refusal of marital intercourse, and indeed any conduct which in the circumstances is prejudicial to the other spouse's health (as apart from happiness) will serve as evidence of cruelty. English authorities on 'cruelty' abound,¹ but they are of importance only on principle, and each allegation in a petition must be considered as a separate question of fact. But English and Indian law agree that pleas consisting of trivial acts 'which are only the wear and tear of married life or do no more than show that the parties are at arm's length' weaken the force of substantial allegations and should be avoided.²

341. The view, judicially approved, that any conduct of the husband which causes disgrace to the wife and annoyance and indignity amounts to legal cruelty,³ is, it is submitted, too wide, for it must be controlled by the requirement (s. 10 (1) (b)) that the petitioner must have reasonable apprehension in his or her mind that it would be harmful or injurious to live with the respondent. Thus unfounded allegations of adultery *may*, if cruelly persisted in so as to undermine the petitioner's health, be cruel within the meaning of the clause.⁴ That same requirement naturally precludes a petition on the ground of cruelty where the parties have long been separated and there is no question of the petitioner living with the other party at all.⁵

342. *Virulent leprosy.* Notwithstanding that leprosy is nowadays curable, leprosy in its virulent form, i.e. where ulcerous and unsightly symptoms make social life and

¹ Instructive examples include *Lissack* (cited above); *Baker v. Baker* [1955] 1 W.L.R. 1011; *Ivens v. Ivens* [1955] P. 129; *Crawford v. Crawford* [1956] P. 195; *Forbes v. Forbes* [1956] P. 16; *Bravery v. Bravery* [1954] 3 All E.R. 59 (CA); *Carpenter v. Carpenter* [1955] 2 All E.R. 449; *Walker v. Walker* [1961] 3 All E.R. 14.

² *Thompson v. Thompson* [1957] P. 19, 35 *per* Denning, L. J. (as he then was).

³ *Abraham v. Abraham* AIR 1959 Ker. 75, [1958] Ker. 643; *Kamla v. Amar* AIR 1961 J. & K. 33 ('the conception of legal cruelty undergoes changes according to the changes and advancement of social concepts and standards of living').

⁴ The dictum in *A. Kuppuswami v. Alagammal* AIR 1961 Mad. 391 should be followed with caution.

⁵ *Britt v. Britt* [1955] 3 All E.R. 769 would seem therefore not to be applicable.

normal intercourse with people impossible,¹ is a ground for judicial separation. The legislature has provided,² that the respondent shall have been suffering from this form of leprosy for one year at least immediately prior to the presentation of the petition. This does not mean that separate maintenance is not available to the spouse immediately upon discovery of the condition: the right is given by s. 18 (2) (c) of the HAMA (§ 268). On the question of condonation see § 344.

343. Venereal disease. If the respondent has been suffering from venereal disease in a communicable form (i.e. as distinct from congenital syphilis, etc.) for not less than three years immediately prior to the filing of the petition³ judicial separation is available. As in the case of leprosy the spouse who is obliged to wait is not obliged to consort with the other meanwhile for any period after the discovery of the disease (HAMA, s. 18 (2) (g) — the residuary clause).

344. It appears that matrimonial relief on the ground of venereal disease is not available where the condition (in its aspect as a 'matrimonial offence') has been condoned.⁴ Here as in the case of leprosy, condonation does not have the more usual sense of *restitutio in integrum*, for the conditional aspect of condonation in its usual sense is not present (§ 280) and restitution to the former condition is in the nature of things not to be looked for, but rather that of 'forgiveness', 'readiness to overlook the defect'. It is reasonable to suppose that where conditions change so as to enable the petitioner reasonably to allege the inapplicability or expiration of the original condonation, the court will entertain the petition notwithstanding previous condonation. For example, it is submitted that where a husband finds that his wife suffers from venereal disease and does not separate, on the understanding that when they have saved enough money she shall take a course of treatment, and when the money is available she refuses to be treated, the wife cannot allege condonation as a defence to her husband's petition.

¹ See § 595 item (vi).

² HMA, s. 10 (1) (c).

³ HMA, s. 10 (1) (d) as amended by s. 2 of Act 73 of 1956.

⁴ *N. v. N.* (1862) 3 Sw. & Tr. 234, 240 = 164 E.R. 1264, 1266.

345. *Unsound mind.* Unsoundness of mind if continuous for not less than two years prior to the presentation of the petition is a further ground for judicial separation.¹ It is to be observed that mental defects will constitute a sufficient ground for obtaining a decree for separate maintenance (as in § 309 above), even though they may not amount to continuous unsoundness of mind. 'Unsound mind' is an expression sufficiently wide to cover idiocy and paranoid conditions which might not amount to raving lunacy. Mere mental weakness or lack of intelligence does not amount to 'unsoundness of mind', but a person who cannot look after his own affairs or conduct himself with normal propriety may be of 'unsound mind'.² It is not required that the respondent shall have been judicially declared insane. Lucid intervals will break the period required by the Act, and a person who is intermittently insane cannot, under the law as at present framed, be either divorced or separated judicially upon the ground of 'unsoundness of mind' alone. In such cases the petitioner is advised to ground the petition on 'cruelty', for in the lucid intervals the defence of insanity (§ 337) will not serve the respondent.

346. *Intercourse with a third party.* Judicial separation may be petitioned for if the respondent has, after the solemnization of the marriage, had sexual intercourse with a person other than his or her spouse. Where polygamous marriages survive from the pre-'Code' period this clause cannot, of course, be relied upon, unless the woman in question is not a wife of the respondent. In all other cases, it is submitted, the words 'sexual intercourse' must be taken in their natural and usual sense. Otherwise there would be no limit to the sexual activity of a spouse which might be rendered equivalent to infidelity, and therefore a matrimonial offence through this clause. What is meant is normal sexual intercourse between the sexes, and is thus somewhat narrower than adultery as understood in the law of divorce (§ 368). Proof of sexual intercourse however need not be direct (indeed in the nature of things this must seldom be possible) but may be circumstantial. Though it is inferred, the conclusion should be irresistible that the offence has been committed. The mere possibility (despite common Indian prejudices) is not enough in law. Strong inclination and opportunity when combined

¹ HMA, s. 10 (1) (c).

² *Joshi v. Rukmini* [1950] All. 396.

raise a presumption that intercourse took place, but the presumption is by no means irrebuttable. Where the behaviour of the persons concerned is adequately accounted for and the court believes evidence of innocent association the charge is refuted.¹ The public's inclination to suspect any couple left alone together anywhere will naturally not weigh with a court of law. Proof of conception of a child conceived during a period when access by the husband was impossible, or of an adulterous association (§ 31) will serve for this purpose. A single instance, however, satisfactorily proved supports the petition under this clause.

347. There is no reason for supposing that the word 'spouse' includes pretended spouse, unless the alleged marriage was voidable. Nor is there reason — indeed the circumstances of India suggest the reverse — to suppose that 'sexual intercourse' must be voluntary. Even a case of rape will suffice — still more intercourse with a child under 14 years of age² — for this purpose. We are not concerned here with any criminality or guilt, *stricto sensu*, in the respondent. No man is obliged by the law to share his wife with another man, however mild and humanitarian many of the ancient *smritikaras* were on this distressing subject.

ACTIONS FOR CRIMINAL CONVERSATION AND ENTICEMENT AND LIABILITIES OF CO-RESPONDENTS

Third parties in divorce proceedings

348. Where a spouse has a ground for complaint against his spouse in which a third party is implicated, the law has provided, within limits which must be described below, for remedies against that third party. In the first case proceedings may be commenced against the third party alone, by way of an action for damages for criminal conversation (brought by the husband) or an action for damages for enticement (brought by the wife). The more usual practice is to prosecute an adulterer under s. 497 of the Penal Code and subsequently to compound the offence.

¹ *England v. England* [1952] 2 All E.R. 784.

² *Barnett v. Barnett* [1957] 1 All E.R. 388.

One may also prosecute under s. 498 for enticement; but both proceedings are limited in their scope, and the remedies in civil actions, though rusted, are not obsolete. Though India is bound, under justice, equity and good conscience, or otherwise, to apply the English matrimonial law in accordance with principles laid down in decided cases, there seems to be no reason why developments in India should not eliminate archaic or unnecessary distinctions that survive in England, and it may be proper to award damages in both contexts under the title 'enticement'. The position of the co-respondent in Indian divorce petitions is a matter of very considerable difficulty in view of the fact that the HMA itself makes no provision for impleading co-respondents or for the intervention of third parties in matrimonial causes, still less for the award of damages against any such third party. This must be discussed below (§ 355).

349. The husband's action for criminal conversation used to be brought in England under that name until 1857,¹ when the damages were awarded for his loss through deprivation of his wife and indignity inflicted upon him by his wife's seduction by the adulterer. When that action was abolished a new right to obtain damages on the ground of adultery was created,² and today the husband may claim damages in matrimonial proceedings, so that where it is found that the adultery was condoned the action for damages fails. This remedy established by English statute is confined to the husband. Since the Indian Divorce Act, 1869, by s. 35, provided that the court might order the adulterer to pay costs, and by s. 34 that the husband might claim damages from the adulterer, public disapproval of the third party had ample scope, and the injured husband was as well catered for as at contemporary English law. Hence the provision of s. 61 of that Act that suits for criminal conversation should not be maintained by persons governed by that Act. The action for criminal conversation remains however unaffected for all persons to whom that legislation did not apply, i.e. Hindus governed now by the HMA; and as a result the law applicable in England before 1857 is still in force in India for the assistance of such persons.³

¹ Matrimonial Causes Act, 1857, s. 59.

² Matrimonial Causes Act, 1857, s. 33.

³ *Soodasun v. Lockenauth* (1859) Montriou 619; *Hurka v. Razejee* (1808) 1 Borr. 391; *Tamunabai v. Narayan* (1876) 1 Bom. 164; *Sobha v. Tika*

350. The claim for damages does not cease with the wife's death.¹ Where damages have been awarded, this may naturally be pleaded as an answer to a petition for restitution. Damages are by way of compensation, and are not normally exemplary or punitive. The ease with which a wife is tempted has been held to indicate the amount of her loss to her husband, and so a rich seducer may properly be cast in heavy damages if his wealth was used to tempt or overawe her.² The conduct of the husband at all material times should be taken into consideration: if the spouses were in fact separated before the third party arrived on the scene the damage to the husband would naturally be minimal.³

351. A wife has no exactly comparable action against a woman who seduced her husband. She may however prove that the conduct of the woman amounts to enticement,⁴ and by this means she may be awarded damages on the same footing as if she had a right of suit for criminal conversation.

352. The wife's action is based upon the common law action of enticement, available to *either* spouse. It is an actionable wrong to cause a spouse to leave the other, so as to deprive him or her of the *consortium* or even maintenance to which he or she is entitled by virtue of the marriage.⁵ The nature of the injury is such that it is possible even for the spouses jointly to sue one who attempts to part them. Mere alienation of affection is, it is submitted, not enough to ground an action for damages. A suit by the wife for loss of *consortium* of her husband is believed not to be available in England, on the ground that the husband's undoubted action for such loss was based on 'the proprietary right which from ancient times it was considered the husband had in his

(1936) 58 All. 903, AIR 1936 All. 454. K. S. Gour, *Hindu Code* § 434. Originally an action for criminal conversation might be brought in the King's, but not in the Company's, courts according to the view held in the Madras Presidency (1 Strange, *Hindu Law*, 46; 2 *ibid.* 40-44), but the distinction must now be considered obsolete.

¹ *Kent v. Atkinson* [1923] P. 142.

² *Butterworth v. Butterworth* [1920] P. 126.

³ *Gardner v. Gardner* (1901) 17 T.L.R. 331. *Sobha* (cited above).

⁴ *Latey on Divorce*, 14th edn, §§ 591, 592.

⁵ *Lynch v. Knight* (1861) 9 H.L.C. 577; *Place v. Searle* [1932] 2 K.B. 497. Limits to the action are indicated in *Best v. Samuel Fox and Co. Ltd.* [1952] 2 All E.R. 394.

wife'.¹ This disability is hardly in point here, where we are concerned with remedies for enticement leading to a loss of *consortium*.

353. A third person, other (it seems) than an actual member of the family,² who entices, receives, or harbours a wife so that she lives apart without her husband's consent and without reasonable cause,³ commits an actionable wrong.⁴ Advice to leave a husband, if given in good faith, is however not an actionable wrong.⁵

Factitation of marriage

354. Where a woman falsely and seriously claims to be married to a man (or vice versa) and the person to whom she (or he) claims to be married has not acquiesced in this claim, the latter may institute a suit for a declaration that no such marriage as is claimed exists in fact.⁶ He may also sue for an injunction restraining the defendant from falsely claiming to be his wife.⁷

Co-respondents

355. In view of the fact that the HMA makes no provision for the impleading of co-respondents, nor gives the court jurisdiction to mulct guilty co-respondents in costs, it would seem that a petition filed without service on a co-respondent, who is alleged in the petition to have committed adultery with the respondent, would be validly filed, notwithstanding the general provision in s. 21 of the Act that proceedings shall be regulated as far as may be by the Civil Procedure Code, 1908. However, it has been found by experience that

¹ *Best* (cited above) at p. 398.

² *Gottlieb v. Gleiser* [1957] 3 All E.R. 715. A wider view is taken in the United States.

³ *Berthon v. Cartwright* (1796) 170 E.R. 426.

⁴ *Place* (cited above); *Menon v. Menon* [1936] P. 200. On the question whether harbouring a husband is actionable see *Winchester v. Fleming* [1957] 3 All E.R. 711, reversed in the C.A. at [1958] 3 All E.R. 51.

⁵ *Smith v. Kaye* (1904) 20 T.L.R. 261.

⁶ *Mir Azmat v. Mahmud* (1897) 20 All. 96. See *Schuck v. Schuck* [1950] W. N. 264 (Ormerod, J.).

⁷ Specific Relief Act, s. 42, ill. (h). See last note.

where it is alleged that adultery has occurred it is inexpedient to proceed with the hearing until the person with whom it is alleged that the respondent committed adultery has been brought on the record, has been apprised of the nature of the charges made against him, and has, if possible, been examined in court.¹ The effect of this discovery was apparent even before the HMA was enacted. In 1939 a Bombay statute amended the Bombay Hindu Divorce Act of 1947 to enable the court to impose costs upon a co-respondent in 'concubinage' cases, and to secure that the co-respondent should be a necessary party. Under the authority conferred by the HMA the governments or High Courts of the various states have introduced Hindu Marriage and Divorce Rules. Several of these do not in fact provide for citing co-respondents, though the majority prudently do so provide; and where the co-respondent is not cited, naturally he cannot be mulcted in costs.² It is submitted that even where the Rules do not specifically provide for citation of co-respondents the court will use its discretion to adjourn the hearing until the person named has been brought on to the record, and cases where relief can be given without the identity of the third party being known must be rare.

There is of course no question of mulcting in costs a co-respondent who turns out to be insane and who, to apply the M'Naghten rules, 'did not know that promiscuous sexual intercourse was wrong,' and such a third party, whether co-respondent or intervener, is bound to be dismissed from the suit.³

Intervention

356. Just as a co-respondent who is found to be innocent may be discharged from the proceedings without stain on his character so it is essential as an element of justice that anyone who is under some odious charge, whatever it may be, and even if it arises in proceedings between other persons,

¹ *Bhagvanti v. Sadhu* AIR 1961 Pun. 181.

² Provision for citation is made in the Rules of Allahabad (r. 6); Bombay (r. 5); Orissa (r. 5); Patna (rr. 16, 17); Punjab (rr. 10-14); Andhra Pradesh (rr. 8-9); Rajasthan (r. 801G); but not in Madhya Pradesh, Madras, or Mysore.

³ *S. v. S. (O. orse P. intervening)* [1961] 3 All E.R. 133.

should be allowed full opportunity of dealing with it.¹ For this reason intervention is allowed, particularly in proceedings for divorce (and indeed in any case where the relief depends upon proof of sexual misconduct), on the part of a female whose reputation is endangered by the allegations in the petition or, as the case may be, in the written statement.

TERMINATION OF MARRIAGE. DIVORCE

Presumption of death

357. A valid marriage is terminated by death or divorce. Where the fact of death is unknown there are presumptions of law, upon the faith of which parties interested in the life of the person concerned may safely take steps which would be invalidated if it were at the time possible to prove that at the moment in question the person was alive. The presumption of survival of the younger, in the case of two persons who die in circumstances where it is not possible to prove survival of either, where the distribution or passing of property is in question, will be dealt with later (§ 591). The presumption of death where a person has not been heard of as alive for seven years by those who would normally expect to hear from or about him if he were alive is a presumption of fact upon which the former or actual spouse is entitled to rely and to marry again without fear of committing bigamy. Such notions, known to India from remote times when communications were bad, are to be relied upon in these days when even remote places and poor people can be reached by relatively cheap means. The burden of proving the survival of a man after the period of seven years has elapsed lies, under s. 108 of the Indian Evidence Act, on him who affirms it (cf. § 590). This presumption does not tell us anything about the time when the person is supposed to have died,² nor, of course, does it validate an actually bigamous marriage made in reliance upon the presumption.

358. The possibility of a husband or wife returning after the period of seven years and finding that the spouse had

¹ *D. v. D.* [1952] 2 All E.R. 854, 856.

² *Dhondo v. Ganesh* (1886) 11 Bom. 433; *Punjab v. Natha* AIR 1931 Lah. 582 (FB); *Gnanamuthu v. Anthoni* AIR 1960 Mad. 430.

married again, and that the estate had been distributed, has to be faced. Naturally the second marriage is void *ab initio* once it is shown that the first spouse was still alive. Hence the necessity for statutory provisions to declare the marriage at an end when the period has been passed. Thus absence for seven years in the circumstances stated above is a ground for divorce so that the spouse may remarry and have children whose legitimacy will never be in doubt.¹ The question of distributing the estate is not provided for so neatly.

359. Where *A* marries *B* knowing that *B*'s former spouse *C* had been missing for seven years and no evidence of his death had been forthcoming, *A* is estopped from raising the question of the validity of his marriage with *B* on the ground that *B* had not made inquiries about *C* during the period prior to the marriage with *A*, particularly when evidence was available that a search was fruitlessly made for *C* during the relevant period.² It is distinctly advisable, in view of the ease with which petitions may be presented under the HMA, that a marriage should be dissolved where the spouse has been missing for seven years, whenever remarriage is contemplated.

Time of presenting a petition for divorce

360. In what follows, as also in §§ 365ff below, no notice is taken of the statutory provisions for divorce under the Baroda Hindu Act, 1937, or other statutes in force and not repealed by the HMA (whether by oversight or otherwise), and in particular in Kerala State (§§ 389-91), for dissolving a marriage, nor of the procedure before caste tribunals where castes have been authorized by custom over the years to dissolve marriages.³

361. Under the HMA a petition for divorce is not to be presented within three years of the marriage whatever the ground or grounds relied upon by the petitioner.⁴ The court must have regard to the probability of reconciliation (where possible) and the interests of any children of the marriage amongst other relevant considerations when exercising its

¹ HMA, s. 13 (1) (vii).

² *Bullock v. Bullock* [1960] 2 All E.R. 307.

³ HMA, s. 29 (2). See § 274.

⁴ HMA, s. 14.

discretion to allow presentation under s. 14 (1), Proviso, within the three-year period. The intention of Parliament was evidently that this discretion should be very sparingly used. No matter how grave the matrimonial offence or other ground of complaint the remedies short of terminating the marriage are now so ample, that precipitation in bringing the marriage to an end is altogether discouraged.¹ Separate maintenance and residence, judicial separation, and nullity serve to protect a spouse whose complaint attracts public sympathy. There are rare exceptions, as where the wife, alienated by the husband's grave matrimonial offence, has conceived a child by adultery and wishes to marry the father in time to give the child legitimate birth as child of that man — for no provision of Indian law as it now stands can assist the child if the marriage is not solemnized before its birth.²

362. We may fairly adopt the dictum of Denning, L. J. (as he then was) in *Bowman v. Bowman*:³ 'The really important consideration in all these cases is to see whether there is any chance of reconciliation. On this point, it is most material to inquire what the applicant [for permission] has already done to try to make the marriage a success or to become reconciled. Is the breakdown of the marriage due to any failing or maladjustment on the part of the spouse who applies to launch her petition within three years of the marriage? . . . If the court is not satisfied that all which is reasonable has been done in this respect, it may well dismiss the application.'

363. The Act provides that permission may be given in cases where the petitioner suffers exceptional hardship or the respondent is guilty of exceptional depravity. The word 'hardship' is wide, but its scope cannot cut down the effect of the word 'exceptional', which, it is suggested, means 'beyond the ordinary run of complaints which come before the court'.⁴ Parliament intended that spouses should have at least three years in which to work at their own difficulties and the case must be exceptional indeed before the court

¹ *Meganatha v. Susheela* AIR 1957 Mad. 423.

² § 32.

³ [1949] P. 353, 357.

⁴ Rayden on Divorce, 5th edn, p. 152 cited in *Meganatha* (cited above) at p. 427a.

removes the last opportunity for the petitioner to reconsider his or her matrimonial duty.¹ 'Depravity' implies moral guilt, and cannot include cases where no moral quality is present, as a case of incurable insanity, the respondent being under care: but in such cases the hardship may be exceptional. Instances which in England have been regarded as within the terms include adultery, desertion and cruelty combined, bearing a child by adultery, adultery shortly after marriage and promiscuously, aggravated cruelty, for example accompanied by sexual perversion.²

364. The Act provides specially for the case where permission to present the petition within three years was obtained by misrepresentation or concealment (that is, where relevant evidence was not available at the time of the hearing of the petition for leave to present, or could not have been made available by all reasonable diligence on the part of the respondent) as appears in the trial of the actual petition for divorce. In such a case the court may dismiss the petition, pronounce a decree subject to the condition that it shall not have effect until after three years from the marriage, or dismiss the petition without prejudice to re-presentation of the petition on the same or substantially the same facts (in default of new facts) after the three years have passed.³

Grounds for divorce under the HMA

365. Formerly Hindu marriages were indissoluble by divorce except by caste custom or the statutory amendments of custom of matrilineal and other peoples of Kerala. The previous statutes of Bombay, Madras, and Saurashtra were repealed and replaced by the HMA, but not those of Baroda and Madhya Pradesh.⁴ The result is that where there is no

¹ See *obiter dicta* in *Shirin v. Vishnu* (1958) 61 Bom. L.R. 100, 102, AIR 1960 Bom. 447.

² *Bowman v. Bowman* [1949] P. 353, 356-7; cited in *Meganatha* (cited above), at pp. 426-7.

³ HMA, s. 14 (1), Proviso.

⁴ Although s. 30 of the HMA (the repealing section) was itself repealed by Act 58 of 1960, it is curious to note that the 'tidying-up' statute (Miscellaneous Personal Laws (Extension) Act, Act 48 of 1959) did not, in Schedule II, get rid of the still obtrusive and unrepealed State statutes on marriage which could not shelter under the special qualifications of the Baroda and Kerala specimens.

discrepancy between the surviving State and the central statutes the former may still take effect. The details are beyond the scope of an introductory book.

366. The grounds for divorce under the HMA, s. 13, are alike in that they must be proved beyond reasonable doubt,¹ the confession or admission of the respondent not being normally sufficient corroboration. Undefended petitions are scrutinized with all the care necessary to detect any trace of collusion (§ 278). Husband and wife have nine grounds open to them; the wife has two special principal grounds of her own.

367. *Living in adultery.* The meaning of this term (s. 13 (1) (i)) was already established by reason of its appearance, in s. 488 (4), (5) of the Criminal Procedure Code, as an obstacle to obtaining, or to the continuance of, an order for maintenance in favour of a wife. Isolated acts of adultery, even if frequent, do not amount to 'living in adultery'. The mere birth of a child does not evidence *living in adultery*, yet such *living* may be proved although the woman does not live at the adulterer's house.² It is a continuous course of adulterous life as distinguished from one or two lapses from virtue.³ There is no hard and fast rule as to the length of time for which the guilty spouse must have 'lived' with the adulterer or adulteress: the establishment of an apparently persisting relationship is sufficient. The intention of Parliament would be frustrated if too narrow a construction were to be placed on the words. Yet the adulterous life must be so related from the point of view of proximity of time to the filing of the petition that the petitioner might reasonably have been supposed to have believed that the respondent was living in adultery at that time:⁴ 'is living in adultery' is after all the statutory expression, and delay in presenting the petition may be as fatal as condonation. Whether the case can proceed to a hearing when the third party has died after the filing of the petition, or the adulterous living has ceased for some other reason, is as yet doubtful.

¹ *White v. White* [1958] S.C.J. 839.

² *Durghatia v. Ayodhya* AIR 1953 V.P. 28; *Kista v. Amirthammal* AIR 1938 Mad. 833, [1938] Mad. 1100.

³ *Subramaniam v. Ponnakshiammal* AIR 1958 Mys. 41.

⁴ *Rajani v. Prabhakar* AIR 1958 Bom. 264, 59 Bom. L.R. 1169.

368. The term 'adultery' does not imply 'sexual intercourse' in the sense in which it is understood in HMA, s. 10 (1) (f). Thus where the evidence is consistent with adultery it is not rebutted by proof that one party never fully penetrated or completed the natural act of intercourse with the other, so long as sexual gratification was obtained, or must in the circumstances be presumed to have been obtained.¹ Where the third party was impotent at all material times adultery has been excluded,² but where the wife has been impregnated by artificial insemination without the husband's consent a decree of divorce for adultery (it has been thought) might not be beyond contemplation. Undue sexual attachment to a person of the same gender (cf. § 388) cannot amount to adultery, but cruelty may be proved in the case of a spouse guilty of lesbianism.³ The wife's right under s. 13 (2) (ii) might be an unconstitutional discrimination in favour of women, were the matrimonial law to be otherwise.

369. Where intercourse is proved to have taken place it is presumed to have been consensual, i.e. that both parties willingly participated.⁴ If, however, the intercourse is shown by the respondent not to have been consensual in that, for example, the married woman was, or may have been, raped,⁵ sexual intercourse, as such, may indeed be proved, but not adultery, which requires the consensual element necessary to establish guilt in the respondent. Where the third party is below the age of consent or is insane she cannot be held an adulteress for the purpose of any proceedings or decrees against her as co-respondent.⁶

370. *Conversion to another religion.* It is a 'matrimonial offence' providing a ground for divorce to cease to be a Hindu by

¹ *Thompson v. Thompson* [1938] P. 162; *Sapsford v. Sapsford* [1954] P. 394. The stricter view, expressed by Hodson, L.J., in *Dennis v. Dennis* [1955] 2 All E.R. 51 (CA) that some penetration is essential for adultery to be established is, it is submitted, altogether too mechanical, and may not recommend itself to India.

² *Dennis* (cited above). ³ *Spicer v. Spicer* [1954] 3 All E.R. 208.

⁴ See *Willan v. Willan* [1960] 2 All E.R. 463.

⁵ *Redpath v. Redpath* [1950] 1 All E.R. 600 (CA). In India rape, followed by kidnapping later acquiesced in, is the situation which the law may have to contemplate.

⁶ *Barnett v. Barnett* [1957] P. 78, 81-3. See also authorities cited in *S. v. S. (O. orse P. intervening)* [1961] 3 All E.R. 133.

conversion to another religion.¹ It seems theoretically possible to cease to be a Hindu, for example by forswearing belief in all Hindu deities and in the *sanatana-dharma*, without conversion to Islam, for example, or Christianity,² but since no amount of unorthodoxy or sympathy with other religions can by itself cause a Hindu to cease to be a Hindu, and as mere outcasting or excommunication (where still legally possible) cannot deprive a man of his religion, it is doubtful whether ceasing to be a Hindu is in practice worthy of contemplation except in the context of conversion.³

371. Conversion to Buddhism, Jainism, Sikhism, Lingayatism or indeed any faith or sectarian belief connected historically with Hinduism does not amount to 'conversion to another religion' because of the definition of 'Hindu' given in s. 2 (1) of the Act, which although it does not relate directly to this question shows the intention of Parliament clearly enough. It is in any case a fact that in this half-century all tendencies to deny the Hinduism of those who belong to or join heterodox or minority religious groups have been discouraged legally and politically.

372. The law is not concerned with the sincerity of an alleged conversion but with its actuality and finality.⁴ This is subject, no doubt, to the possibility of reconversion or 'relapse' into the former faith. Fortunately both in Islam and Christianity the moment of conversion is identifiable with acts well-known to the community in question and unless it is proved that they were not validly done or undergone it is presumed that one who formally utters the Islamic profession of faith is a Muslim and one who is validly baptised is a Christian.

373. It seems that the time is not yet ripe to discard religious conversion to either of those religions as a ground for divorce, though it is recognized that considerable deviations involved in conversion, within the legal definition of Hinduism, e.g. into the Arya Samaj, or from Jainism to Lingayatism, or from any traditional manifestation or school of Hinduism

¹ HMA, s. 13 (1) (ii).

² Note the forswearing that took place in *Narayan v. Punjabrao* (1958) 60 Bom. L.R. 776. § 28.

³ *Chandrasekhara v. Kulandaivelu* AIR 1963 S.C. 185, 200a. ⁴ See § 17.

into Buddhism, are no grounds for divorce in themselves. Whether a spouse who is himself converted to the same or another religion is debarred under s. 23 (1) (c) from petitioning for divorce under this clause is doubtful. It would seem that he is.

374. Renunciation of the world. Just as conversion to another religion involves hardship on the wife except when she is converted herself to the same religion, so renunciation of the world (*sanyasa*) is embarrassing and may be painful to the spouse if done without her consent, even without any element of cruelty. In fact, to renounce the world, except in the case of an aged man, is a form of desertion, since every aspect of *consortium* is abandoned together with worldly desires and concerns. However, the law provides that *sanyasa* is no ground for divorce unless the renunciation takes place 'by entering any religious order'.¹ This does not imply that any particular sect, group, or community is to be joined: it is sufficient if the person concerned becomes a *sanyasi*, reaching thereby the 'order' or *asrama* of *sanyasa*. The law recognizes no *sanyasa* which is not formal, complete, and irrevocable. (We are not concerned with relapse from the *asrama* of *sanyasa* about which the *sastra* has some hard things to say.) Ceremonies of actual entry into *sanyasa*, in which the householder's *asrama* is ceremonially left, and the *sanyasi* performs his own death rites, are settled by custom, and are required by law to be carried out according to custom if the *sanyasa* is to have legal effect.² This applies both in succession and in divorce matters. What is said about males applies, *mutatis mutandis*, to females, who may become *vairaginis* (§ 592). No *Sudra* may become a *sanyasi* except by custom,³ and this discrimination continues to apply despite the attempted elimination of caste from Hindu law by the 'Hindu Code'.

375. Unsoundness of mind. The respondent must have been incurably of unsound mind continuously for three years immediately preceding the presentation of the petition.⁴ It is important to remember that at times cruelty may not

¹ HMA, s. 13 (1) (vi).

² *Sital v. Sant* AIR 1954 S.C. 606; *Baldeo v. Arya* AIR 1930 All. 643, 52 All. 789.

³ *Gulabrao v. Nagorao* [1952] Nag. 591.

⁴ HMA, s. 13 (1) (iii).

be provable because of the mental condition of the respondent, and yet there may be no ground for divorce within this clause.

376. 'Unsound mind' ought to be indistinguishable from a mental condition for which a judicial declaration of insanity has been or might be given. However no such declaration would by itself be sufficient to support the petitioner's case, and even where there was neither advisability nor need for certification (in the opinion of medical advisers) the court has held the respondent's condition to be that of incurable unsoundness of mind.¹ Whether the respondent is of 'unsound mind' must be determined by the court from the petitioner's evidence corroborated by that of medical witnesses; upon the evidence of medical experts the court must determine whether the respondent's condition is 'incurable', that is, 'it appears incurable.'² The test is whether, in the opinion of experts, there remains any likelihood of recovery. This means a return to complete independent living as a married person, on the scale of mentality which the respondent possessed at the time of the marriage. Where the petitioner knowingly married a person of dim intelligence whose mental condition sharply deteriorated 'recovery' might be satisfied by a reappearance of the former low level of intellect. The 'cured' patient must have the ability to manage his own affairs, the test of that ability being that of the reasonable man,³ but even a lower grade of ability, if normal in that patient, must be the standard to be applied in that case.

377. Needless to say, there are many mental conditions which are nowadays susceptible of cure, so as to enable a patient to return to normal life, provided, of course, that the necessary treatment can be undergone. Where a respondent has had lucid intervals, particularly if numerous or prolonged in the past, the burden of proving incurable unsoundness of mind becomes very heavy, and indeed the development of a lucid interval breaks the statutory period

¹ *Lock v. Lock* [1958] 3 All E.R. 472; *Randall v. Randall* [1939] P. 131, 138. Certification is in England somewhat readily resorted to for the better keeping of the insane and the relief of relatives.

² *Swettenham v. Swettenham* [1938] P. 218.

³ *Whysall v. Whysall* [1959] 3 All E.R. 389.

of three years, and one appearing even at the time of presentation of the petition would be fatal to it. On the other hand any prospect of cure, even if based upon the assumption that proper medical care will be made available regardless of expense, will take the respondent out of reach of this clause.

378. Where the respondent is represented by his guardian *ad litem* the latter, who should have no interest in the respondent's property,¹ must take every proper step to rebut the charge of unsoundness of mind. He must consider the availability of evidence of the respondent's condition which might enable the court to take a different view of the position from that suggested by the petitioner, and if the condition of the respondent had been brought about or materially aggravated by the petitioner's own conduct, he should bring this fact to the notice of the court.² *

379. It seems that the 'offence' of 'unsound mind' within the meaning of the clause cannot be condoned³ for, as in the case of previous marriages, a restitution to a faultless condition thereby is impossible.

380. *Absence, unheard of, for seven years.* See § 357 above.

381. *Leprosy or venereal disease.* We come now to diseases which are 'matrimonial offences'. In contrast with corresponding grounds under s. 10 of the HMA (Judicial Separation), the relevant clauses⁴ reveal the general intention of Parliament that marriages may be terminated when the two more revolting contagious diseases have established a hold on their victim. The requirements of the two clauses differ markedly, however. The respondent must have been suffering from leprosy in a virulent and incurable form for three years preceding the petition; or from communicable (as contrasted with congenital) venereal disease for three years. If the disease persists for three years it is to be assumed (Parliament appears to have decided) that it is either in-

¹ *Randall v. Randall* [1939] P. 131.

² *Greenstreet v. Greenstreet* (1948) 64 T.L.R. 334-5.

³ See dicta of Desai, J., in *Chandrabhagabai v. Rajaram* AIR 1956 Bom. 91, 92, 57 Bom. L.R. 946, 949.

⁴ HMA, s. 13 (1) (iv) and (v).

curable (from a practical viewpoint) or that its results are permanent and that the marriage-bond may be broken without proof of incurability. We note that for divorce it is not specifically required that the disease shall not have been contracted from the petitioner, but this requirement is to be supplied from the 'own wrong' provision of s.23(1)(a).

382. The 'offences', it has been suggested, cannot be condoned, but an old authority suggests that venereal disease can be condoned in the context of judicial separation (§ 344) and the same principle ought, it is submitted, to apply to divorce, and if so the same considerations would apply to leprosy.

383. *Continuous absence of consortium.* Desertion as such is no ground for divorce under the HMA. Where however the respondent has not cohabited with the petitioner for two years or upwards in circumstances which amount to a judicially noticed separation, whether with excuse, as where a decree for judicial separation has been granted against the respondent¹ or without excuse, as where he has failed to comply for that period with a decree for restitution,² the facts may be pleaded as matrimonial offences in a petition for divorce. Cohabitation must here be taken to be a genuine return to matrimonial life, not a mere single visit.³ The period of two years seems to be interrupted by any period during which compliance with a decree for restitution was impossible on account of nullity proceedings between the same parties.⁴

384. 'Failure to comply with the decree for restitution' requires that the petitioner shall have made some *bona fide* attempt to recall the respondent to the matrimonial home in pursuance of the decree. Where he neglects to invite her to return and takes no steps to get the decree executed, it is open to the court, in one view, to hold that there has been no failure within the meaning of the clause.⁵ Whether

¹ HMA, s. 13 (1) (viii). The guilty spouse against whom judicial separation was decreed cannot petition under this clause: *Shri Waryam v. Pritpal* AIR 1961 Pun. 320.

² HMA, s. 13 (1) (ix).

³ *Perry v. Perry* [1952] P. 203 (CA). ⁴ *Ishwar* (cited below).

⁵ See construction of Hindu Mar. Wom. R. to Sep. Res. & Maint. Act, 1946, s. 2 (now repealed) in *K. S. Deenadayalu v. Lalithakumari* AIR 1953 Mad. 402.

the respondent failed to comply without sufficient cause is, it is submitted, an irrelevant question here. The court is concerned only with the question whether there has been a failure. Another view of the law has some plausibility, namely that the statute does not require the successful petitioner to execute his decree, and that, the obligation resting upon the unsuccessful respondent, the petitioner need not do more than show that his decree was obtained.¹ But there can hardly be any doubt, in spite of the wording of the statute, that only the successful petitioner for restitution can sue for divorce on this ground.²

In Uttar Pradesh special grounds for divorce exist which are part of the matrimonial law of Hindus domiciled in that State and some others (§ 16). Cruelty is a ground for divorce, and the ground dealt with here under the title 'continuous absence of *consortium*' has been modified. The detailed discussion of the effect of the State statute in question is beyond our present scope.

385. Special grounds for the wife-petitioner. (i) Where the husband had 'married again', i.e. had first married the petitioner and later another woman, or had first married another woman and had later married the petitioner during her lifetime, in either case prior to 18 May 1955, the wife may petition for divorce on that ground alone, provided that the other wife is alive at the time of presenting the petition.³ 'Married' here includes a voidable marriage, which, of course, the petitioner would be in no position to break, but does not include a void marriage. Even if the respondent divorced the other wife subsequent to the petition the ground may still be relied upon.⁴

386. Condonation cannot be pleaded in answer to such a petition, even if the wife lived for some time with the other wife, for in such a case condonation cannot restore the husband to any state free from the statutory 'matrimonial offence',⁵ which is not an 'offence' in the ordinary sense of the term. However a question may arise whether s. 23 (1) (c), the 'no other legal ground' clause to which we have

¹ *Ishwar v. Pomilla* AIR 1962 Pun. 432; *Kamlesh* (cited below).

² *Kamlesh v. Kartar* AIR 1962 Pun. 156. ³ HMA, s. 13 (2) (i).

⁴ *Mandul v. Lachmi* [1962] 2 An. W.R. 198.

⁵ *Chandrabhagabai v. Rajaram* (cited at § 383).

often referred, may not hinder the court in dissolving a marriage of a man whose subsequent marriage was actually requested and brought about by the petitioner, or whose prior marriage was deliberately accepted and acquiesced in by the petitioner at the time of her own marriage. It is submitted that it does so hinder the court, for it is unthinkable that in communities where the second marriage of a man used to be arranged on terms favourable to the second father-in-law's family the wife whose entry to her husband's family was negotiated on such terms should proceed to better her position at the expense of the family of her marriage by divorcing her husband, unless the circumstances show that the prior marriage constituted a matrimonial offence in the true sense of that term.

387. (ii) Where the husband has, since the solemnization of the marriage, been guilty of rape, sodomy, or bestiality, the wife may petition for divorce.¹ A criminal conviction for one of these offences is not required, but the standard of proof is as high as in a criminal trial.² Particularly in the two latter cases strict proof is required, and in the case of sodomy practised against the wife the wife's testimony alone is not usually sufficient, notwithstanding the difficulty of obtaining corroboration in such cases.³ Instances where relief has been given without corroboration do not appear to have extended to decrees of divorce.⁴ Where it is apparent that the wife was a willing party corroboration is more desirable, as in the case of the evidence of an accomplice.⁵ This last applies only to cases of cruelty and constructive desertion, and not to divorce, where the wife's consent prevents her reliance upon the acts in question. The real consent of the wife to sodomical practices is fatal to a petition on the ground of sodomy with her.⁶ And the offence can be condoned, even if condonation is not pleaded in the respondent's answer.⁷ If the wife knew of the husband's abnormal tendencies before the marriage that alone would not prevent

¹ HMA, s. 13 (2) (ii).

² *Statham v. Statham* [1929] P. 131, 139.

³ *N. v. N.* (1862) 3 Sw. & Tr. 234 = 164 E.R. 1264; *Statham* (cited above); for what may constitute corroboration see *Lawson v. Lawson* [1955] 1 All E.R. 341 (CA).

⁴ As *D.B. v. W.B.* [1935] P. 80.

⁵ *Lawson* (cited above).

⁶ *Statham* (cited above); *Bampton v. Bampton* [1959] 2 All E.R. 766 (CA).

⁷ *Statham* (cited above) at pp. 141, 146, 153.

her from presenting the petition. Lapse of time in a bestiality case was not, once, thought detrimental to the wife's petition: in that case¹ twelve years had passed and apparently it was not urged (in the absence of a defence) that delay raised a presumption of condonation. It is not likely that such a precedent would be followed in India.

388. Unnatural relations on the wife's part with another woman or women are not a ground for divorce, *per se*,² but they may found a petition for judicial separation which, as in other cases, if followed by non-cohabitation for two years, will in turn provide ground for divorce (§ 383).

Malabar divorces

389. The various statutes passed by the Madras and the former Travancore and Cochin legislatures prior to the 'Hindu Code' to regulate marriage and divorce are parts of the personal laws of the castes, or groups of castes, to whom they apply. Their effectiveness has been affected by the HMA to a limited degree. In respect of divorce their provisions are still in force. It is not possible to give full details here of the varied provisions of the dozen or so statutes in question.³

390. What should be known about divorces characteristic of the matrilineal (i.e. *marumakkattayam* and *aliyasantana*) communities of Malabar⁴ can be summarized as follows: (i) Marriage as understood in orthodox Hinduism was not practised, but rather a relationship of a consensual character which in every way resembled marriage so long as one or both of the parties did not form the intention to dissolve it. This union, which was more stable than a temporary liaison, was called *sambandham*, 'relationship'. In course of time unions tended to become more stable than previously, the parents tended to live together with their children rather than in the matrilineal home, the *tarwad*, or *kutumba* in

¹ *R. v. R.* [1932] 173 L.T. Jo. 264.

² As they are in England where cruelty is a ground for divorce: *Gardner v. Gardner* [1947] 1 All E.R. 630. § 368.

³ See Further Reading below.

⁴ Including the S. Kanara district of Mysore State and Kerala.

aliyasantana parlance, and this development was recognized by statutes which turned customary *sambandhams* into statutory marriages for the purposes of preventing polyandry and extending protection to the 'wife' and issue by way of maintenance and a right to participate in intestate succession. Along with this movement came legislation enabling property to be left by will, a step which strengthened the expectations of a man's 'legitimate' children. With the new concept of marriage naturally came provision to recognize divorce.

391. (ii) Divorce by mutual consent, and by deed executed by the parties, was recognized,¹ but every encouragement was given for the parties to seek divorce, if at all, by decree of court. This could achieve little more than delay, but delay was provided for so that the parties would have time to reconsider their position. Divorce upon grounds was gradually introduced, and in some communities divorce upon grounds is normally availed of.² The grounds are far from stringent, and in two statutes 'incompatibility of temperament' is a ground.³ In many cases divorce was allowed only upon payment to the non-consenting spouse of damages or compensation. Even where a petition was filed for divorce on grounds and the spouses later agreed to a dissolution the court might award compensation, in which case it would not look into allegations other than that of adultery or change of religion.⁴

392. Members of the matrilineal or mixed communities of Kerala can marry taking advantage of the HMA, and are no longer bound by the restrictions of their former personal law. Fortunately when they propose to marry Hindus of other communities the difficulties do not arise which are experienced when a person divorced by caste custom

¹ Cochin Marumakkathayam Act (1938); Madras Marumakkattayam Act (1933); Madras Aliyasantana Act (1949); Travancore Ezhava Act (1925); Cochin Nayar Act (1938). There are in most cases special rules concerning the dissolution of the marriages of minors.

² Travancore Nayar Act (1925); Nanjinad Vellala Act (1926); Krishnanvaka Marumakkathayee Act (1939).

³ The first and last statutes mentioned in the last note.

⁴ *Narayanan v. Parukutty* AIR 1952 T.C. 558, [1951] T.C. 394. The provisions of and the concept behind the statutes are beyond the scope of this book.

elsewhere in India remarries. In the latter case proof of the divorce is not always readily forthcoming, and the so-called 'deeds of release' which are tendered in lieu of records of a regular divorce can be of questionable validity. But with Malabar divorces there is some security, for either the properly attested divorce-deed can be produced, in which some property is usually settled on one of the parties, or a copy of the divorce-decree is readily available.

Marriage after being divorced

393. We have already seen that the remarriage of persons divorced under the HMA is inhibited by s. 15 (§ 255). This rule does not apply to divorced persons who have taken advantage of s. 29 (2) and been divorced by caste customary tribunal or under the provisions of a continued statute (§ 274). The laws relating to divorce applicable in those tribunals or under those statutes are incompatible with the HMA, and the conditions relating to divorce are saved by s. 4 of the Act. It might be argued with some show of plausibility that the rule in s. 15 applies to all persons whose divorce has been obtained by *decree*, and that it is a rule about capacity to marry and not a rule relating to conditions of a divorce. The better view seems to be that s. 15 is an integral part of the divorce section of the HMA, and its words are applicable only to the machinery of that Act, and to hold otherwise would be an unjustifiable discrimination against those whose marriages are dissolved by *decree* rather than by award or agreement.

Foreign divorces

394. We have already discussed jurisdiction of foreign courts to annul marriages (§ 228). Our discussion will be completed with a summary of the general rules relating to foreign divorces. Generally a valid decree of divorce will operate to put an end to the marriage for all purposes and in all countries.¹ In order to be valid the decree must not be given

¹ For a discussion of s. 13 of the Civil Procedure Code, which limits the operation of foreign judgments, see *R. Viswanathan v. Rukn-ul-Mulk* AIR 1963 S.C. 1, 14, 48, 53. Sri T. S. Rama Rao at (1955) 4 I.Y.B.I.A. 261-70.

in defiance of the rules of natural justice or so as to produce a manifestly unjust result (for then it would not be recognized)¹ and must be a decree of a competent court of the domicile of the spouses² acting within its jurisdiction. Thus if the spouses were married in India, the decree would be a nullity in India as well as in England and elsewhere if they became domiciled in England and had their marriage dissolved in India. An exception must be made for those countries which recognize the decree of a court of the country of nationality of the parties, but that system is not in force in the Commonwealth or in the United States. It is of no significance that the procedure and grounds might be similar, or even identical, in the country where the decree was given and in the country which refuses to recognize the decree. The only court which can dissolve a marriage is the court of the domicile. In certain Commonwealth countries a jurisdiction to dissolve marriages based upon *residence* alone has been created by statute, and as a result of the principle of comity divorces outside the Commonwealth upon a jurisdiction founded upon residence alone have been recognized as valid subject to certain conditions.³ But this relaxation need not detain us further as no trace of it has so far appeared in India, which retains the older requirement as stated above. If *A* and *B*, Hindus married in Bombay, become domiciled in England, reside in Switzerland and are divorced in Switzerland, they are validly divorced from the point of view of English law, but not that of Indian law, whereunder they remain a married couple. The position would have been the same had they been married in Pakistan.

395. The key to the subject is *domicile*. A person has only one domicile,⁴ in the country where he has (subject to special exceptions) his permanent home.⁵ A person is presumed to be domiciled in the country in which he resides, and once established, a domicile is presumed to continue.⁶

¹ Latey on Divorce, §§ 107ff. *Manning v. Manning* [1958] 1 All E.R. 291; *Macalpine v. Macalpine* [1957] 3 All E.R. 134; *Formosa v. Formosa* [1962] 3 All E.R. 419 (CA); *Hari v. Muhammad* AIR 1927 Lah. 200; *Popat v. Damodar* AIR 1934 Bom. 390.

² *C. A. Neelakantan v. Neelakantan* AIR 1959 Raj. 133.

³ *Mountbatten v. Mountbatten* [1959] 1 All E.R. 99, 118.

⁴ Dicey, *Conflict of Laws*, 7th edn, ed. Morris, p. 89.

⁵ Dicey, p. 84.

⁶ Dicey, p. 90.

A legitimate child has at birth the domicile of his father at that time, an illegitimate child that of his mother at that time.¹ This is the domicile of origin, which is not totally destroyed, since it may revive when an acquired domicile is lost.² By residence and intention of permanent or indefinite residence a person may acquire a 'domicile of choice'.³ An intention to remain in a country for a period, however long that period may be, is inconsistent with the intention to remain indefinitely which the law requires for the acquisition of a domicile of choice. It is sometimes a difficult question of fact, whether a person has in fact acquired a new domicile. Minors' domiciles change with the domicile of the father, if the minor is legitimate, or of the mother if he is not, or if he is but his father has died. An adopted child's domicile changes with that of the adoptive parent so long as he is a minor. Where the legal guardian is other than the parent it is possible that the court may hold that the minor's domicile has not changed with the domicile of the parent; and it may change with that of the guardian, though doubts have been expressed on this.⁴ The remarriage of a widow, however, does not necessarily change the domicile of her minor children born to her by her previous marriage.⁵ A woman on marriage acquires the domicile of her husband, and her domicile changes with his, independently of her own volition.⁶ The last domicile of a dependent person continues, on his or her becoming independent, unchanged until it is changed by his or her own act.⁷

396. The question where a person is domiciled is always to be determined according to Indian law, which does not differ from English law,⁸ though it differs somewhat from the laws of the United States and more considerably from those of countries belonging to the Civil law tradition.

¹ Dicey, p. 93.

² Dicey, p. 112.

³ Dicey, p. 95.

⁴ Dicey, p. 117.

⁵ Dicey, p. 118.

⁶ Dicey, p. 119. Regretted, but accepted in *C. A. Neelakantan v. Neelakantan* AIR 1959 Raj. 133 (ignore dictum at p. 135b).

⁷ Dicey, p. 122.

⁸ T. S. Rama Rao, 'Private international law in India,' (1955) 4 I.Y.B.I.A. pp. 219ff, at 219-40.

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CHAPTER SIX

The Joint Family and Partition

THE MITAKSHARA JOINT FAMILY

MEMBERSHIP OF THE JOINT FAMILY AND RIGHTS DERIVED FROM IT

397. The joint Hindu family consists at any one time of at least two related persons within the circle that will be described below. Thus a childless widower, sole surviving coparcener, and holder and ostensible owner of joint-family property, does not in himself constitute a joint family. Yet two widows, whether they be co-widows of the same deceased coparcener, or mother-in-law and daughter-in-law, may constitute a joint family.¹ Even if the members live apart and never correspond they may still be joint; and this must be the case even where, as with co-widows or daughters under the system in force in India before 17 July 1956, a separation for convenience of living cannot alter the jointness of their tenure of property inherited from their husband or father.²

398. Unless a partition occurs between the coparceners (§ 515) or other members of the family who have acquired separate rights by statute in the coparcenary property, the following persons are members of the joint family: (i) the coparceners; (ii) their mothers or step-mothers; (iii) their wives, even if separated from them by agreement or decree; (iv) their unmarried daughters; (v) the widows and unmarried daughters of coparceners who died in a state of jointness with at least one other coparcener; (vi) their illegitimate sons by permanently-kept concubines; (vii)

¹ *Comm. of I.T. v. Sarwankumar* AIR 1945 All. 286, 288-9. Note that for income-tax purposes the income of a sole coparcener may be treated as his personal income: *Comm. of I.T. v. Swamy Gomedalli* AIR 1937 P.C. 239, 169 I.C. 7. In general income-tax problems are beyond the scope of this book.

² § 693.

by consent of all coparceners competent to give consent (there being no male minor coparcener), the illegitimate daughters of the same; and (viii) married daughters whose husbands by custom of the caste take up permanent residence in the parent-in-law's home. The rights of such sons-in-law (known as *gharjamai*, etc.) have been judicially recognized¹ and they have been mentioned in connexion with adoption (§ 201).

399. These persons (with the exception of the illegitimate daughter if the consent mentioned above is not forthcoming: § 36) are entitled to be maintained at the expense of the joint-family property as a whole.² The term 'maintenance' includes residence, food, clothing, medical attention, education, and marriage expenses and dowries (where customary, and subject to the Dowry Prohibition Act: § 217). The second marriage of a coparcener may be a legitimate joint-family expense if it is in the interest of the family (as it often is) that widowed coparceners should remarry.³ In parts of the world where polygamy is still not illegal the expenses of a coparcener's second marriage during the lifetime of the first wife may be charged to joint-family funds if it is exceptionally for the family's benefit, for it is presumed that such marriages are in no case a necessity, and the expenses are not to be charged to the family as a matter of course.⁴ The expenses of a marriage of a member below the statutory minimum age for marriage (§ 238) can never be an allowable family expense.⁵

400. Where members of the joint family own separate assets, as a coparcener may own separate property, or a female member may own inherited property, earnings or (under the former system) the separate estate called *stridhanam*, the rate of maintenance may be affected, to the extent that the needs of the less fortunate will reduce the entitlement of the more fortunate (§ 26), but the right to be maintained subsists

¹ *Nibaran v. Lalit* AIR 1939 Cal. 187, 190, [1938] 2 Cal. 368.

² *Cherutty v. Nagamparambil* AIR 1940 Mad. 664, [1940] Mad. 830; *Subbayya v. Ananta* 53 Mad. 84, 97, AIR 1929 Mad. 586.

³ *Bhagirathi v. Jokhu* (1910) 32 All. 575.

⁴ *Dicta in Thimma v. Chinna* AIR 1947 Mad. 65, [1947] Mad. 379 are relevant.

⁵ *Birupakshya v. Kunja* AIR 1961 Or. 104.

in full vigour. In *N. Varahalu v. N. Sithamma*¹ a Full Bench of the Andhra Pradesh High Court considered the position of a widow, who had sufficient means of her own, but claimed past and future maintenance from the coparceners. The considerations listed by the Privy Council,² having a bearing on the determination of the amount of maintenance to be awarded, were held to be exhaustive. The right to maintenance is not related to any want of means, but to membership of the deceased husband's family, and is historically the relic of a share. The only deductions which could be made from the allowance (not exceeding the income of the late husband's share) which would keep her in the same degree of comfort, if possible, as she had enjoyed during his lifetime, would be on account of properties, yielding an income, given or (it is submitted) bequeathed to her by her husband or his father.

401. When the right to be maintained is threatened by mismanagement the remedy of the coparceners (except in certain cases in Maharashtra and Gujarat, where a different remedy may apply, § 517) is to sever, to demand their shares, and to ask for accounts, or even (exceptionally) the appointment of a receiver. The non-coparcener may sue for a charge to be created over all or a part of the property for maintenance in a specified monthly sum,³ or for maintenance out of the property in the hands of alienees.⁴ This last right accrues only where the transfer was gratuitous (for the manager cannot be prevented from selling *bona fide* at the market value), or where, if it was for value, the alienee had notice of the rights of the persons entitled to maintenance in question.⁵ Where no charge has been created the person entitled to maintenance has no right over the property in the alienee's hands, whether or not maintenance is available to him or her out of remaining joint-family property. The problem arises acutely with reference to residence. A female member's right of residence cannot

¹ AIR 1961 An. P. 272 (FB), relying on *N. Annapurnamma v. P. Veeraraghava* AIR 1940 Mad. 547, [1940] 1 M.L.J. 608, and disapproving of Bombay and Calcutta decisions.

² *Ekradeshwari v. Homeshwar* AIR 1929 P.C. 128, 56 I.A. 182, 31 Bom. L.R. 816.

³ Cf. § 39.

⁴ Cf. § 663.

⁵ Transfer of Property Act, s. 39. *Dan v. Sarla* AIR 1947 P.C. 8, 73 I.A. 208.

easily be defeated. The alienee, even if he had no notice of her right, must find her accommodation.¹ Yet debts binding on the family will support an alienation such as will enable the purchaser to oust a female member even without providing an alternative residence.² A right of residence is not a legally transferable interest, any more than is a right to future maintenance, which is personal and unassignable.³ An unmarried daughter has the same right as any other female member until her marriage, and all widows with a right of residence lose that right when they remarry, and, except where custom otherwise provides, remarriage severs their connexion with and ends their claims upon their previous family. If a coparcener's interest is taken in execution for his *private* debts one might suppose that his wives and unmarried daughters would be entitled to residence on the property sold or to alternative accommodation from the alienee. However, because they cannot be in a better position than the judgment-debtor's male issue who are liable under the Pious Obligation (§ 503) they have no claim for residence against the auction-purchaser.⁴

402. The coparceners or a surviving coparcener cannot defeat a widow's right to maintenance merely by selling the family property and spending the proceeds. To the extent of the family property which came into their or his hands they or he may personally be liable for her maintenance. They or he can discharge themselves of this liability only by showing that the property was applied for family purposes that took priority over the present right of maintenance. This rule, the rule in *Chumilal v. Bai Saraswati*,⁵ provides a valuable protection for non-coparcener members of the family, which will operate to save them from hostility or fraud, though not, of course, from incompetence. It was for this reason that a movement demanding absolute shares for persons previously entitled to maintenance culminated in the provisions of the 'Hindu Code'.

403. The discretion of the manager (§ 421) is absolute, and it is his function, not that of the senior male or female

¹ *Bai v. Sanmukhram* (1889) 13 Bom. 101.

² *Jayanti v. Alamelu* (1904) 27 Mad. 45.

³ *Subraya v. Krishna* (1923) 46 Mad. 659, AIR 1924 Mad. 22 (FB).

⁴ *Suriyanarayana v. Balasubramania* (1920) 43 Mad. 635, 38 M.L.J. 433.

⁵ AIR 1943 Bom. 393, 45 Bom. L.R. 747.

member other than the manager, to determine what proportion of joint-family funds shall be spent upon which members, and for what purposes.¹ There is no obligation upon individual members to bring into the common chest what they earn (§ 549) otherwise than as a direct result of the use or prejudicial immobilization of joint-family assets (however small in extent). To this proposition there is a general exception that gains of learning, that is to say the acquisitions due to instruction or training (§ 547), are in any event acquired as separate property, even if joint-family monies were spent on the education. The maintenance of members, therefore, lies as a heavy burden upon ancestral and joint-family funds, and it is consistent with membership of the joint family that *X* should be maintained to the full extent of his needs whilst contributing nothing to the common chest from his salary. Coparceners who do not relish this situation have a remedy in partition: others must adopt other tactics as occasion offers. Fortunately life in a joint family encourages a sense of corporate responsibility rather than separate ambitions, and sharing is more common than insistence upon rights.

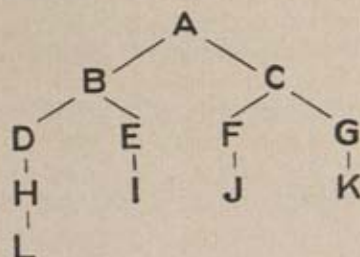
THE COPARCENARY

404. By tradition the coparceners are the masters or 'owners' of the joint-family property. This consists of ancestral property and all other property which would be available for distribution at a partition (§ 547). This concept of 'ownership' is convenient, but misleading. When non-coparceners may obtain charges on any part of the property for their maintenance, and may commence actions against transferees of the property, the coparceners certainly do not exhaust between them rights amounting to ownership. Yet it is the coparceners (subject to statutory rights discussed below) who may alienate the property, may challenge alienations, and may demand partition and accounts. They are the principal sharers at a partition, and their immediate dependants will look to those shares for their subsequent

¹ For the manager's width of discretion in these matters see the observations of Mitter, J., in *Abhaychandra v. Pyari* (1870) 5 B.L.R. 347, 349 (FB) and of the Privy Council in *A. Perrazu v. A. Subbarayadu* (1921) 48 I.A. 280, 44 Mad. 656. Mayne, 11th edn, pp. 367-9.

maintenance. It is from amongst them that the manager will be chosen. The expression that the joint-family property *vests* in the coparceners is useful, but not accurate. We cannot avoid it, but when we speak of the 'vesting' we must remember that it has a technical significance in this context.¹

405. Membership of the coparcenary is confined to the male descendants in the male line from a common male ancestor up to four degrees inclusive. This range corresponds to the 'living *sapindas*' mentioned above (§ 242). In the following diagram all are coparceners except *L*.² When the common ancestor, *A*, dies *L* automatically becomes a coparcener as if he had then been conceived, but with retrospective effect so far as a right to participate in joint-family funds at partition is concerned.



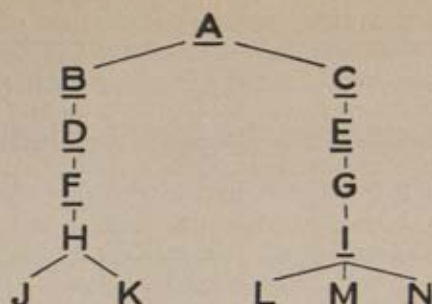
406. In the diagram on p. 250 the coparceners underlined died in the order of nature (except for *I*, who predeceased his father). The remainder are coparceners. Most are more than four degrees inclusively removed from their common ancestor. He, or any other deceased member, may have acquired any item of their coparcenary property (§ 525). But the coparceners are coparceners, even so, because the generations overlapped, and at no time has a gap of four degrees occurred in either branch.³

407. Membership of the coparcenary is acquired by legitimate birth (it then relates back to conception) or by valid adoption (§ 178) of a male child. The special case of the *dasiputra* (§ 32) of a man of Sudra caste by a Sudra female,

¹ *Att. Gen. of Ceylon v. A. Arunachalam* [1957] A.C. 513, 60 Bom. L.R. (J.), 161ff.

² *Moro v. Ganesh* (1873) 10 B.H.C.R. 444.

³ *Dasharathrao v. Ramchandraro* AIR 1951 Bom. 141, 53 Bom. L.R. 576.



who is not born a coparcener, must be discussed separately (§§ 33, 410, 526). Membership is lost by partition when the coparcener severs in status from the other or others, and by being given in adoption to a stranger. Attempts are made from time to time to claim that coparcenaries exist, the membership of which is spread between two different families which live and work together. These so-called 'composite' families may be allowed if a custom can be proved in favour of such a usage. Otherwise they are unknown to the law, and claims to 'survive' to the interests of deceased members of an associated family are not recognized.¹

408. No individual member of the coparcenary can claim before partition (in which he participates) that he owns a certain definite share either of the corpus or of its income.² The rights of a coparcener are (i) to be maintained; (ii) to demand partition and an account of the state of the family property; (iii) to become manager if the managership is vacant and no coparcener effectively objects; (iv) to alienate (in South India only) in effect his undivided interest in the joint-family property; and (v) to take, so long as he remains undivided, by survivorship so much of the interests of deceased coparceners as will serve proportionately to increase his presumptive share, which will become ascertained for the first time at partition. Thus coparceners have a community of interest and of possession of the joint-family property³ and are comparable with joint-tenants at English

¹ *A. Veerapa v. G. Venkaiah* AIR 1962 An. P. 534.

² *Appovier v. Rama* (1866) 11 M.I.A. 75.

³ *Katama v. Moottoo* (1863) 9 M.I.A. 543, 615.

law with benefit of survivorship,¹ save that their individual rights commence independently and by operation of law, not by transfer between parties. No one can create a coparcenary interest, any more than he can create, with a stranger, a joint Hindu family.² He can, no doubt, provide in, for example, a will that property over which he exercises a right of disposition shall be enjoyed by the transferees as if it were Mitakshara joint-family property and they were coparceners at Hindu law in respect of it: but that is a different matter.

409. A 'disqualified coparcener' is one who, by virtue of congenital lunacy or idiocy, is disentitled to claim partition. He is disqualified, also, it is usually supposed, from manager-ship. Outside British India, wherever the Hindu Inheritance (Removal of Disabilities) Act, 1928, was not extended before 1959,³ the ancient disqualifications persisted. These corresponded to the disqualifications from adopting or being adopted (§ 142, cf. § 595). In spite of some doubts it appears that a disqualified coparcener is still entitled to become sole surviving coparcener and to enjoy full coparcenary rights, including the right to alienate undivided property, short of actual institution of partition.⁴ This right itself remains in abeyance until cure. Others retain their right to sever from him.⁵ The male issue of a disqualified coparcener are not deprived of their rights by reason of his disqualification.⁶ In the former Travancore State there have been no disqualified heirs or coparceners since 1939, by reason of a state statute which is still in force.⁷

¹ The analogy with English law, though imperfect, is established: *In the matter of the Hindu Women's Rights to Property Act*, AIR 1941 F.C. 72, 77.

² *Bahu v. Rajendra* AIR 1933 P.C. 72, 60 I.A. 95; *K. Subbayya v. M. Sitaramamma* AIR 1959 An. P. 86, [1958] 2 An. W.R. 59.

³ Misc. Personal Laws (Extension) Act, Act 48 of 1959, Sch. I.

⁴ *Kesava v. Govindan* [1946] Mad. 452, AIR 1946 Mad. 287. *Deonath v. Lekha Singh* AIR 1946 Pat. 419 appears to be wrong. See *K. V. Venkatasubramanya Iyer* in [1942] M.L.J. (Jour.) 63ff. The case of *Venkatalakshammammal v. Balakrishnachari* AIR 1960 Mad. 270 seeks inadequately to distinguish *Kesava's case* and appears to be wrongly decided.

⁵ *Ratneshwari v. Bhagwati* AIR 1950 F.C. 142, 146, [1949] FCR 715, [1950] S.C.J. 514.

⁶ *Krishna v. Sami* (1885) 9 Mad. 64.

⁷ Travancore Hindu Inheritance (Removal of Disabilities) Act, 1114 ME. *Parameswaram v. Narayana* AIR 1961 Mad. 345: § 595.

410. If a coparcener is deprived of enjoyment of the joint-family property he has a right to sue for possession and reinstatement and for mesne profits, that is to say his maintenance day by day during the period of his deprivation or exclusion.¹ No coparcener may sue for separate possession of any particular portion of the joint-family property and if he holds some portion *denying the title* of the other coparceners it is possible for him to acquire it as his separate property by adverse possession: the normal presumption that one joint owner cannot hold adversely to other joint owners being rebutted by his denial and ouster of the other members.² Needless to say, a Sudra's *dasiputra*, being no true coparcener (§ 407), can hold adversely to the coparceners,³ unless they are exclusively his brothers (§ 526).

411. Since on the death of a father his separate property (or divided share) passes to his sons as ancestral property between them and the sons and grandsons of each of them (the 'male issue') — a position which persists notwithstanding the reforms of the Hindu Succession Act — it is not uncommon, where a father dies in the lifetime of the grandfather, to find a grandson who is a member of a coparcenary in two distinct capacities.⁴ A man may be a member of several coparcenaries simultaneously if he is coparcener with his brother or brothers in respect of his father's estate, and coparcener with them and his uncles and cousins in respect of his grandfather's estate. The legal principles applicable to these coparcenaries 'within' other coparcenaries are the same as those applicable to the parent coparcenary. It is to be noted, however, as against the general rule envisaged above, that a share which a father takes at a partition does not *necessarily* descend as coparcenary property to his sons: if they themselves are separated in interest (irrespective of possession) they must take it, if at all, as tenants-in-common, and their own male issue have no 'birthright' therein.⁵ This is (somewhat unexpectedly) the

¹ *Venkata v. Ct of Wards* (1882) 5 Mad. 236; *Krishna v. Subbanna* (1884) 7 Mad. 564.

² *Kumarappa v. Saminatha* AIR 1919 Mad. 531, 42 Mad. 431.

³ *Munusami v. Swaminatha* AIR 1953 Mad. 25, [1952] 2 M.L.J. 239.

⁴ *Shyam v. Rameshwar* (1941) 20 Pat. 904; *Sidheshwar v. Bhuvaneshwar* AIR 1953 S.C. 487, 491.

⁵ *Ragho v. Shantabai* (1957) 59 Bom. L.R. 999, AIR 1957 Bom. 274; *M. D. R. Ranganatha v. M. D. T. Kumaraswami* [1961] 1 M.L.J. 404.

position at pure Mitakshara law, as worked out by the courts. Under the Hindu Succession Act the sons, along with other intestate heirs indicated in Class I of the Schedule (§ 601), must take the property of their intestate father as tenants-in-common in all circumstances, but their male issue will have a birthright as before.

OWNERS OF COPARCENARY INTERESTS OTHER THAN COPARCENERS

412. Formerly in British India since 14 April 1937 and in certain Princely States of India and other states from shortly after Independence, the Hindu Women's Rights to Property Act was in force until it was repealed by the Hindu Succession Act, 1956.¹ By an unfortunate oversight the statute was passed in the Indian central legislature only, which was not entirely competent to legislate, under provisions of the 1935 Constitution, concerning the devolution of interests in agricultural land.² Some provincial statutes (the defect applied only to the governors' provinces) enacted provisions corresponding to the original Act, and this, with subsequent retrospective amendments, applied thenceforward to all property. A few provinces, now States, for example Bengal and, until very shortly before the repeal of the main Act, the Central Provinces and Berar, neglected to extend the original Act, with the result that leases, mortgages and all interests in agricultural land fell outside the operation of the statute, and the Anglo-Hindu law and that law as amended by the Hindu Women's Rights to Property Act operated simultaneously on the various categories of a deceased intestate Hindu's estate. The statute produced effects which will long be felt, and its provisions must be regarded as in a sense current law.

413. Without disturbing the widow's right to maintenance³ it was provided by s. 3 (2) of that Act (see App. III, p. 627

¹ By s. 31 (itself repealed in 1960).

² *In the matter of the H.W.R.P. Act 1937* (cited above).

³ *Rathinasabapathy v. Saraswathi* AIR 1954 Mad. 307, [1953] 2 M.L.J.

below) that the widow, or all the widows together, should have in Mitakshara joint-family property the same interest as the deceased husband himself had. As a result she did not actually become a coparcener,¹ but from the relevant date and in respect of property within the scope of the relevant statute she stepped into her husband's shoes and became an owner, by statute, of an ordinary Mitakshara undivided coparcenary interest. The right to demand partition as if she were a male owner was specially conferred on her (s. 3 (3)), and the same subsection provided that whatever rights she should take under the statute should be subject to the limited interest known as the Hindu woman's estate.

414. The widow was entitled under s. 3 (2) to take her husband's interest as sole surviving coparcener,² but the share he took at a partition could not pass to her under the Act since it did not come within the definitions of 'separate property', which means self-acquired property, in s. 3 (1), or 'an interest in a Hindu joint family property' in s. 3 (2).³ Similarly property which he received in a settlement of a dispute concerning the joint-family estate cannot be within the section.⁴ Another view, that it passed under s. 3 (2) to the widow because it was *potentially* joint-family property (becoming so, e.g., by the adoption of a son under the old system by the widow, or the conception of a son by a wife of the owner himself) has obtained the force of law in Madras and Bombay.⁵ For the question whether an unchaste widow might take advantage of the Act (the better view is that she could not) see below (§ 595).

415. The widow who has taken under s. 3 (2) was until 1956 entitled to all the rights of a coparcener, that is to take by survivorship,⁶ to question alienations,⁷ to alienate

¹ The dicta in *Manorama v. Rama* AIR 1957 Mad. 269 equating the widow with a coparcener went too far: *Lakshmi v. Ramachandra* AIR 1960 Mad. 568, 571.

² *Umayal v. Lakshmi* AIR 1945 F.C. 25, [1945] 1 M.L.J. 108, [1945] FCR 1.

³ *C. Seshamma v. C. Ramakoteswara* AIR 1958 An. P. 280, [1957] 2 An. W.R. 287. ⁴ *K. Lakshmanamma v. K. China* AIR 1961 An. P. 505.

⁵ *A. N. Subramanian v. A. S. Kalyanarama* AIR 1957 Mad. 456, [1957] Mad. 565; *Jana v. Parvati* (1957) 60 Bom. L.R. 553, AIR 1958 Bom. 346.

⁶ *Nagappa v. Mukambe* AIR 1951 Bom. 309, 53 Bom. L.R. 177; *Bhondu v. Ramdayal* AIR 1960 M.P. 51 (FB).

⁷ *Lakshmi* (cited above); *Shivappa v. Yellawa* AIR 1954 Bom. 47.

her interest (if her husband could have alienated his,¹ though Orissa and an early Patna decision wrongly take the view that she, as a statutory owner, may alienate even when he could not have done so²), to demand partition, to demand accounts³ and to reunite.⁴ But if she alienated beyond the powers of a limited owner (§ 678f) the reversioners (or coparceners, see below) might recover the property after her death, forfeiture, or surrender as the case might be (§ 695f.).⁵ She was liable to pay the debts of her deceased husband, and her interest was as liable to be attached and sold in execution as it was when it was his.⁶ And she was not more entitled to an account prior to partition than her husband would have been.⁷

The decisions relied upon above proceed upon the assumption that the widow took an interest which was by nature a coparcenary interest. A discordant decision in Orissa⁸ laid down that when one of two widows died, who had survived two coparceners, the interest owned by the deceased did not pass by survivorship to the other, since *inter se* the widows held as tenants-in-common. As we shall see (§ 416) this did not accord with either of the more accepted points of view on that subject. In *Manicka v. Arunachala*⁹ Jagadisan, J., in the Madras High Court, relied upon it for the proposition that a widow owning an interest could not take by survivorship from the sole surviving coparcener, on the ground that the right to take by survivorship belonged in such circumstances only to a real coparcener. The correctness of the decision must be doubted.

416. A sharp disagreement arose over the effect of the widow's death after the division of the property by metes and bounds at her instigation or after the coparceners had

¹ *Dagadu v. Namdeo* AIR 1955 Bom. 152, 56 Bom. L.R. 513; *Hemant v. Somenath* AIR 1959 Pat. 557, 560-1.

² *Kunja v. Bhagaban* AIR 1951 Orissa 35; *Pem v. Bandhu* AIR 1958 Pat. 20. ³ *Nepur v. Sheochand* AIR 1961 Pat. 57.

⁴ *Manorama* (cited above). ⁵ *Dagadu* (cited above).

⁶ *Saradambal v. S. Subbarama* AIR 1942 Mad. 212 [1941] 2 M.L.J. 862; *Thimmi v. M. V. Venkatarama* AIR 1960 Mad. 347, [1960] 2 M.L.J. 125.

⁷ *Seethamma v. Veeranna* [1950] Mad. 1076; *Nepur* (cited above).

⁸ *Keluni v. Jagabandhu* AIR 1958 Or. 47.

⁹ [1961] Mad. 1016, [1961] 2 M.L.J. 483. See [1963] 1 M.L.J. (Jour.) 20.

separated from her. If she died after completing partition, that is to say after receiving the share absolutely, it was held by Hidayatullah, C.J., (as he then was) that the share reverted to the remaining coparceners or owners of coparcenary interests, since the provisions of s. 3 (3) did not control what should happen after the widow's decease.¹ This appears to be correct: survivorship had been interrupted for limited purposes, and once these were satisfied it should revive if possible. Other decisions, more widely noticed, took the view that whereas the coparceners, etc., re-acquire a right which had been suspended in the widow's interest if she did not separate, her share devolved if she *had* separated on the reversioners of the husband, who might be the daughter or daughter's son, and quite probably not the surviving coparceners at all.² The Andhra Pradesh High Court, after considering the case law, found that the Act's provision that she should take a woman's limited estate determined in favour of the reversioner (in this case the daughter) if she asked for partition; and Sanjeeva Row Nayudu, J., said *obiter* that she could not become a coparcener, no one could take by survivorship from her, and the husband's heir would take on her death *whether or not* she claimed her share by partition.³ This last seems to go too far. Yet another dispute arose over what was required in order that a widow *could* separate. It was held by some, including Hidayatullah, C.J., that the mere demand, or even the filing of a suit for partition, would not be sufficient to enable her to acquire her share — she must live until actual partition.⁴ This appears to be a mistaken transference of a rule appropriate to partitions at Mitakshara law (§ 526): her right to partition as if she were a 'male owner' might not give her a right to disrupt the coparcenary permanently, but it left her with the capacity to sever as a coparcener severs. Thus it has been held correctly in Patna that an unequivocal communication of a settled intention to

¹ *Bhagobai v. Bhaiyalal* AIR 1957 M.P. 29; *Harekrishna v. Jujesthi* AIR 1956 Or. 73 (dictum).

² *M. Subba v. M. Krishna* AIR 1954 Mad. 227, [1953] 2 M.L.J. 561; *Parappa v. Nagamma* AIR 1954 Mad. 576, [1954] Mad. 183 (FB); *Sabujpari v. Satrugghan* AIR 1958 Pat. 405.

³ *K. M. Ramaswami v. P. K. Lashmamma* [1962] 2 An. W.R. 238, 249.

⁴ *Shamrao v. Kashibai* AIR 1956 Nag. 110, [1955] Nag. 728.

separate (§ 519) will serve to vest a share in her as if she were a separating coparcener.¹

417. One of the effects of the HSA was to convert into absolute interests the undivided limited interest held by widows under the Act of 1937 (or its associated Acts), provided that the property in question was 'possessed' by the widow in fact or in the eye of the law at the time the Act came into force.² It is to be noted that the widow entitled under the Acts has since 1956 an absolute interest in a *coparcenary* interest, which did *not* thereby cease to fluctuate and to be subject to the manager's ordinary rights of management and representation. This is not the case with the interest in coparcenary property which comes to a widow *under* the HSA (s. 8) : see below, § 418.

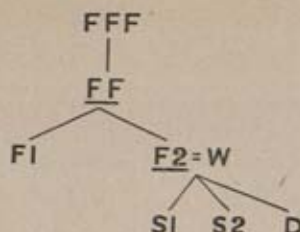
418. Along with these statutory owners of absolute interests in the nature of coparcenary interests, there have arisen since 17 July 1956 innumerable instances of inheritance of fractions of a coparcenary interest (§ 598). Each heir is entitled to demand his share which he holds, in that character, with himself and other coparceners. The coparcener-heir has in this respect more in common with a non-coparcener heir, such as a widow or daughter, for the share in a coparcenary interest taken under s. 8 (read with s. 6) of the HSA cannot fluctuate, for it has been statutorily quantified.³ In all other respects it is indistinguishable from a normal coparcenary interest. This may be illustrated by an instance which is typical.

FFF is alive; his son FF died leaving separate property in 1950; and his son's son, F1 is alive, while another son of FF, F2, died in 1960 leaving a widow, W, two sons, S1 and S2, and a daughter, D. S1 is a coparcener in respect of coparcenary property in which FFF has an interest, along with F1. S1 is also a coparcener with F1 in respect of property left by FF (see § 411). S1 is a non-coparcener sharer along with S2, W, and D in F2's separate estate. S1 is also a sharer in the coparcenary

¹ *Hemant v. Somenath* AIR 1959 Pat. 557, 562; *Rathinasabhapathy* (cited at § 413); *Sabujpari* (cited above). Preliminary decrees for partition cause a vesting in any event: *Alamelu v. Chellammal* AIR 1959 Mad. 100 (FB) (leaving room for doubt? The case is in any event differed from in Andhra Pradesh (above)).

² § 676. *K. Sri Sankara v. K. Rajyalakshamma* AIR 1961 An. P. 241.

³ '... the interest ... shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death ...': HSA, s. 6, expl. 1.



interest which F_2 had in the major coparcenary, that headed by FFF, and the minor coparcenary in respect of the property of FF. In this last group of interests S_1 's share amounts to $\frac{1}{8}$, i.e. one-eighth of the minor coparcenary's property, and one-twelfth of the major coparcenary's property (§ 524). Whereas S_1 's interests which do not derive from the death of his father will fluctuate and be increased (a) by the death of F_1 (if F_1 leaves no nearer heir than a brother's son joint with himself) and (b) by the death of FFF (if W predeceases FFF: see § 601), the $\frac{1}{8}$ to which we have referred remains fixed.

419. There is a practical difference between the situation of a widow and a son who is joint at Mitakshara law. The share in the coparcenary property which the widow inherits, whether she takes it by intestate succession or by a legacy, cannot be merged (§ 549) in the joint-family property, for she is not a coparcener.¹ The share taken by the son however can be merged, and indeed many such mergers must be presumed to have taken place by virtue of the heir's or legatee's conduct. The widow can give the property to the sons and others on condition that if they do not merge it or if they cease to maintain her at a stipulated rate out of it it shall revert to herself, and that seems to be the nearest that a widow can get to re-establishing the situation that prevailed prior to the passing of the HSA.

420. The State is not an owner of a fraction of the interest of a deceased coparcener to the extent that assessable Estate Duty in respect of his interest has not been paid,² for although in such cases the State appears to be an heir along with true heirs, it is in no different position from the State as the body entitled to income-tax, expenditure-tax, or wealth-tax, all of which have to be paid by undivided Hindu families. The State is a creditor in all these instances.

¹ *Mallesappa v. Desai* AIR 1961 S.C. 1268.

² Estate Duty Act, 1953, ss. 2 (12), 5, 7, 39 (1).

The law relating to assessment and levy of these taxes is outside the scope of this book.

THE MANAGER

Identity, commencement and termination of the position of the manager

421. While in fact all joint Hindu families have managers, a family may lack the individual known to the law as the 'manager' or 'managing member'. He is to be distinguished from *de facto* managers (whose powers are limited and are not derived from the Hindu law) and guardians. We have seen that the legal guardian of minor coparceners does not have all the powers of a manager of a joint Hindu family (§§ 90, 95), though the gap between them is perceptibly narrowing. Even the appointed guardian of the interests of minor coparceners (§ 68) is not to be confused with the manager—indeed the manager cannot be appointed guardian of their interests under the HMGA, the characters being incompatible.¹ His powers are far more restricted. His importance derives solely from the authority which he derives *ad hoc* from the court's approval of his schemes.

422. The manager properly so called (often referred to as *karta*) is the senior coparcener who has not retired from the position and who is not disqualified by insanity or otherwise from social intercourse and responsible dealings with the world at large on behalf of the family. In *Man Singh v. Gaini*² it was held that a father suffering from virulent leprosy, and apparently no longer resident with his family, might yet, as manager, alienate the family property for legal necessity (§§ 437-8); but where he has competent collaterals a leper will hardly purport to act as manager. There is a presumption that the eldest undisqualified coparcener is the manager.³ This is readily rebutted by

¹ *In re Krishnakant* AIR 1961 Guj. 68. But see § 68 for the exception.

² (1918) 40 All. 77. During an inquiry whether a disqualified coparcener may make a voluntary alienation of his interest, doubts were cast upon this case in *Mool Chand v. Chahta* [1937] All. 825, 832 (FB). See also Mayne, p. 721, n. (w), and § 409 above.

³ *J. Sreerama v. N. Krishnavenamma* [1956] An. W.R. 565, AIR 1957 An. P. 434.

evidence that the family are represented by a junior coparcener and hold him out as their representative.¹

423. Where all coparceners are minors there may be a 'domestic manager' (for want of a better name) having authority to conserve and control the enjoyment of the joint-family property. His guardianship of the interests of junior members, and his right to determine the proportionate shares in the income of persons for whose maintenance he is responsible, is undoubted for, apart from purely practical considerations, the GWA recognizes the position in s. 21.² But in all contractual dealings with strangers, as with his own relatives, he is no true manager so long as he is a minor, for he cannot contract, or create rights binding even upon himself, except so far as the law allows in the case of a minor. His own guardian, we have seen, is no true manager. The 'domestic manager' becomes a true manager on reaching majority. Dicta that a minor *karta* can act as such through his guardian³ are true only within the limits of a *guardian's* powers: they are not the powers of a manager as such.

424. Since the powers of the manager are founded upon his being an 'owner' of coparcenary property — for he binds himself by all proper acts which bind his coparceners — it is questionable whether a female, who cannot be a coparcener,⁴ is entitled to act as a true manager when she had acquired an interest in coparcenary property by virtue of a statute (§ 412). According to a progressive view there is no reason why she should not.⁵ The stricter view has been adopted by Madras, Bombay, and Patna. The reasoning, namely that she is not a coparcener and that the statutes must be taken to have disturbed the Hindu law only so far as is necessary for their purposes, is technically sound,⁶

¹ *Ghasiram v. Hiral* AIR 1954 M.P. 67, [1953] M.B. 147.

² *Trimbak v. Lonkaran* [1948] Nag. 393, AIR 1948 Nag. 324.

³ *Trimbak* (cited above), agreed with in *Budhi v. Dhobai* AIR 1958 Or. 7.

⁴ § 413.

⁵ *Comm. I.T. v. Laxmi* AIR 1949 Nag. 128, [1948] Nag. 775; *Budhi* (cited above): a weak authority for this purpose, especially in view of the conflict with *Maguni v. Lokanandhi* AIR 1956 Or. 1).

⁶ *Radha v. Comm. I.T.* AIR 1950 Mad. 538, [1950] 1 M.L.J. 399; *Rakhmabai v. Sitabai* (1951) 54 Bom. L.R. 55, 58.

however great the inconvenience that must often result.¹ A family with no adult coparcener must make do with the powers which by law inhere in the minors' guardian or guardians or are conferred upon an appointed guardian by the court. When a capacity for business becomes more widespread, and in particular for the types of business in which a well-to-do family involves itself, the practical motive for denying full coparcenary status to female owners of coparcenary interests will disappear.

425. As the manager is not chosen or elected formally (such notions being repugnant to traditional Hindu manners), but holds his position by the agreement or sufferance of the other coparceners and females owning interests in coparcenary property, so too he is not liable to be formally deposed or dismissed. He ceases to be manager by voluntary retirement or by the separation of all other holders of coparcenary interests from him. The threat of partition normally keeps a self-willed manager within tolerable bounds since a partition in circumstances of mutual disagreement frequently causes loss of prestige as well as financial loss. The function of the manager inevitably ceases when separation leaves him alone, or when he dies, for his power of management cannot survive him. He cannot renew promissory notes so as to bind coparceners after partition (unless the debt was binding on them or some of them under the Pious Obligation),² nor can he manage or dispose of the property by his testament.

Responsibilities and liabilities of the manager

426. Before considering how the manager may bind his coparceners and other members of the family it is essential to grasp the fiduciary position of the manager.³ Not being their agent,⁴ nor a trustee (nor a trustee-beneficiary), in a

¹ *Sheogulam v. Kishun* AIR 1961 Pat. 212.

² *Rengaswami v. Sivaprakasam* AIR 1941 Mad. 925, [1942] Mad. 251 (FB); contrast *Somasundara v. K. P. Narasinhachariar* [1939] Mad. 140, AIR 1939 Mad. 69.

³ *A. Perrazu v. A. Subbarayadu* (1921) 48 I.A. 280, 44 Mad. 656 (PC), AIR 1922 P.C. 71, 73.

⁴ *Kandasami v. Somaskanda* (1910) 35 Mad. 177.

strict sense,¹ he is not liable for positive failure to, for example, invest assets, to save, or to produce periodical accounts in any particular, or any, form. He is not bound to pay out the income in any fixed proportion, and he can with impunity go back on any agreement he has entered into with coparceners that he will do this. He is not obliged to treat the members with strict impartiality, nor to maintain them equally comfortably. He obtains no reward for his services, and the onerous responsibility of managing the family's concerns and of being their sole representative *vis-à-vis* the government and other strangers is matched by the complete faith and confidence which the family (so long as they remain joint) must repose in his discretion within the sufficiently wide limits laid down by the Hindu law. Of the coparceners it is fair to say that they, and the statutory owners, waive their rights against him, if any, for incompetence, mismanagement, favouritism and any fault short of misappropriation and fraud simply by remaining joint with him. They have, for example, no rights against him for allowing debts owed to the family to become time-barred by his negligence, in the absence of fraud or collusion.² Minor unmarried daughters of deceased coparceners, who have no right to demand partition, must, it seems, make the best of their manager and hope that regard for the family's prestige will induce him to arrange good marriages for them. They are not entirely without rights in this direction. Even prior to the marriage the court may order the estimated costs to be fixed, charged on the property, or deposited, and the girl, or her mother or holder of her power of attorney, may be empowered to draw them out on conditions assuring the *bona fides* of the claim.³

427. The manager is responsible for the maintenance of the members of the family and if he improperly excludes a member he may be sued for maintenance and for arrears of maintenance (§ 408). His personal liability where he cannot explain how funds came not to be available for maintenance has already been shown (§ 402). On receipt of notice of partition he must prepare accounts of the state of the family

¹ *R. M. N. Ramanathan v. Narayanan* AIR 1955 Mad. 629, [1956] Mad. 282.

² *Jyotibati v. Lacchmeshwar* AIR 1930 Pat. 260, 126 I.C. 372.

³ *Alagammai v. Veerappa* AIR 1956 Mad. 428, [1956] 2 M.L.J. 193.

property and make these available to the separating coparceners, arbitrators or the court as the case may require. His liability to account at this juncture is of great importance to all parties. Ordinarily the manager is liable to render an account only of the existing state of the property.¹ At a partition the manager becomes personally liable if when a *prima facie* case has been made out that there are deficiencies in his accounts, or where fraud or misappropriation is distinctly alleged, he cannot show that assets proved or admitted to have been received by him have been spent on purposes that come within his legal powers.² The coparcener separating is by no means obliged to accept the manager's schedules of assets available for partition, for items may have been omitted in error; and the court may determine whether his alleged expenditure did in fact take place, by way of directing a general account to be taken of the management.³ This does not, however, permit coparceners' 'fishing' in order to find out if there have been misappropriations, by way of vague allegations in their complaints.⁴ It is thus possible for the manager to be held accountable personally for any assets unaccounted for in partition proceedings.⁵ In such a context only is it permissible to investigate the transactions of the manager occurring prior to partition. He is in no circumstances liable to account for what he might have received had he invested the property more prudently.⁶ Needless to say, after partition the manager is normally a custodian of the shares of separated members and he owes them an account on demand as is the case in the Dayabhaga joint family (§ 566).

428. Normally the manager's liabilities cease with the death of his coparceners, their being given in adoption, or the

¹ *Balakrishna v. Muthusami* (1908) 32 Mad. 271; *Narendra v. Abani* (1937) 42 C.W.N. 77, 79, AIR 1938 Cal. 78.

² *L. Bappu v. Renganayaki* AIR 1955 Mad. 394, [1955] 2 M.L.J. 302 excellently summarizes the law at pp. 400-1.

³ *Abhayachandra v. Pyari* (1870) 5 Ben. L.R. 347 (FB), 349; *Parameswar v. Gobindo* (1915) 43 Cal. 459, 465, 20 C.W.N. 25, 28.

⁴ *L. Bappu* (cited above). *Nepur v. Sheochand* AIR 1961 Pat. 57 (the widow's right to demand back accounting is as limited as that of a coparcener where she took under the Act of 1937).

⁵ *Off. Ass. v. N. Rajabadar* AIR 1924 Mad. 458, 46 M.L.J. 145; *Jagmohan v. Ranchoddas* AIR 1946 Nag. 84, [1945] Nag. 892.

⁶ *Manikrao v. Deorao* AIR 1955 Nag. 290, [1954] Nag. 709.

separation from him of owners of coparcenary interests of all sorts. There are two exceptions of limited significance. Under the Estate Duty Act the manager is liable to pay estate duty payable on the interest of the deceased coparcener to the government. And in partitions which embrace immoveable property outside the territorial jurisdiction of the court, the court will exercise its jurisdiction *in personam* over the manager (that is to say, acting as a court of equity) and will oblige him to pay proportions of the income of this foreign property to the sharers until such time as it is practicable to allot the property itself in shares, or to sell it and distribute the proceeds.¹ Until that time the manager is a trustee for the members in respect of that income.

Powers of the manager

429. The manager is entitled to possession and custody of the family assets and though he cannot oust any member from enjoyment of what is his right, he can check disproportionate claims and even eject a coparcener who denies his authority and disturbs his management, for in his position he can claim the protection of s. 145 of the Criminal Procedure Code.² His very varied powers must be considered separately.

430. Representation. The manager represents the family and sues by and against him in his representative capacity bind all the members.³ It is a question of fact whether a suit was instituted by him in his representative or personal capacity,⁴ which the pleadings will often clarify. Where he has lost a case through gross negligence it is not open to non-managing members to have the decree set aside on that ground alone.⁵ He may refer partitions and other disputes

¹ *Ewing v. Orr Ewing* (1883) 9 A.C. 34, 40 (H.L.); *Kashinath v. Anant* (1899) 24 Bom. 407; *R. M. Ramanathan v. Narayanan* AIR 1955 Mad. 629, [1956] Mad. 282. The court has no jurisdiction over foreign immoveables: *Harmindar v. Balbir* AIR 1957 Pun. 214; *R. Viswanathan* (cited at § 394).

² *Bhaskari v. Bhaskaram* (1908) 31 Mad. 318, 18 M.L.J. 343.

³ *Lingangowda v. Basangowda* (1927) 54 I.A. 122, AIR 1927 P.C. 56, 29 Bom. L.R. 848.

⁴ *Devidas v. Shrishaiappa* AIR 1961 S.C. 1277, [1962] 2 S.C.J. 557.

⁵ *C. K. S. Krishnamurti v. Chidambaram* AIR 1946 Mad. 243, [1946] Mad. 670. *Jankilal v. Jabarsingh* [1956] Nag. 121, 130-1 is *per incuriam*.

to arbitration and compromise claims in his discretion, but compromises of suits before the court will not bind the minor coparceners unless the court approves their terms. The minor may take advantage of Order 32, rule 7 of the Code of Civil Procedure (1908) as readily where he is represented by the manager as where he is represented by his natural or any other guardian.¹ It provides:

(1) No next friend or guardian for the suit shall, without the leave of the court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise so recorded entered into without the leave of the court shall be voidable against all parties other than the minor.

Any compromise of a suit, entered into with the court's approval, may be upset if the court was misled by fraud or the concealment of material facts, but not merely because the guardian was under a misapprehension of fact or law. Apart from compromises within the section quoted above the manager has power to bind minor members, whether or not they are his sons, if the settlement is not imprudent or against the interests of the family.² Collusive or fictitious compromises, against which the court is ever alert, do not bind the minors in any event, and even major members may be entitled in certain cases to impeach them. They will be voidable if they amount to gifts or releases of joint-family property in which the minors have interests,³ for releases and alienations without consideration are in general beyond the manager's powers. He is entitled to make terms with the family's debtors and, if reasonable in the family's interest, to release portions of interest or principal, but the burden of showing his *bona fides* in so doing lies upon him if he is challenged at a partition.⁴ Though he may do all such things as are necessary for the benefit of the family (§ 437) the court will not lightly presume that if he abandons litigation, where there exists a *prima facie* cause of action, or forgives debts or allows them to become time-barred out of generosity,

¹ *Ganesha v. Tuljaram* (1913) 40 I.A. 132, 36 Mad. 295, 17 C.W.N. 765. Trevelyan, *Minors*, 6th edn, 273.

² *Pathal v. Sheobachan* AIR 1934 Pat. 283.

³ *Venkata v. Tuljaram* (1921) 49 I.A. 91, AIR 1922 P.C. 69, 45 Mad. 298.

⁴ *Vaikuntam v. Avudiappa* AIR 1937 Mad. 127, 170 I.C. 234.

it was within his powers.¹ If his act consists in a misuse of his powers it will be set aside at the suit of a coparcener within the time provided by law, notwithstanding the manager's general authority to represent the family in actual or prospective litigation.

431. When the manager executes a *hundi* or promissory note the debt will be binding on the family if it was incurred for a family purpose, but the joint-family firm and the joint-family assets will be liable on the note itself only where on a fair interpretation of the terms of the instrument it indicates the firm or family sought to be made liable.²

432. Because every family has its manager strangers are not well advised to pay debts owed to the family into the hands of a non-managing member. Such payments do not release the debtor.³ When however the manager neglects the property and does not care to preserve it another coparcener may give valid receipts and institute litigation and make binding alienations, if necessary, upon the strength of the text, 'even one person. . .', cited below.⁴

433. Alienation. The powers of managers who have sons, sons' sons, or sons' sons' sons joint with them are wider in practice than those of other managers, but we shall deal with them separately (§ 445). Other managers may validly bind non-managing members in circumstances contemplated in the text of the *Mitakshara* (as translated by Colebrooke):⁵

... even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable.

¹ *K. Dasaratharama v. I. Narasa* (1927) 51 Mad. 484; *Gunni v. Dal Chand* (1931) 53 All. 923, AIR 1931 All. 717.

² *Mulchand v. Sugnamal* (1958) 60 Bom. L.R. 1343. Cf. the general rule, that only those are liable whose names appear: *Sadasuk v. Kishan* (1918) 46 I.A. 33, 21 Bom. L.R. 605; *Janga Ramakrishna v. Challa* AIR 1962 An. P. 255.

³ *Sangappa v. Sahebanna* (1870) 7 B.H.C.R. ACJ. 141.

⁴ *Amirdham v. Valliammai* AIR 1936 Mad. 19; *Gour v. Garib* AIR 1957 Or. 212.

⁵ *Mitakshara* I, i, 28-9. See *Tatoba v. Tarabai* AIR 1957 Bom. 280, 59 Bom. L.R. 633, 643-4.

434. Small portions of immoveable, and reasonable portions of moveable property may be given *inter vivos* for religious purposes, that is to say for purposes which the court will hold to be conducive to religious benefit or for the furtherance of religion as these are understood in Hinduism today. Although the manager may alienate for 'optional' as well as obligatory religious purposes,¹ not every gift which appeals to the donor as *dharmika* will meet this requirement (§ 780). Gifts for proper purposes, but of excessive amount, are invalid *in toto*, and cannot be rendered valid (it seems) by being cut down to a proper amount. On the meaning of an 'invalid' alienation see below (§ 439). A dedication or appropriation, even of lands or the income thereof, may be made without any instrument in writing, provided the manager acts within the powers described here.²

435. Reasonable portions of immoveable or moveable property may be given where this is customary in the caste to a son-in-law of a coparcener in connexion with the betrothal, or as the case may be the marriage, of the daughter or sister whose marriage is to be arranged at the family's expense.³ This rule is, naturally, subject to the statutory prohibition of 'dowries' (§ 218).

436. Appropriate portions of immoveable or moveable property may be transferred to a coparcener or to a female dependant of the family in part or full satisfaction of his or her right to be maintained. A father or brother may, as manager, provide in this way for the maintenance even of a widowed daughter or sister who is unable to obtain maintenance out of her deceased husband's property or from his family estate.⁴ It is within the power of the manager at his discretion to exonerate the donee in such cases from liability to account for income in excess of the requirement for maintenance (a duty which would otherwise rest upon the donee as a resulting trustee),⁵ and even from the duty to return

¹ Mukherjea, *Rel. & Char. Trust*, p. 90.

² *T. B. Gangi v. Tammi* AIR 1927 P.C. 80, 54 I.A. 136, 140.

³ *A. Ammal v. Sunderathammal* AIR 1953 Mad. 404, *E. Galb v. B. Veeranarayana* AIR 1957 An. P. 257, [1956] An. W.R. 919.

⁴ *Ram v. Gobind* (1926) 5 Pat. 646, 705.

⁵ *Ramayya v. Kolanda* AIR 1939 Mad. 911, [1939] 2 M.L.J. 639.

the corpus. Acting *bona fide*, the manager may thus alienate in perpetuity.¹

437. Immoveable or moveable properties may be sold, exchanged,² given on lease,³ hypothecated or charged for the benefit of the family. 'Benefit' is interpreted as a prudent father of a family would understand it. They may also be transferred for any purpose urgently pressing upon the family and necessitating a payment. The necessity in question should be inevitable, but the manager has a discretion to consult the family's best interests in meeting it and may, for example, sell, whereas a mortgage would have been equally efficient in providing funds, if a prudent man in the actual circumstances would have seen some advantage in a sale. If he borrows, the rate of interest must be such as a prudent man would undertake, and an excessive rate may be cut down, though what is excessive would be determined having regard to conditions operative and commercial usages prevailing at the time and place.⁴ Where family lands have been mortgaged a sale of a portion to redeem the whole and thus recover undiminished enjoyment of the remainder may well be valid even if there is no fear of a foreclosure, if a prudent man would take such a step.⁵ Where a business is not going well and a prudent man might think it practical to raise money for its improvement rather than wind it up and take no further risks, the manager's discretion is absolute, and third parties are not expected to put him through searching and detailed inquiries before lending him money, once they are satisfied that he has exercised discretion.⁶

438. The court is keen to protect non-managing coparceners, but not from acts which a prudent man of average ability would think reasonable in the circumstances. It was once thought that alienations for the 'benefit of the estate' were alone to be contemplated. This view has long been abandoned for the more realistic doctrine that as long as the manager abstains from speculative or visionary projects, and acts

¹ *Ramayya* (cited above); *Krishnamraju v. Reddamma* AIR 1951 Mad. 608, [1951] 1 M.L.J. 49.

² *Balzor v. Raghunandan* (1932) 54 All. 85, AIR 1932 All. 548.

³ *Palaniappa v. Deivasikamony* (1917) 44 I.A. 147, 40 Mad. 709.

⁴ *Sunder v. Satya* AIR 1928 P.C. 64, 55 I.A. 85, 54 M.L.J. 427.

⁵ *Jivanandan v. Sia* AIR 1961 Pat. 347.

⁶ *Niamat v. Din* AIR 1927 P.C. 121, 54 I.A. 211, 8 Lah. 597.

along lines probably conducive to the family's advancement, or likely to prevent probable losses, his act cannot be questioned. If the manager were confined to purely defensive acts, enterprise would be stifled and the family would stagnate.¹ On the other hand a sale (even at a good price) of an hereditary asset, in particular *land*, without the immediate anticipation of replacing it by equally suitable and equally profitable assets, is very likely to be invalid.² In such a case enterprise is thought to have outrun prudence. An alienation *partly* supported by necessity or 'benefit' of the family is somewhat specially situated and will be considered separately (§ 483).

An alienation will be invalid if it is nominally to perform or facilitate a duty potentially incumbent on the family, but actually to secure some ulterior object, as for example a settlement on the manager's wife for her life and thereafter as a marriage portion for her daughter aged 6 years at the time of the settlement. For the law does not assume that every girl will marry.³ Similarly if the object is illegal, as a mortgage executed to facilitate the marriage of a daughter aged 12,⁴ unless the mortgagee can show that he satisfied himself *bona fide* that the girl had reached the legal age for marriage. Needless to add, dowries which are within the meaning of the Act of 1961 being illegal (§ 218), a mortgage to supply a dowry is invalid.

Gifts by a manager other than those made by a father-manager under his special powers are normally invalid. A manager gave a small portion of ancestral land to defeat a suit for preemption and thereby save the family from costs and perhaps loss in the event of the court holding the sale consideration to be less than it was. The gift was held valid.⁵

A manager sold land 18 miles from the family home in order to purchase land more suitably situated. Pending the purchase the money was deposited in a bank which failed. The coparceners could not repudiate the transaction.⁶

¹ *Ram Nath v. Chiranjī* AIR 1935 All. 221 (FB); *Medikenduri v. Kata* AIR 1953 Mad. 210, [1952] 2 M.L.J. 484.

² *Hemraj v. Nathu* (1935) 59 Bom. 525; *Sengoda v. Muthuvellappa* AIR 1955 Mad. 531, [1955] 2 M.L.J. 331; *Nirmal v. Satnam* AIR 1960 Raj. 313.

³ *Palwanna v. Annamalai* AIR 1957 Mad. 330, [1957] 1 M.L.J. 238.

⁴ *D. Sadasiva v. B. Rattain* [1957] 2 An. W.R. 16, AIR 1958 An. P. 145, § 238.

⁵ *Mohib v. Baldeo* [1939] All. 305, AIR 1939 All. 380.

⁶ *Jagat v. Mathura* (1928) 50 All. 969, AIR 1928 All. 454.

The manager leased the whole family estate. The lease was held not binding upon his son as it was not shown on behalf of the lessee that the manager might not have worked the estate himself with hired labour with as great, or greater profit.¹

A manager sold the family estate because he found his family isolated from caste members in that village. Another, because he wanted to live near his father-in-law. Neither alienation was binding upon a son.²

A manager mortgaged joint-family lands for Rs. 20,000, the amount to be drawn in instalments as and when needed for maintenance. The transaction was valid,³ but only as a prudent method of providing for actual and anticipated needs.⁴

A member of the family had been killed. The manager mortgaged joint-family property to raise money to assist in the prosecution of the suspect. The expenditure could do the family no good; neither its finances nor its prestige would be enhanced, and the mortgage was held not binding on the family.⁵

439. A specialized application of the general rule is the rule against a 'new business'. The manager may not bind the family property by alienation for the commencing or support of a 'new business'.⁶ It is presumed that any business which is a departure from the business tradition of the family will be a gross speculation.⁷ For a joint-family business carries with it risk for minor coparceners and potential personal liability for the major coparceners (§ 451) as well as risk to their ancestral assets, and a 'new' business which must call for new skills and new expertise is *prima facie* a heavy risk. To join a firm is normally to enter upon a new business unless the manager or his predecessor was a member of a similar firm — for normally the joint family will be liable for debts incurred by a firm of which their manager has become a partner on their behalf.⁸ On this view of the rule it is easy to see that not all new businesses are 'new' in the

¹ *Haribhau v. Hakim* AIR 1951 Nag. 249, [1951] Nag. 99.

² *Maman v. Ranga* AIR 1959 Ker. 363; *Helava v. Sesigowda* AIR 1960 Mys. 231.

³ *Ramadhin v. Gajraj* AIR 1939 All. 513, [1939] All. L.J. 358.

⁴ With *Ramadhin* (cited above) compare *Ghulam v. Rustom* AIR 1949 E. Pun. 354, 355.

⁵ *Maruthappan v. Niraikulathan* AIR 1937 Mad. 434, [1937] Mad. 943.

⁶ *Benares Bank v. Hari* (1932) 59 I.A. 300, 54 All. 564, 34 Bom. L.R. 1079 (PC).

⁷ *In re Esakkivel Pillai* AIR 1955 NUC 96 (Mad.) gives a handy definition of 'new business'.

⁸ *C. Purnachandrarao v. K. Mallikharjuna* AIR 1961 An. P. 247.

legal sense. An extension of an existing business,¹ a revival of a recently dissolved firm,² or a business recently started by a deceased ancestor in the male line of existing coparceners, which to them is actually an ancestral business,³ do not come within the definition. What is an extension is naturally a question of fact. A business started *de facto* by coparceners with coparcenary funds will be a family business and it may well be for the benefit of the family that the joint-family property should be encumbered at a later date to finance it or rescue it from threatened liquidation.⁴ But the initial encumbrances to start the business might not have been valid and binding on minor members. The criterion throughout is the degree of risk involved in the new business; and we must note that even though an existing business involves evident risks the manager is not under any obligation to shut it down, though he might well be justified if he does so.

440. Where the family's hereditary occupation is miscellaneous trade, and members normally take up various types of commercial undertaking, the hereditary avocation, or *kulachara* as it is known, acts as an umbrella wide enough to protect many departures and enterprises which would otherwise be decidedly 'new'. Much depends upon the habits and traditions of the caste in question and the so-called *kulachara* rule is by no means universally resorted to.⁵ In fact commercial adventure and enterprise are the very life of a hereditary trading family, and heredity in business should there be the touchstone rather than the difference or novelty in the nature of the undertaking.⁶ Consequently

¹ *Narain v. Muni Lal* AIR 1951 All. 400; *Bhagwansingh v. Beharilal* AIR 1937 Nag. 237.

² *Ramkrishna v. Ratanchand* (1931) 58 I.A. 173, AIR 1931 P.C. 136, 53 All. 190.

³ *Sanyasi v. Krishnadhan* (1922) 49 I.A. 108, 24 Bom. L.R. 700, AIR 1922 P.C. 237; *Bahadursingh v. Girdharilal* [1942] Nag. 543, AIR 1942 Nag. 39.

⁴ *Budhakaran v. Thakur* [1942] 1 Cal. 19; *Ram v. Chiranjii* 57 All. 605, AIR 1935 All. 221 (FB).

⁵ *Kumbakonam Bank v. Shanmugham* AIR 1956 Mad. 306, [1956] 1 M.L.J. 58; *Canara Banking v. South Indian Bank* AIR 1958 Mad. 132, [1958] Mad. 15; but compare *Shivramsa v. Gurunathsa* (1955) 58 Bom. L.R. 239, 245-6.

⁶ *Kulitalai Bank v. Nagamanickam* AIR 1955 Mad. 670, 671; *per* Govinda Menon, J., in *Kumbakonam Bank* (cited above).

greater latitude must be allowed to managers of hereditary trading families, provided the new enterprises are within the scope of their *kulachara* and involve no unusual risks. Alternatively the usages of trading families may be relied upon to modify the ordinary rules restraining the manager from starting new businesses in place of or in addition to existing businesses.¹ It is a question of fact in each case whether the risk was such as to render the borrowing invalid.

The manager of a Nambudri family commenced a *kuri* (chit-fund), which involves speculation even for the organizer who acts as banker. It was held that in the absence of a special custom liabilities incurred for this purpose were not binding on other members of the family.²

A father in a hereditary trading family had hitherto had rice-mills. He borrowed for the purpose of a business in motor-cars. It was held that the business was not in fact highly speculative and that the family were bound by the mortgage.³

The family were Brahman landowners and the manager sold joint-family property to start a rice-mill. The sale was not binding on the minors.⁴

The family traded in comestibles. The business was enlarged by commencing to import areca nuts. This was held to be an extension.⁵

A family having a shop-business started a rice-business. They were Chettians, whose *kulachara* was trade. The security-bond given by the father for this purpose was held valid and binding on the minor sons.⁶ So, where the ancestral business was a commission-business in chillies and groundnuts and the manager joined a firm dealing in brassware it was held, the *kulachara* being 'business', the undertaking was binding.⁷

A family had an ancestral grocery shop. The manager started a cotton commission agency. This was held not a legitimate extension of the ancestral grocery business and debts incurred in connexion with it were not binding on the minors.⁸

The family abandoned their provision shop and started a cycle shop. From its income the manager maintained the family. Borrowings to assist the cycle shop were held within his powers for 'benefit of the family'.⁹

441. In all the instances mentioned in § 434 to § 440 Anglo-Hindu law has provided relief for the third party dealing with a manager by recourse to a doctrine well known in

¹ *Hindusthan v. P. Sattayya* AIR 1961 An. P. 183, 186-7.

² *Narayanan v. Varnasi* AIR 1947 Mad. 76, [1947] Mad. 236 (FB).

³ *Hindusthan v. P. Sattayya* AIR 1961 An. P. 183, 186.

⁴ *Nataraja v. Lakshman* AIR 1937 Mad. 195, 170 I.C. 145.

⁵ *Kumbakonam Bank* (cited above). ⁶ *Kulitalai Bank* (cited above).

⁷ *C. Purnachandrarao* (cited at p. 270). ⁸ *Shivramsa* (cited above).

⁹ *Hayat v. Nem* AIR 1945 Lah. 169 (FB).

the English law of trusts which has already been fully explained in connexion with alienations by a guardian (§ 93). If the alienee shows that his inquiry convinced him that a decretal debt had to be paid, a daughter had to be given in marriage, or the like, and there were no funds available for the purpose he is safe, even if it subsequently transpires that the demand for payment was forged, the daughter was below marriageable age, and so on. The alienee is not obliged to see that the money is used for the purpose cited by the manager, but if (in the last resort) he can prove that it was so used his own defence to a suit by non-managing coparceners will be so much the stronger.

442. The Mysore High Court retains (in reference to cases from the pre-1956 Mysore districts) a special rule which more faithfully adheres to the Mitakshara text. The manager may bind minors by making alienations for necessity or benefit of the family, but not adult coparceners, who must give their consent even when the alienation is justified, before their interests will be bound.¹

443. Investment. As manager of the family's affairs he is authorized to invest or lay out the existing assets in whatever manner he thinks fit. He may make loans to the coparceners themselves which by agreement will be set off against their shares at an eventual partition, and similarly he may borrow from them for purposes of investment. Investments in the joint-family affairs by the coparceners by way of loans to the joint-family chest may be recovered at any time up to final partition,² except in the case of the manager himself, who is debarred by statute from claiming after three years from the date of the loan³ — it is rightly assumed that if the manager cannot repay himself no one can.

444. When coparceners lend to the family or invest in the family's concerns, purchases made by them or out of their assets naturally retain the quality of self-acquired property: for the intention to merge separate assets with the joint stock must be specifically proved (§ 549).⁴

¹ *Nanjundegowda v. Rangegowda* AIR 1953 Mys. 138.

² *Chidambaram v. Nachiappa* AIR 1939 Mad. 70, [1938] M.W.N. 1092.

³ Limitation Act, 1908, Art. 107.

⁴ *Subramonia v. Padmanabha* AIR 1950 T.C. 52.

445. *The father-manager.* The father-manager has in effect two additional powers of alienation. For his power to advance and separate a son from himself and its effects see below (§ 517).

(i) He may, out of *moveable* property, make gifts of affection,¹ which include gifts of jewels or clothing to a wife or daughter-in-law, and gifts, which really amount to advancements, to his male issue, including sons' sons and sons' sons' sons. These are not to be brought into hotchpot at an eventual partition and must be reasonable in extent, not amounting to gross favouritism towards the donee. The father does not have the right to deal with joint-family moveables as freely as he may with all his self-acquired property. The freedom to make presents on suitable occasions to his daughter is one which her brothers will not begrudge their father.² Gifts of *immoveable* property (even for an estate less than an absolute estate) are invalid under this head, no matter how deserving the donee or how reasonable the size of the present.³ Dicta to the opposite effect cannot be followed in practice,⁴ for they are in conflict with the express text of the Mitakshara, and appear to be the result of confusion with the powers of the manager to make gifts for religious purposes (§ 434). In *Sivagnana v. Udayar*⁵ the father gave a very reasonable portion of land to his second wife (or wife-to-be) as a marriage gift. It was held invalid.

446. (ii) By reason of the Pious Obligation (§ 503) he may render the coparcenary interests of his sons, sons' sons, and sons' sons' sons liable to be taken in execution for recovery of any private untainted pre-partition debt. 'Private' because joint-family debts bind the whole family and require no discussion. 'Untainted' because immoral or illegal debts are not binding on the male issue; and 'pre-partition' because the original cause of indebtedness must have occurred prior to the severance of status of the coparcener sought

¹ Mitakshara, I, i, 25.

² *S. Krishnan v. Lakshmi* AIR 1950 T.C. 73, [1950] K.L.T. 6. A donation of the entire property to sons and wife (who is a stranger for this purpose) is a very different matter: *Ram v. Ajodhya* AIR 1952 All. 83.

³ *Jinnappa v. Chimmava* [1935] 59 Bom. 459, AIR 1935 Bom. 324.

⁴ *Rathinasabapathy v. Saraswathi* AIR 1954 Mad. 307; *Dhondiram v. Bhagubai* AIR 1956 Hyd. 118; *Tara v. Raghunath* [1962] Cut. 575 is bad.

⁵ AIR 1961 Mad. 356, following instructive dicta in *Paluanna v. Annamalai* AIR 1957 Mad. 330, [1957] 1 M.L.J. 238.

to be charged with the debt. Because of this right to inflict his debts upon them he is authorized to bind their interests by an alienation for the purpose of paying such debts, and this he may do without their knowledge and immediately after incurring the debt, and independently of any possibility of paying it from his separate earnings in the future.¹ So long as a valid pre-partition debt of the male lineal ancestor is outstanding the interests of his male issue are liable to be mortgaged or sold to pay it; and from this it follows that the father may sell the interest of his sons for *antecedent*² private, untainted, pre-partition debts and the court may directly utilize the father's power by levying execution of a decree against the *father* against the father's and his male issues' interests without impleading the latter as parties.³

447. The doctrine of antecedency, though it makes good sense, is not derived from texts and was ignored in several States outside the former British India. But it is too late in the day to disturb, on mere academic considerations, well-established positions resting upon Privy Council decisions.⁴ In *Brij Narain v. Mangla Prasad* the Privy Council (*per* Lord Dunedin)⁵ laid down the following propositions which are now classical:

(i) the managing coparcener of a joint undivided family cannot alienate or burden the estate *qua* manager except for purposes of necessity;

(ii) if he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt;

¹ *Maman v. Ranga* AIR 1959 Ker. 363 is incorrect in that it purports to postpone the attaching of the Pious Obligation so long as the father may be able to pay the debt. This is a survival from the period prior to *Pannalal v. Naraini* AIR 1952 S.C. 170 when some States held that that Obligation did not attach during the father's lifetime.

² Note the requirements of *Brij Narain* (cited below) (reiterated in *Lal v. Ambika* AIR 1925 P.C. 264) with an example where antecedency could not be proved on the facts: *Medikenduri v. Kata* AIR 1953 Mad. 210, [1952] 2 M.L.J. 484. So *Hindustan v. Sohan* [1962] 1 Pun. 735.

³ *Pannalal* (cited above); *Sidheshwar v. Bhubaneshwar* [1953] 2 M.L.J. 789, AIR 1953 S.C. 487, [1954] SCR 177.

⁴ *Luhar v. Doshi* AIR 1960 S.C. 964, 970b, *per* P. B. Gajendragadkar, J.

⁵ The words are slightly differently reported in different Reports. (1923) 51 I.A. 129, 46 All. 95, AIR 1924 P.C. 50.

(iii) if he purports to burden the estate by mortgage then unless that mortgage is to discharge an antecedent debt, it would not bind the estate;

(iv) antecedent debt means antecedent in fact as well as in time, and not part of the transaction impeached;

(v) there is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

448. We must regard as refuted the doctrine that finds favour in Northern India and latterly elsewhere to the effect that a debt secured by the father's mortgage without necessity or other justification could bind the interests of the male issue without a prior decree against the father personally.¹ This evasion of the requirement of antecedency is currently (but inaccurately) justified by the equating of a *potential* personal liability of the father with an actual liability, and a forced interpretation of the propositions in *Brij Narain's case* which we have just read.² Such a doctrine, though it recognized the undoubted liability of sons, etc., for debts, ignored the fact that the Mitakshara provisions hindering the father from any but justifiable alienations would be frustrated if *any* debt would immediately be binding on the interests of the non-alienating coparceners. The point in requiring first a personal liability of the father, on a basis of which an attachment and sale of the male issue's interests might follow,³ is that, in the extra interval thus provided for, steps may be taken to pay the debt from other sources, or it may become time-barred.

Though the logic of this position is clear, the incorrect doctrine (now established in Madras and Mysore) has obtained support from another quarter — or so it would appear. If the father's mortgage *simpliciter* (i.e. without any personal obligation) has formed the basis of an attachment and sale of joint-family property it is urged⁴ that there has been an *alienation* to pay a *debt* (for the mortgage-debt was at least a debt), and the male issue are bound thereby.

¹ *Abdul v. Provident Investment* AIR 1954 Mad. 961 (FB), [1954] 2 M.L.J. 416 (FB); *Hira v. Puran* AIR 1949 All. 685, [1949] All. L.J. 476.

² *Faqir v. Sardarni* AIR 1961 Pun. 138 (FB).

³ *Ganapati v. Rameshwar* [1946] Nag. 741, AIR 1947 Nag. 69; *Firm Makhanlal v. Harnarain* AIR 1960 M.P. 56, 57.

⁴ *Abdul* (cited above); *Jagadesan v. Saraswathi* AIR 1962 Mad. 174 (FB); *Kalappa v. Venkatesh* AIR 1962 Mys. 260.

But it has not been observed that the requirement of antecedency has not been fulfilled.

449. A debt to pay which a binding alienation can be made by the father must be antecedent to the alienation in fact as well as in time, and if the two are closely interrelated the requirement of antecedency is not met.¹ Nevertheless it must be admitted that so far as male issue are concerned the protection afforded to them by the requirement of antecedency is not very substantial. It inserts a step into the procedure and obliges the creditor in many cases to file an additional suit. But ultimately the alienation by the father-manager for a 'new business', or for some other purpose not binding on the family, may lead to a loss of his male issue's interests (or a proportion thereof) as well as his own.² When the alienee obtains a decree against the father for failure of consideration or breach of warranty of title, or upon the debt secured by the alienation (which he, as alienor, cannot personally repudiate) the male issue have no defence except to plead and prove 'taint' (§ 507), and if they are to plead this they must do so as promptly as the evidence at their disposal enables them.³

The joint-family business

450. If the family owns a business the manager may in fact manage it, but it is common for a business or businesses, or even partnerships in which the joint family owns shares or interests, to be managed on the family's behalf by coparceners other than the manager. They have powers corresponding to those of the manager within their spheres. Particularly where offices or branches are situated in different places it is convenient that managerial responsibility should be delegated in this way by the manager. The family may take the step of conferring upon a member not the manager by power of attorney powers which are indistinguishable from those

¹ *Medikenduri* (cited above: § 446).

² *P. Lingayya v. V. Punnya* AIR 1942 Mad. 183 (FB), [1942] Mad. 502 (FB); *Chattanatha v. Ramachandra* AIR 1955 S.C. 799, 801 (dictum); *Meenakshi v. N. M. Manikkam* AIR 1960 Mad. 99, 100, [1959] Mad. 1046.

³ *Kulitalai Bank v. Nagamanickam* AIR 1955 Mad. 670, 673, [1956] Mad. 307.

of a true manager.¹ Yet this does not increase the authority of such persons to bind the minor members beyond the delegation which a manager at Hindu law can effect — it has some utility in dealings with third parties who cannot communicate readily with the manager of the family.

451. A manager of a joint-family business can take advantage of special powers which are needed, in reality, in order that the joint family may do business smoothly with strangers. Every debt properly incurred by such a manager will be binding upon every coparcener. If a junior member is held out by the manager as *de facto* manager, the family firm is bound by such debts as he may have incurred properly, with consequent liability on the part of the coparceners.² Every contract entered into in those circumstances will bind all members of the family to the extent of their interests in joint-family property. Moreover all junior adult members actively participating in the management of the business (as contrasted with those who merely serve in a capacity that might be expected of one having an interest in a family business, but without any directing responsibility) may bind themselves and one another *personally*, that is to say to the extent of their separate assets as well.³ Unless this ancient rule were kept it would not be practicable for strangers to do regular business with coparceners representing joint-family firms. Although, since 1932, it is evident that a joint-family firm is *not* a partnership,⁴ in this context their participation is thought of as that of a manager at Hindu law or a partner in a partnership.⁵

452. It would be intolerable if every purchase from the joint-family business manager or every loan to him upon the security of the joint-family stock, book-debts, or lands should have to be supported by proof of necessity or benefit to the family or, alternatively, of sufficient *bona fide* inquiry as to the existence of necessity, etc. The rule is, therefore,

¹ *Ramamoni v. Kasinath* AIR 1960 Or. 199.

² *Rajagopal v. Louis* AIR 1960 Mad. 388.

³ *R.M. L. M. L. V. Alagamai v. VR. PL. M. Palaniappa* AIR 1940 Mad. 580, [1940] 1 M.L.J. 469.

⁴ Partnership Act, 1932, s. 5.

⁵ *Yeshavant v. Shripad* AIR 1946 Bom. 396, 399, 48 Bom. L.R. 246; *Alagamai* (cited above) at p. 583a. *Bala v. S. Sivagurunatha* [1930] M.W.N. 437 (Coutts Trotter, C.J.) seems no longer to be good law.

that since credit is part of the life-blood of a joint-family business, strangers may safely lend to a joint-family business on the security of any form of family property provided they satisfy themselves *bona fide* that the loan is required for the normal purposes of the business and that the manager is acting as a reasonable man in raising that amount of money in that way. It is entirely a matter for the manager's discretion whether he mortgages or sells in order to keep alive a business which has not been profitable, and it would be unreasonable to expect a lender or purchaser to investigate the factors influencing his exercise of such discretion.¹ Naturally a mere representation by the manager that the loan is required for the business will not be sufficient,² yet a detailed scrutiny of the firm's affairs is unnecessary. To secure a loan for the purpose of engaging in gambling in 'futures' contrary to the provisions of State statutes would of course not be within the manager's powers, and it is not thought a hardship to impute to strangers knowledge of the extent of the manager's powers at law.³

453. A joint-family firm, being made up exclusively of some or all the major coparceners,⁴ is not a partnership. Nevertheless the contracts of one, as we have seen, if properly entered into, bind all the members in a manner reminiscent of a partnership.⁵ Yet it is a person for some purposes. For income-tax purposes it resides at a particular place.⁶ Yet it cannot be declared insolvent—the coparceners who run it must be declared insolvent;⁷ nor can it, or the joint family, enter into a partnership: this is done in the firm's, and so the family's, interest by the manager or other coparceners with his consent.⁸ This step will not give other members of the family any interest in the partnership as such. Indeed there is nothing to prevent coparceners separating and

¹ *Niamat v. Din* AIR 1927 P.C. 121, 54 I.A. 211, 217, 8 Lah. 597.

² *Mauli v. Brij* AIR 1943 Lah. 33 (FB), [1943] Lah. 345 (FB).

³ *Ramaswami v. Srinivasa* AIR 1936 Mad. 94, 70 M.L.J. 214.

⁴ *Off. Ass. v. Neelambal* AIR 1933 Mad. 920, 65 M.L.J. 798.

⁵ *Chidambaram v. Mutaya* (1936) 14 Ran. 122, AIR 1936 Ran. 160 (useful discussion of the differences between firm and partnership).

⁶ *Comm. I.T. v. Nandlal* (1960) 63 Bom. L.R. 208 (SC), AIR 1960 S.C.

1147.

⁷ *Chatram v. K. Amarchand* AIR 1960 Mys. 267.

⁸ *Dulichand v. Comm. I.T.* AIR 1956 S.C. 354; *Ram v. Comm. I.T.* AIR 1953 All. 150.

forming true partnerships *inter se* or with strangers,¹ or coparceners forming similar partnerships whilst still undivided but in respect of their separate assets first, subject to liability under the law of partnership to the extent of their undivided interests as well. Or they may contribute undivided joint-family assets to the partnership. This leads to complications, since the profits of the partnership are in the latter case joint-family property.² They can at any time become joint-family property between a *separated* coparcener who has entered a partnership and his after-conceived un-separated son by mere expression of intention to that effect without formality.³ If the firm is no partnership itself it may finance partnerships, and may in fact have shares in the profits of partnerships as its own profits, which are, of course, joint-family property from the outset.

The manager as agent, attorney, or trustee

454. When a coparcener severs from the joint family his interest is owned by him as a tenant-in-common with the other coparceners (§ 515), and no longer as a joint tenant with right of survivorship. In practice severance by metes and bounds takes place some time after severance in status, and indeed years may intervene between the two parts of a partition. So long as the coparceners remain joint the manager represents them by virtue of his office; as soon as they separate he can deal with their shares only upon some footing which is distinct from that of manager.⁴ In so far as he takes initiative, invests, converts, or deals with the property with any hope of binding them legally he must take his authority from an agency, created explicitly or by conduct of his principals, the separated coparcener-owners of the property he is handling, or from a formal appointment by them as their attorney. Difficulties can ensue where he deals with their shares, or the income therefrom, and himself buys property for his own use with that produce. What rights have the separated coparceners (i) over the income,

¹ *B. Chinna v. B. Venkata* AIR 1954 Mad. 282, [1953] 2 M.L.J. 695.

² *Knightsdale v. Comm. I.T.* AIR 1956 Mad. 487, 28 ITR 650.

³ *R. Subramania v. Comm. I.T.* AIR 1955 Mad. 623, 28 ITR 352, [1956] Mad. 682.

⁴ *S. Ramabhadra v. S. Virabhadra* (1899) 26 I.A. 167, 22 Mad. 470, 1 Bom. L.R. 388 (PC).

and (ii) over any property which the former manager may have bought out of it? Their right to an account from the moment of severance is not disputed, but the effect of unauthorized dealing is not simple to explain without further investigation of facts. It is important that this should be settled clearly, since after the death of a Mitakshara coparcener his interest is now almost always owned by non-coparceners as well as coparceners and all of these may be attempting to pursue rights against funds in the former manager's hands.

455. Where the family, whose coparceners have separated, have agreed to remain 'joint' in the sense that the property will remain undivided for a certain period or until a future uncertain event, upon what footing must the 'manager' account to the former coparceners? In *S. Ramabhadrā v. S. Virabhadrā*¹ the manager failed to keep accounts and claimed that he was accountable on the footing of being a manager at Mitakshara law (§ 427). The District Judge said that he was a trustee, and liable to account personally upon the footing not of what profits had been made, and what balance actually remained in his hands when partition by metes and bounds was demanded, but upon the footing of what the assets might have been had he used proper frugality and skill. This was an onerous as well as apparently unexpected liability. But their Lordships of the Privy Council commented :

In their Lordships' view the defendant was an agent for the three [former coparceners], unpaid, it is true, but accountable for his receipts and expenditure. The District Judge's description of him as a trustee, and as liable for failure in frugality and skill is open to criticism in point of expression, but it does not appear that in applying his principle he has saddled the defendant with any larger liability than results from his agency.

It seems to follow that, in similar cases, where the former coparceners agree to treat surpluses as profits and deficits as loss, and leave the 'manager' to manage their undivided shares as an actual or constructive agent, he is bound to account to them in that capacity upon the footing of what he could have earned or accumulated if he had been an agent operating upon a commission under the general law. Only if they expressly agree that he shall not be accountable

¹ Cited above.

to them upon that footing is he free to rely upon a character similar to that of a manager at Hindu law. The inconveniences of these constructive agencies are obvious.

456. There is some difference of judicial opinion as to the effect of a former manager's continuing to collect the rents and profits of former joint property, blending these with his own assets, and using the whole from time to time for purposes of his own. Fundamentally, no doubt, a tenant-in-common does not stand in a fiduciary relationship towards other tenants-in-common who leave the management of the property in his hands: if he collects their rents along with his own he does not become liable to the inconveniences which attend blending of funds by a trustee.¹ It is possible to take the view that if the former manager merely collects the rents and manages the property, and does not obtain any advantage by availing himself of his position in derogation of the rights of the other persons interested in the property,² the other parties will be entitled to their share of the profits but will have no rights in equity or otherwise over the remainder of the profits with which their shares may have been blended, still less in any property purchased out of the previously blended fund.³ On the other hand it is possible to take the view, and it has been taken in one High Court,⁴ that his position is essentially a fiduciary one, that he must account for his administration, and also that out of the purchases made by him from the blended funds their proportions of his profit must be paid to the coparceners. It would seem, taking a broad view of the position, that it is as inequitable for the sharers who have not taken the trouble to sever their shares by metes and bounds, nor to appoint the former manager specifically their agent, to claim proportionate rights in any profitable venture which the manager may have started out of the blended and undivided profits of the property owned by them all, as it is for the manager to derive personal advantage from having at his disposal moneys belonging to persons with whom he

¹ *Kennedy v. De Trafford* [1897] A.C. 180 gives the usual rule.

² Trusts Act, 1882, ss. 90, 94.

³ *Gulabrao v. Baburao* AIR 1960 Bom. 159, 61 Bom. L.R. 752. This apparently is the view taken in *Panchapagesa v. Kalyanasundaram* AIR 1957 Mad. 472 and in *A. Kunjaiyyappan v. A. Unnaman* AIR 1955 T.C. 279 (Ezhava co-owners).

⁴ *Lingraj v. Ananta* AIR 1957 Or. 63.

is not in reality joint in interest. Their attempt to prolong the joint-family character of the fund is as idle as his attempt to monopolize the fruits of his stewardship of their money. Perhaps the happiest solution is that propounded in *Madhya Bharat*,¹ where, without denying the general fiduciary character of the manager's position, a constructive agency has been imputed — a solution which normally allows the manager a recompense on a reasonable basis for the skill with which he has handled the other parties' affairs.

457. Particularly difficult cases arise where the joint-family property consists largely of a business. A business as such is indeed impartible, and consequently, although its assets and goodwill are owned as tenants-in-common after severance² at which all, or most, of the assets are divided, it itself remains joint-family property. But it is not the business itself but its assets that have to be managed, and the question is in what capacity the manager continues to manage them. He retains no authority as representative of the separated member. Here is undoubtedly a case for a constructive agency. The law (according to the Madras, but not the Calcutta, High Court) will not infer a partnership merely because the coparceners who separate leave their former joint-family business undivided.³

458. Third parties dealing with a former manager of former coparcenary property do so at their peril, for they are not entitled to notice of the severance.⁴ A different rule has become established in Maharashtra and Gujarat which has much to recommend it. In a learned and constructive judgment in *Kashiram v. Bhaga*⁵ it was held that the presumption is of the continuance of jointness once it has been shown to have existed, and the close analogy between the joint-family firm and a partnership (particular reference was made to s. 25 of the Partnership Act) enabled a stranger to leave upon the coparceners the duty to give notice of their severance; and until such notice is given the manager can bind the separated coparceners by debts for the management

¹ *Ramchandra v. Pannalal* AIR 1957 M.B. 113.

² *K. Gundayya v. K. Siddappa* [1938] 1 M.L.J. 574, AIR 1937 Mad. 599.

³ *K. Gundayya* (cited above); cf. *Babu v. Off. Ass.* (cited below).

⁴ *P. A. R. Ramaswami v. Srinivasa* AIR 1936 Mad. 94, 70 M.L.J. 214.

⁵ AIR 1945 Bom. 511, 47 Bom. L.R. 470.

and carrying on of the joint-family business pending a winding-up or physical partition.

459. Where the mere preservation of the business is concerned an agency of necessity might be presumed; but in all other cases it is impossible for subsequent ratification to turn a manager who was not the agent of the coparceners into their agent. It is imperative as the law stands for the manager to keep scrupulous accounts after the commencement of a separate interest in favour of a coparcener or heir, and to seek authorization from its owner to continue management as before until the business is wound up.

460. A further possibility can arise: where the coparceners and others elect to continue the business it is open to them to do so as partners by implication of law. If an agreement to trade together with their separate shares can be made out they may be treated as partners, when the former manager disappears from the picture, to reappear, perhaps, as the employee of the others, or as a managing partner. The fact that the male issue will have rights in the profits of the partnership will not serve to recreate the joint-family unity of interest between the partners.¹

ALIENATION BY OWNERS OF COPARCENARY INTERESTS

For value

461. If there is no son of a living or deceased coparcener in the womb and no minor coparcener or owner of a coparcenary interest (§§ 413, 418) all the coparceners, etc.,² together will be able to give, sell, exchange, or mortgage the joint-family property (subject to rights of maintenance, § 401) and the alienee need fear no suits to set aside the transaction. But non-alienating coparceners may, as we shall see, impugn alienations which are not justified by necessity or other justifying motive (§ 470) or by the existence of a binding

¹ *Jatti v. Banwari* (1923) 50 I.A. 192, 4 Lah. 350, 353; cf. *Babu v. Off. Assignee* (1934) 61 I.A. 257, 57 Mad. 831, AIR 1934 P.C. 138.

² For convenience the phrase 'coparceners, etc.' will be used to mean 'coparceners and owners of coparcenary interests'.

antecedent debt of the father in all parts of India, or which are in excess of the alienor's presumptive share in Southern India. The pure Mitakshara law, which is adhered to in this respect in Northern India (including Orissa, except in respect of Andhras) and by the High Courts of Assam and Bengal in Mitakshara cases, leaves no room for individual alienations by coparceners in defiance of the manager's judgement and for purely personal, and perhaps selfish reasons: the coparceners having an interest in all the property have, until severance, no fractional ownership at all (as distinct from the position at Dayabhaga law, § 563) — consequently they cannot transfer any interest to a stranger or to one another, still less introduce him into the coparcenary circle.¹ However a position arose about the beginning of the 19th century, following the usage of moneylenders in Bombay and Madras, whereby a coparcener might use his coparcenary interest as a security. Instead of demanding severance, realizing his share, buying what he wanted, and then asking to be readmitted by reunion (§ 557) with the balance, he might utilize his share in anticipation of a partition, in the hope that the debt might be paid (at the latest) out of what would be allotted to him at a partition by metes and bounds. This usage was founded on convenience and on the reluctance even of independent-minded sons and younger brothers to separate merely to satisfy a whim. It was supported by the law of attachment and sale of assets to satisfy judgment-creditors. Since a coparcener could demand partition at any time, he was not permitted to hide behind his coparcenary status and claim that he owned nothing. The courts, all over India, early saw the justice of a process whereby the interest might be attached, and, provided the coparcener-debtor did not die before judgment,² sold for the satisfaction of creditors.³ If the court could sell an undivided interest it followed that there was no juridical objection to its being mortgaged.⁴ These arguments did not prevail in Northern India.⁵

462. In the South (including the former Bombay districts of Mysore and some districts of Orissa State, but excluding

¹ *Suraj v. Shro* (1878) 6 I.A. 88, 5 Cal. 148 (PC). ² § 486.

³ *Deendyal v. Jugdeep* (1877) 4 I.A. 247, 3 Cal. 198 (PC).

⁴ This reasoning is not at present accepted in Kerala with reference to matrilineal families: § 580.

⁵ *Chandradeo v. Mata* (1900) 31 All. 176 (FB).

pre-1956 Mysore) a coparcener may create in favour of a *bona fide* purchaser for value an equity to step into the shoes of his alienor and work out his rights by a general partition of the joint-family assets (§ 541). The other coparceners cannot object, provided that their interests are not affected by the so-called 'transfer'. The court protects them in the partition proceedings. Since the value received by the alienor is theoretically available for them (it is certainly impressed with the character of joint-family property), they are prevented from hindering their fellow coparcener's alienation. When it comes to an actual partition between the coparceners the alienor's share, if he wishes to participate at all, will be debited with the loss he has actually caused by his alienation and partial or total appropriation of the proceeds.¹

Gratuitously

463. Since the equity referred to above is available only to the purchaser for value it follows that a gift of joint-family property by a single coparcener without legal justification cannot create in the donee a right to demand partition against the coparceners, etc. It is more than doubtful whether it can enable him to demand possession even against a trespasser who has not yet acquired title against the family by adverse possession, since only by the strength of his own 'title' can he oust a possessor — and he has no title. It will be recollected that a gift by a manager or father-manager may be authorized and effective (§§ 434, 435, 445). Similarly a gift of all coparceners, etc., or a gift of one of two coparceners to the other,² would, under certain conditions (§ 461), be a gift of the coparcenary body or attributable to the body, and would be valid. Unauthorized gifts, however, by individual coparceners are usually described as 'void'.³

464. In *R. Runganatham v. P. Ramasami*⁴ (a South Indian case) the father conveyed joint-family property worth Rs. 11,000 to

¹ The principle is alluded to by P. Chandra Reddy, J. (as he then was), in *Veeri v. Karion* AIR 1953 Mad. 240.

² *Gundayya v. Shrinivas* AIR 1937 Bom. 51, 38 Bom. L.R. 1095.

³ *Radhakant v. Nazma* (1917) 45 Cal. 733 (PC), 20 Bom. L.R. 724 (PC); *K. Venkatappayya v. K. Raghavayya* AIR 1951 Mad. 318, [1950] 2 M.L.J. 466.

⁴ (1904) 27 Mad. 162 (FB).

X for Rs. 1,000. Held, this was a gift of Rs. 10,000. The sons obtained re-conveyance of the land subject to an equitable charge for Rs. 1,000 with interest from the date of the conveyance, since the father burdened himself with a debt to the extent of the consideration, which was binding on the sons under the Pious Obligation.

In *Kulasekaraperumal v. P. Thalevanar*¹ one of three brothers settled property on his wife. In the settlement deed the wife undertook certain obligations, including the maintenance of a relative, whose maintenance was charged upon the property. Later the settlor sold his undivided interest in items comprised in the settlement to X. In X's representative's suit for partition and possession the widow of the settlor and his surviving brothers set up the settlement against the sale. It was held that although the want of the brothers' consent at the time of the settlement would have rendered the transaction 'void' had it been a true gift (a voidness that their subsequent approval could not have cured — dictum), the obligations undertaken by the wife made it an alienation for value, which took priority over the rights of X. The fact that the obligations might turn out to be much less in value than the net value of the settlement did not alter the position.

In *D. Nagaratnamba v. K. Ramayya*² the father had passed a registered sale deed to his concubine, the consideration being her past cohabitation with him. After his death his son impugned the transaction. It was held to be no sale, but a gift which was beyond a manager's powers. It was void *in toto*. A transfer of moveables in payment for past cohabitation might (in the view of many High Courts) be a different matter.

465. The South Indian High Courts call an improper gift by a manager (as in *R. Runganatham*) 'void'³ though the position, as we shall see, is more properly described as 'inchoate', 'void until "ratified"'.⁴ As we shall see, the word 'ratify' in this connexion has a quite special sense. But in Northern India it is treated as 'voidable', in that no one who has not an interest in the joint-family property from the time of the alienation can impeach it. In so far as these gratuitous alienations by a manager are thus made binding on some strangers in any event, such as the Controller of Estate Duty, or the Official Assignee, the Northern Indian decisions are probably irreconcilable with the South Indian decisions on principle (even in the South the gifts have so far rarely been set aside by *strangers*).⁵ Confusion is

¹ AIR 1961 Mad. 405.

² [1962] 2 An. W.R. 169.

³ See references in §§ 463-4; also *Tatoba v. Tarabai* (1957) 59 Bom. L.R. 633. See *Sripati* (cited below).

⁴ *Kashinath v. Bapurao* [1940] Nag. 573, 596.

⁵ *Sripati v. Lingamurthy* AIR 1962 An. P. 173 is an instance of a stranger (legatee of a coparcener's widow) suing successfully.

somewhat deepened by a dictum in a comparatively recent Andhra Pradesh case that the gift of a coparcener's interest is merely 'voidable'.¹ This movement towards reconciliation has been thwarted by another dictum to the contrary from Madras.² The Northern view is supported by the theory of the manager's *excess* of power, the Southern by the lack of consideration to support a colour of an equity. Even if the Southern view is correct the Northern cases are probably impregnable under *stare decisis*, despite a comparatively recent Northern case³ in which an improper gift by a father-manager was held void *ab initio*.

466. Although the non-alienating coparceners cannot 'ratify' a 'void' gift (for the donor was not their agent) they can acquiesce in it or adopt it, and so give it a *de facto* efficacy by precluding themselves from questioning it.⁴ This may be by express approval, which will operate as an estoppel⁵ if it amounts to a declaration intentionally causing or permitting the alienee to believe that they consented to it, or will not upset it, for the donee will rely upon this, and will act upon it at least to the extent that he will not provide against legal action to recover the donation. Or they may adopt it by their conduct which amounts to the same thing, for acts, omissions, and declarations equally give rise, in appropriate cases, to an estoppel. Mere failure to sue to set aside the gift will not serve to render the gift binding.⁶ But we must

¹ *G. Suryakantam v. G. Suryanarayanamurthy* [1955] An. W.R. 944, 946, AIR 1957 An. P. 1012, not followed in *Sripati* (cited above).

² *Kulasekaraperumal* (cited above), per Jagadisan, J.

³ *Ram Rao v. Ajodhya* AIR 1952 All. 83.

⁴ This seems to be the law represented in *Amar v. Saradamayee* (1929) 57 Cal. 39. See also *Tatoba* (cited above) at pp. 637, 645 (contrast the dicta at pp. 641-2), where the learned judges notice in passing that the coparceners, etc. have a right to affirm even this 'void' alienation. The emphatic attempt to distinguish gifts by a coparcener in South India from excessive or unauthorized sales is, it is submitted with respect, not entirely convincing, nor the attempted distinction between the power of a manager in this respect and the power of a widow before 1956. The manager or other coparcener was after all an 'owner' of the estate, even if it is not exclusively his own property. The position of a mere guardian is different: yet the law on the voidability of his act seems to be similar (§ 102). The present writer questions the translation by Vyas, J., at p. 643 of the words *kutumbavirodhena*, but the matter cannot be discussed further here.

⁵ Evidence Act, s. 115.

⁶ *Riasat v. Iqbal* (1934) 16 Lah. 659, AIR 1935 Lah. 827.

take into account the effect of the law of limitation. The donee is a mere trespasser, estoppel or no estoppel, and holds adversely to the coparceners, etc., from the moment he obtains possession: the result is that after twelve years land given to him by a coparcener becomes his for all practical purposes.

S, a resident in Maharashtra, gives one fifth of the family lands to *B*, his brother-in-law, to enable *B* to set himself up in business. The only other coparceners are *F*, *S*'s father, and *S*₂, *S*'s brother, who is not a minor. *F* arranges the registration of the transfer, and *S*₂ asks *B* to appoint him to a post in *B*'s prospective business. As the transfer is not within *F*'s powers as manager, the gift, if effective, must operate (if at all) as an alienation of *S*'s interest or part thereof. Until *S*₂ acted as if the transfer were valid it was voidable at the option of *S*₂, but as he has encouraged *B* to proceed on the assumption that he will not impugn the transaction, he is no longer entitled to impugn it. *B*'s title from that moment becomes as complete as if it had been a transfer for valuable consideration accompanied by possession.

In 1960 a joint Hindu family consisted of *F*, his wife *W*, who was pregnant with a son, *S*₂ who was born in 1951, and *S*, another son born in 1937. *S*, against *F*'s advice, gave shares in a limited company that stood in the name of *S* but belonged to the joint family to *M*, the widowed mother of a school-friend. The shares can be recovered by *F* or *S*₂ until 1966, when *M* will have perfected title to them by adverse possession against the joint family, for the mere gift gave her no legal title. Limitation operates in *M*'s favour only against the entire family, so that as long as one coparcener can sue his success operates to the advantage of the other or others.¹

467. Since the gift is not effective unless and until it becomes *de facto* unassailable by reason of the act or omission of coparceners fully representative of the joint family, it follows that if, on the contrary, the gift is repudiated by a coparcener, even by the donor himself,² either by specific notice of repudiation, or by conduct inconsistent with the gift, the property is reclaimed and the coparceners, or the manager on their behalf, or an alienee of the property or of the interest of one or more coparceners for value (§ 462), may obtain possession, or resist a claim for possession by the donee. It is for this reason and to this extent that a gift of coparcenary property may be called 'void', and the donee as a

¹ The rule of overlapping of lives (§ 475) does not extend the overall period of limitation; therefore the pregnancy of the wife and the minority of *S*₂ do not affect the time when *M*'s right to have the shares transferred to her name in the share register becomes unimpeachable.

² The rule that a grantor cannot derogate from his own grant does not apply: *K. Venkatappayya* (cited at § 463.).

trespasser retrospectively becomes liable (subject to any equities in his favour on the facts) for mesne profits.¹

468. Testamentary dispositions of coparcenary property formerly used to take effect only by way of the agreement of coparceners, sometimes expressed in a family arrangement (§ 723). By such means what was essentially 'void' found an indirect validity. The question seldom arises in India as most Hindus may dispose of their undivided interests by will (§ 599).

Statutory owners

469. Widows, sons, daughters, daughters-in-law, legatees, and others who have inherited a share in a coparcenary interest (§ 418) are similarly placed with coparceners at Mitakshara law in that, although the share does not fluctuate in extent (§ 418), the identity of the objects owned may vary and the capacity to alienate for value in Northern India or gratuitously in Southern India has not been granted to them unless they first realize their interests and make them definite, and concrete as to objects, by partition. The position is not altogether unlike that of widows who took under the repealed Act of 1937 and associated statutes (§ 412). There is no reason whatever to suppose that such a widow had a right to make gifts,² unless they were gifts for the spiritual benefit of her deceased husband (on which some doubt remains which the court had never passed upon when the limited interest itself was abolished in 1956). These new statutory owners of undivided Mitakshara coparcenary interests or shares therein are well advised to seek partition before engaging in transfers for value, for the expenses and uncertainties of the partition-proceedings will certainly lower the market value of the interest which they are, in Southern India, perfectly entitled to mortgage or sell.

¹ See Code of Civil Procedure, s. 2 (12). Y. Ch. Ram Sarma, *Law of Mesne Profits*, 2nd edn, Allahabad, 1957, ch. i.

² Dicta in *Dagadu v. Namdeo* (1954) 56 Bom. L.R. 513, AIR 1955 Bom. 152 are not to be read as laying down the reverse.

THE RIGHT TO CHALLENGE ALIENATIONS

The right

470. The right to impeach or impugn, i.e. to 'upset', alienations, e.g. gifts by managers, sales of undivided interests in Northern India, excessive alienations by coparceners in Southern India, unjustified alienations not supported by antecedent debts of the father-alienor anywhere, may arise at a partition, or otherwise. Coparceners, etc., may impeach an improper alienation from the moment they (or if they are minors, their guardians) come to know of it until their rights to upset it are barred by limitation. In all cases where the right exists the burden of proof that the alienation was justified lies on the alienee or his successor.

471. All persons interested in coparcenary property, whose interests are acquired by mortgage,¹ purchase,² by reason of an insolvency of a coparcener, etc.,³ inheritance or bequest under the Hindu Succession Act, or adverse possession,⁴ are entitled (subject to one condition) to question an allegedly unauthorized or improper alienation which occurred prior to the accrual of their own interests, since they are entitled in partition proceedings or when their interest is threatened to define as well as realize their interest so far as their right (however acquired) permits. To put it in homely language, an heir, for example, who 'comes into' a share in a coparcenary has the right to find out the truth, when coparceners allege that some of the coparcenary property was made off with in the nick of time. And if the Official Receiver acquires a coparcener's interest for the benefit of his creditors it is no use telling him that the creditors will be disappointed because the other coparceners have given the property away to their wives meanwhile. These strangers may in fact possess a right which a coparcener does not have, because he was conceived too late (§ 473); or a right which coparceners may have but prefer for reasons

¹ *Madan Lal v. Gajendrapal* AIR 1929 All. 243, 51 All. 575.

² Even if the alienor or judgment-debtor did not impeach: *Madan v. Chiddu* (1930) 53 All. 21; *A. Venkataramanna v. P. Mangamma* AIR 1944 Mad. 457, [1944] Mad. 867; *Ram v. Kripesh* AIR 1961 As. 54.

³ § 489.

⁴ *Muhammed v. Mithu* (1911) 33 All. 783 (FB).

of their own not to utilize. But, to revert to the condition referred to above, it is evident that if the stranger's right in the property first arises when all rights on the part of the members of the family to question an alienation are extinguished, he cannot claim that the joint-family assets over which his right accrues include this improperly alienated property. The only (anomalous) exceptions to this are the so-called 'void' alienations as understood in South India (§§ 465-6).

In *Sarju v. Mangal*¹ the Allahabad High Court held that the reversioner from the female heir of a non-alienating coparcener (her son) had a right to question an alienation which had been made by the said son's father. This decision is protected by *stare decisis* in Uttar Pradesh, but cannot be followed elsewhere, for the heir had no interest in the property while the son lived, still less had the reversioner.

In *Pethu v. Kandaswami*² it was held that a purchaser from a non-alienating coparcener could sue for partition and possession without first setting aside the improper alienation of the property he claimed to have 'purchased'. This is to place alienation by the manager upon the same footing as improper alienations by guardians (§§ 104, 105)³ or by widows prior to 1956 (§ 698), but it is far from clear that the cases are parallel. The manager's alienation for value is everywhere understood to be voidable at the option of a coparcener, etc., on proof of impropriety (that is to say, where the alienee, upon whom the burden lies, fails to support the alienation in his defence).

472. At a partition, as we have seen, the manager can be made personally liable for some improper alienations (§ 427), but this procedure does not affect the alienations themselves, so that it can be left out of account now.

One who has acquired title to certain items of joint-family property by adverse possession may put to proof of the validity of his equity a claimant who alleges that he has purchased the items in dispute from the joint family or from a coparcener.⁴

473. We may now return to the coparceners themselves. Their right to challenge at any time (subject to what is said below) springs at the earliest from conception, or in the case of an adopted son, from his adoption. To take an extreme

¹ AIR 1925 All. 542, 47 All. 490.

² AIR 1950 Mad. 560, [1950] 1 M.L.J. 469.

³ Reliance was placed in *P. Kamaraju v. C. Gunnayya* AIR 1924 Mad. 322, the correctness of which is more than doubtful.

⁴ *Kalu v. Barsu* (1894) 19 Bom. 803, cited in *Tatoba v. Tarabai* (1957) 59 Bom. L.R. 633, 638, 641, AIR 1957 Bom. 280.

case, a son, born to a *sole* coparcener, acquires at once a birthright, retrospectively from his conception, in all joint-family property in the father's hands. This right extends even to those assets which were acquired out of joint-family property *prior* to his conception and their accumulated income and purchases out of this income, provided that at no time had the father deliberately appropriated them to himself and severed them from the ancestral stock (which is a somewhat difficult question of fact in each case).¹ But if the father made an alienation of any of this property before the conception of the son, or adoption as the case might be, the son is unquestionably bound by it.² He takes as he finds.³

474. Just as a coparcener cannot challenge an alienation made before his conception or adoption so he cannot challenge an alienation to which he put his name, or one made with his consent, after he had reached majority (assuming him to be of sound mind), nor after the period of limitation has expired against him. Where immoveable property is in possession and the relief required is to set aside the alienation, as for example a non-possessory mortgage, the period is six years; if the alienee is in possession the period will be twelve years. The period runs from the moment when the cause of action occurred, namely the alienation itself. Minor coparceners may challenge up to the end of the normal period of limitation calculated not from the accruing of the cause of action, but from their attaining majority,⁴ and the failure of one to sue does not bar his younger brother. There is a curious exception to the last rule. Where several minor coparceners come of age successively and the senior, as manager (§ 423), allows time to elapse against *him*, limitation bars all the rest of them as well.⁵

¹ *Sivaramakrishnan v. Kaveri* AIR 1955 Mad. 705, [1956] Mad. 649. Cf. *Gunga v. Ajudhia* (1881) 8 Cal. 131, 136 (where Mitter, J. thought differently).

² *Sivaramakrishnan* (cited above) at p. 713; *Canara Banking v. South India Bank* AIR 1958 Mad. 132, [1958] Mad. 15.

³ *Lal v. Ambika* AIR 1925 P.C. 264, 52 I.A. 443, 47 All. 795.

⁴ Limitation Act, 1908, s. 6 (1). *Jawahir v. Udai* (1926) 53 I.A. 36, 48 All. 152, 50 M.L.J. 344 (PC); *Varada v. Sriramalu* AIR 1953 Mad. 894, [1953] 1 M.L.J. 31.

⁵ *J. Sreerama v. N. Krishnavenamma* [1956] An. W.R. 565, AIR 1957 An. P. 434 relying on *Subba v. Pattabhiramayya* [1945] 1 M.L.J. 200. Limitation Act, s. 7.

475. The right of a coparcener to challenge as stated above is modified by a very curious rule, which, like so much of Hindu law, is perfectly rational though not at once obvious. We have seen that 'after-born' coparceners cannot sue to set aside alienations made before their conception or adoption, as the case may be. But overlapping of lives may give this very right to them. If at the time of his conception there existed an unexpired right amongst the coparcenary body to challenge the same alienation, the joint-family property in which he acquired a birthright includes the 'invisible' asset, the property whose alienation could be effectively challenged,¹ an asset which, like an equity of redemption, may turn out to be of great value.² The rule is not open to abuse because, although a succession of minors might otherwise extend the period of challenge over a long space of time, it is settled (fortunately, but not very convincingly) that the period of limitation will in no circumstances be extended by this 'overlapping'.³ The same principle applies in a Nambudiri *illam*, in which wives have a right to question alienations along with the male coparceners (§ 582), for a wife whose marriage occurred after the death of the last member of the *illam* competent to question the alienation cannot herself impeach it.⁴

A joint family consisted in 1945 of *F* and his sons *S*₁ (a major), *S*₂ and *S*₃ (minors) and his wife *W*. *S*₁ then joined *F* in an improper alienation. *S*₂ and *S*₃ did not challenge it. In 1961 *S*₂ reached majority. By 1962 he died without challenging the alienation. Later in 1962 *W* conceived a son, *S*₄, but before his birth *S*₃ died without reaching majority. *S*₄ can challenge the alienation until 1964, when time would have run out against *S*₂ had he lived.⁵

476. Strangers who have not acquired an interest in the joint-family property cannot question an alienation, except in South India where the alienation, if *gratuitous*, is at present treated as 'void'. Thus *Imperial Bank of India v.*

¹ *Panchaiti v. Surajpal* AIR 1945 P. C. 1, 47 Bom. L.R. 599 (PC), [1944] 2 M.L.J. 395 (PC); *K. Sesamma v. P. Venkayya* [1956] An. W.R. 1067, AIR 1957 An. P. 386.

² *Bhagwat v. Debichand* (1940) 20 Pat. 727, 731, 734. See a full explanation of the current position in *Shivaji v. Murlidhar* (1953) 56 Bom. L.R. 426, AIR 1954 Bom. 386 (FB).

³ *Ranodip v. Parmeshwar* (1924) 52 I.A. 69, 47 All. 165 (PC), AIR 1925 P.C. 33; *Mahadu v. Tulsabai* (1957) 59 Bom. L.R. 1117.

⁴ *Kunji v. Dhathri* AIR 1954 T.C. 371, [1954] T.C. 471.

⁵ Limitation Act, 1908, ss. 6, 8; Art. 126.

Maya,¹ a leading case for Northern India, is no authority in the South. In that case a father-manager who owed money to a bank gave joint-family land to his wife. The bank, a stranger to the family property, had proceeded only so far as to attach the land alleging that it was still joint-family property. It was correctly held that only coparceners could impeach the manager's gift. If the bank had in fact been the auction-purchaser of the manager's interest it seems almost certain that it could have utilized the minor son's, or other coparceners', right to impugn the manager's gift, and challenged it without difficulty. It was because the bank was as yet a stranger to any interest in the property that its rights to challenge were denied. In South India a bank in such a position could rely upon the 'voidness' of the gift, and proceed as if it had never taken place (§ 465).

The method of challenge

477. When the alienation is 'void', as a gift by a manager or other coparcener in South India, no specific method is required by the law, nor is challenge, as such, essential. A suit to set aside the alienation is quite unnecessary, though it would lie. An unequivocal act repudiating the transfer will enable another alienee to dispossess the former (provided the latter has not perfected his title in any of the ways mentioned above: §§ 474-5), or to resist the latter's suit for possession.

478. Where it is 'voidable' in that, though for value, it is excessive (in South India), or beyond the powers of the manager,² or an alienation of an undivided interest in Northern India, the alienee is perfectly secure provided the persons entitled to challenge take no steps against him. No person not having an interest in the joint-family estate can disturb him, and the law of limitation perfects his title with time.

479. In Southern India one may sue to set aside an alienation for value on the ground of want of necessity, *bona fides*, etc. If however the plaintiff is concerned only to protect

¹ (1934) 16 Lah. 714, AIR 1935 Lah. 867. § 465.

² *Indernath v. Nandram* AIR 1957 Raj. 231. The use of the word 'void' in some cases, e.g. *Bhulan v. Rup* AIR 1941 Pat. 233, is *per incuriam*.

his interest and does not want to invoke the court's jurisdiction entirely to set aside the alienation, and is prepared if necessary to pay his proportion of any binding consideration that may be ordered as a condition of the freeing of his interest, he may sue only in his personal and not in a representative capacity.¹ He sues then for a declaration that the alienation did not bind his interest, whether in specific property handed over to the alienee, or generally, and if possession was handed over to the alienee, then he asks for possession with mesne profits from the date of suit. Mesne profits are available to him no earlier since the alienee in these circumstances was not a trespasser.²

The effect of challenge

480. An alienation once declared void by the court is void *ab initio*.

A manager improperly gave joint-family property to charities executing a trust deed. Exemption from income-tax was granted in respect of the income from the property. The deed was later set aside at the suit of a coparcener. It was held that the title reverted to the family and the income for the intervening years required to be assessed to income-tax.³

As we have seen, the right of the coparcener or coparceners to mesne profits depends upon equitable considerations. It is rare for the truly 'voidable' alienation to give the plaintiff a right to mesne profits, for until the alienation is set aside the alienee is entitled to rely upon the transaction and is not a trespasser. By contrast the plaintiff who has upset a void alienation may obtain (at the most) the profits of the three years before suit.⁴

PARTIALLY VALID ALIENATIONS

481. An alienation by a manager, a coparcener, or an owner of a coparcenary interest, or the court at the suit of a

¹ *K. Venkata v. K. Ramalingam* AIR 1957 An. P. 744, 748 citing *Peramanayakan v. Sivaraman* AIR 1952 Mad. 419, 437, [1952] Mad. 835.

² *Subba v. Krishnamachari* (1921) 45 Mad. 449, AIR 1922 Mad. 112, 118-19.

³ *S. N. R. Sundara v. Comm. I.T.* AIR 1957 Mad. 451, 31 ITR 449.

⁴ *Janakirama v. Nilakanta* AIR 1962 S.C. 633.

judgment-creditor of a coparcener or of the Official Assignee or Official Receiver may be attacked on the ground that it is only partially justified. This may be where the manager's alienation is partly supported by necessity, etc., where the alienee's *bona fide* inquiry extended only so far as to cover part of the proceeds of the transaction, where the coparcener, etc., purported to sell or mortgage property in excess of his presumptive share, or where the court sale has comprised more of the joint-family property than corresponds to the presumptive share of the judgment-debtor or insolvent, and therefore more than would be allotted in right of the coparcener at a partition.

482. In the case of the last illustration the rule applicable is simple enough: the sale does not bind the excess, and the coparceners (or in South India each individual coparcener) may sue to recover it or his share of it and the auction-purchaser has no defence or redress.

483. Partially-justified alienations by the manager and similar alienations by others come into a different category. There is a difference between mortgages and sales.¹ In the case of mortgages what is effected by the mortgage is a security and there should be no difficulty in decreeing the mortgage for the sum covered by necessity, by the mortgagee's *bona fide* inquiry, or (in South India) the amount corresponding to the mortgagor's presumptive share.² In the case of a sale, however, a distinction applies to the case of a manager or other alienor purporting to bind the whole family. If the difference between the consideration and the amount of binding debts or other 'necessity' found by the court is relatively small, the entire transaction will be upheld, because there is a presumption that the balance has been spent for the benefit of the family.³ This presumption is somewhat artificial, but it is convenient. The manager cannot be expected to work to very narrow margins.

A house which could not practicably have been partitioned was sold entire for Rs. 12,000. Necessity could be relied upon by the vendee

¹ *Ganpat v. Ishwar* AIR 1938 Nag. 476.

² *Durga v. Jewdhari* AIR 1936 Cal. 116, 62 Cal. 733, 745; in *Karuppu v. Sellammal* [1959] 1 M.L.J. 173, where the alienee had not acted *bona fide*, the court declined to employ this rule. § 484.

³ *Krishan v. Nathu* AIR 1927 P.C. 37, 54 I.A. 79, 49 All. 149 (PC).

to the extent of Rs. 7,700. It was held that the sale was nevertheless valid.¹

484. In order not to cramp unduly the manager's powers it has been held occasionally that even in a case of a mortgage a small discrepancy between binding consideration and the amount secured by the mortgage will not be allowed to affect the validity of the mortgage for the full amount, since once a proper application of a substantial proportion of the consideration has been proved, the court may, in the absence of circumstances giving rise to suspicion, *presume* that the small balance is also likely to have been required and applied for proper purposes.² But where the factors operating upon the manager's mind are clear the normal rule is, as we have seen, to decree the mortgage for the amount corresponding to necessity.³

485. Where the difference between the amount of necessity and the consideration is larger than one could reasonably call 'small', the sale will be set aside in Northern India without any equity over any part of the joint-family estate in favour of the alienee,⁴ who is reduced to suing his alienor, and thereafter (if necessary) his male issue under the Pious Obligation if there were male issue joint with him at the time of the infructuous alienation. Yet where some of the consideration is used for binding purposes, such as the payment of joint-family debts, the coparceners cannot approbate and reprobate and must, as a condition of the recovery of the property, repay that part of the consideration to the vendee.⁵ So in cases where the manager sold improperly and with the money all the coparceners bought other property, it was only just that they should not be allowed to enjoy both the recovered family property and what was acquired out of its proceeds.⁶ In South India, however,

¹ *D. Sadasiva v. B. Rattain* [1957] 2 An. W.R. 16, AIR 1958 An. P. 145.

² *Ambalavana v. Gowri* AIR 1936 Mad. 871, 873a (guardian : compare *Purushottam v. Gangadhar* AIR 1939 Bom. 445).

³ *Shidaya v. Basaprabhappa* AIR 1939 Bom. 301, [1939] Bom. 413.

⁴ *Narain* (otherwise *Lachhman*) v. *Sarnam* AIR 1917 P.C. 41, 44 I.A. 163, 39 All. 500 (PC).

⁵ *Krishan v. Nathu* AIR 1927 P.C. 37, 54 I.A. 79, 87, 49 All. 149; *Sri Nath v. Jagannath* AIR 1930 All. 292, 52 All. 391 (61 I.A. 150 reversed this on another point).

⁶ *Madegowda v. Gangadharappa* AIR 1955 NUC 1231 (Mys.).

where a non-alienating coparcener or owner of a coparcenary interest sues to free his interest from the excessive or improper alienation, the practice is in every case to declare his interest free of the alienation on terms. Thus the appropriate fraction of property is recoverable from the alienee on payment by the plaintiff of the same proportion of any part of the consideration that was covered by necessity or used to pay binding debts.¹ Thus where the balance is too large to be covered by the presumption of use for family purposes (§ 483), or where the alienation is an excessive alienation by a coparcener not a manager, we visualize an order that between the plaintiff and defendant matters should be so adjusted that the defendant retains so much of his purchase as corresponds to the actual necessity, returning the remainder (or agreed compensation) to the plaintiff. In principle this appears to violate the spirit of the rule in *Krishan v. Nathu*² (which was an appeal from Allahabad, a Northern Indian High Court) that it is incorrect to uphold the sale subject to the vendee's repaying the amount not covered by necessity, etc., but in adjusting the equities of the non-alienating coparcener and the purchaser for value the court has adhered to this practice and it is too late in the day to question it.

ATTACHMENT, AND INSOLVENCY

486. Attachment is a pending process and does not affect existing rights, while it hinders the creation of new rights, so long as it is in force, over the property in respect of which it has issued.³ Where attachment is (as an exceptional measure) ordered before judgment the right of the plaintiff to have recourse to the defendant's undivided interest is fully secured if the defendant dies *after* judgment, even before execution proceedings are commenced.⁴ The death

¹ *Vadivelam v. Natesam* (1914) 37 Mad. 435; *K. Venkata v. K. Ramalingam* AIR 1957 An. P. 744, 755, [1957] 1 An. W.R. 31.

² Cited above, at p. 88 of the I.A. report. See also *Karuppu* (cited above).

³ *Anantapadmanabhaswami v. Off. Rec.* (1933) 60 I.A. 167, AIR 1933 P.C. 134, 56 Mad. 405 (PC) (it takes precedence over an insolvency).

⁴ *Sankaralinga v. Off. Rec.* AIR 1926 Mad. 72, 49 M.L.J. 616. The opposite view held in Bombay overemphasizes the precautionary nature of attachment before judgment: *Subrao v. Mahadevi* (1914) 38 Bom. 105, AIR 1914 Bom. 256.

of a coparcener before judgment ends the creditor's hope of recovering his debt¹ unless (i) the debt is one which by its nature attaches to the coparcenary interest so as not to be defeated by survivorship,² or (ii) he can take advantage of the Pious Obligation.³ But where there has been no attachment before judgment, he stands to lose his remedy even if the debtor lives to judgment but does not survive until the interest is attached, this being the essential preliminary to the procedure of advertisement and sale.⁴

487. The position of the statutory owner of a coparcenary interest, or part thereof, differs, in that his interest does not pass by survivorship except in very rare circumstances and a female's interest never passes by survivorship.⁵ The defendant's legal representatives may thus suffer the attachment exactly as in the case of the separate estate in the hands of any heirs before the Hindu Succession Act was passed.

488. Formerly the widow who had taken under s. 3 (2) of the Hindu Women's Rights to Property Act, 1937, or an associated statute, was similarly placed to a Mitakshara coparcener in this respect.

489. Insolvency, whether it occurs as the result of the petition of the insolvent himself or his creditors, vests in the Official Assignee or Official Receiver his interest in the joint-family property as well as his separate assets. The peculiar nature and purpose of insolvency requires that after-acquired assets vest in the Receiver on behalf of creditors⁶ until the insolvency is terminated and the insolvent discharged. Accordingly the insolvent's share does not cease to be capable of being presumptively *increased* by survivorship, and the death of his brother, for example, may operate to the advantage of his creditors. If any joint-family property remains in the Receiver's hands on the termination of insolvency it reverts in the joint family as

¹ *Kalianna v. Masayappa* AIR 1943 Mad. 149, [1942] 2 M.L.J. 750.

² *Raghunath v. Dwarkabai* AIR 1941 Bom. 357, 43 Bom. L.R. 772 (the wife's right of maintenance, including arrears of maintenance).

³ *K. Parandhamayya v. S. Veerayya* AIR 1939 Mad. 280, 48 M.L.W. 905.

⁴ *Suraj v. Sheo* (1878) 6 I.A. 88, 5 Cal. 148 (PC).

⁵ HSA, s. 6.

⁶ *Hanumantha v. Off. Rec.* [1947] Mad. 44, AIR 1946 Mad. 503.

joint-family property, for insolvency does not affect the insolvent's status, nor work his severance from his coparceners.¹ Neither attachment, insolvency, nor sale in execution of the undivided interest can disrupt the family or defeat the right of survivorship.² The Receiver may dispose of the interest, or of items which he believes will be allotted by the court in future partition proceedings to an auction-purchaser or any other purchaser from the Receiver, and the purchaser must proceed against the joint family like any other purchaser of joint-family property otherwise than from the manager or from the total coparcenary body (§ 501).

490. When a father, or grandfather, or greatgrandfather is adjudicated insolvent the power of the ancestor to sell his male issue's interests to pay his antecedent untainted debts passes to the Receiver, who may proceed as the court would proceed in execution of a decree against the ancestor in question (§ 512).³ He cannot however sell shares of the sons, etc., which have been attached by creditors of the sons,⁴ nor, it seems, after they have separated from the father, albeit while insolvency proceedings were pending. When a *manager* becomes insolvent his power to alienate for purposes of legal necessity or benefit of the family does *not* vest in the Receiver, since this power is not a power in respect of property which the insolvent might have exercised for his own benefit; and this is the case even where the manager had incurred debts on behalf of the joint-family firm.⁵

491. A joint-family firm cannot be adjudicated insolvent, but the adult members participating in the business may be adjudicated insolvent,⁶ so as to produce a similar effect. The interests of minor members of the joint family are unaffected by these insolvencies and as a result some

¹ *N. Suryanarayanamurthy v. N. Veeraraju* [1946] Mad. 54, AIR 1945 Mad. 257.

² *Sheonandan v. Ugrah* AIR 1960 Pat. 66. So also in matrilineal families: *Cherutty v. Krishna* [1961] K.L.T. 879, 881-2.

³ *C. Nageswaraswami v. V. Viswasundara* AIR 1953 S.C. 370, [1953] SCR 814.

⁴ *K. Ramkrishna v. Purnachandra* AIR 1962 An. P. 129.

⁵ *Ramanlal v. Manilal* (1957) 59 Bom. L.R. 1243; *Off. Ass. v. Ramachandra* AIR 1923 Mad. 55, 43 M.L.J. 569.

⁶ *Chatram v. K. Amarchand* AIR 1960 Mys. 267.

proportion of the assets of the firm may be rescued from the claims of creditors.¹

492. The court itself has jurisdiction to effect a rateable distribution of the proceeds of the sale of a coparcener's interest amongst his creditors in certain circumstances outside the scope of the insolvency statutes. When an interest is sold to meet certain liabilities the purchaser cannot be subjected to the former coparcener-owner's proportion of other liabilities, and as a result the proceeds are applied by the court to the satisfaction of such creditors as agree to a rateable distribution with the decree-holder at whose instance the sale was held. We rely upon the obviously equitable rule that property which has once been sold by the court apparently free of encumbrances in order to pay a coparcener's debts cannot again be liable in the hands of the auction-purchaser to meet certain unsatisfied family liabilities which would have exhausted the entire family assets prior to the sale.

In *P. Sreeramulu v. D. Subbarami*² *R* and his brother incurred a debt for family necessity. The creditor attached the family properties and obtained a decree against *R* and his brother and *R*'s sons to the extent of their interests in joint-family property. *R* and his brother were then adjudicated insolvent. The creditor decree-holder applied and obtained execution against the sons' interests in the attached properties. The purchasers of these interests paid the sale proceeds into court and these were paid out rateably to the decree-holder and other creditors of the family who had decrees against the family for debts binding on the family and had applied for rateable distribution. The purchasers sued for partition. The district court held that they had purchased subject to payment of other family debts. The value of the joint-family property was Rs. 25,000, but the debts amounted to Rs. 40,000. The court could not have sold the interests at all if this condition could have been foreseen. Held: the purchasers bought free of debts. This must be so, for it was property they bought, not an interest having a minus value.

RIGHTS OF PURCHASERS OF COPARCENARY ASSETS

Purchasers from coparceners

493. We have seen that in South India the coparcener or owner of a coparcenary interest can create an equity in

¹ *Chidambaram v. Mutaya* AIR 1936 Ran. 160, 14 Ran. 122.

² AIR 1942 Mad. 554, [1942] Mad. 738 (FB).

favour of an alienee against the whole family which can be worked out by the alienee stepping into the shoes of his alienor in a general partition of the joint-family property. There is, therefore, no question of an actual transfer of an identifiable object, for the coparcener has no right to claim exclusive ownership of any object however trifling unless the manager, acting within his powers, confers this privilege upon him, or all the coparceners (§ 461) do the like. The alienee is not entitled to be put into possession of his purchase,¹ he does not become a tenant-in-common with the coparceners, etc.,² nor does the transaction substitute him for his alienor in any respect whatever.³ If the coparceners put him into possession of the property, however, it is not possible for *them* to eject him, but he is liable to be ejected at the suit of minors or owners of coparcenary interests who did not authorize or participate in the act of putting him into possession. A rule confined to Maharashtra and Gujarat, that an alienee once put into possession cannot be ousted pending a partition suit and may hold as if he were a tenant-in-common with the coparceners, etc.,⁴ is now supported by *stare decisis* only and appears to have been based on the special relationship of the alienee to the alienor in that very case as well as his long possession.

494. The alienee must pursue his remedy against the joint family within the period allowed by the Limitation Act. There is a difference of opinion both as to the moment when his cause of action arises and as to the period of time which may run against him. The Bombay High Court has held that the cause of action arises at the alienation (at the earliest) or on the death of the alienor, and, in the view of this High Court, there being no period specifically allotted by the Act the residual article (Art. 120) applies and the alienee has only six years in which to sue for partition.⁵ If however the alienor was already separated in status and the property

¹ *Bai Shevantibai v. Janardan* AIR 1939 Bom. 322, 41 Bom. L.R. 631.

² He is not entitled to mesne profits except where the coparceners separate (whether in status only or by metes and bounds) without allotting him his share: *D. Sivaramamurthi v. A. Venkayya* (1934) 57 Mad. 667, AIR 1934 Mad. 364.

³ *Peramanayakam v. Sivaraman* AIR 1952 Mad. 419 (FB), 441, 473.

⁴ *Bhau v. Budha* (1925) 50 Bom. 204, 28 Bom. L.R. 765; see *Bai Shevantibai* (cited above), at 41 Bom. L.R. 631, 659, 651.

⁵ *Bai Shevantibai* (cited above).

had remained undivided notwithstanding the severance, Art. 144 applies and he must file his suit within twelve years from the date on which his title is actually denied.¹ A more attractive rule is in force in Madras and Andhra Pradesh. There the view is taken that the alienee's cause of action arises at the time of the creating of the equity itself, that is, when he gives value to the coparcener-alienor, except in the rare cases where the coparceners put him into possession of the joint-family property, and that since his demand for partition is in substance a demand for possession of property (a view the Bombay High Court does not take) the appropriate articles of the Limitation Act are in every case those which relate to recovery of possession (Artt. 49 (it seems), and 144). Thus in all mortgages and sales of immoveable property the period is twelve years, and it runs from the time when consideration passes.²

495. The remedy is to step into the shoes of the alienor and work out rights by partition.³ This may be done even after the alienor's death, for the equity attaches not specifically to his interest but to the joint-family property as a whole. It is for this reason that although, as used to be remarked, the alienee is not interested in and has no right to detailed knowledge of, the affairs of the family beyond his immediate concern,⁴ he is in fact compelled to sue for a general partition.⁵ The nuisance imposed upon the manager of supplying full accounts of the family's assets, debts, and future liabilities by way of maintenance, etc., is offset by the fact that the alienee may otherwise be allotted judicially as his purchase a much larger share than the alienor would have had, had he been suing for a partition at that identical time. The litigation proceeds upon a mere fiction that the alienor is separating simultaneously with the alienee's suit, the net

¹ *Vishwanath v. Mahadeo* (1958) 61 Bom. L.R. 180, AIR 1960 Bom. 50.

² *Thani v. Dakshinamurthy* AIR 1955 Mad. 288, [1955] Mad. 1278; *M. Narasimhaswami v. M. C. Venkata* AIR 1961 An. P. 279, dissenting from *Bai Shevantibai* on the ground that the Privy Council in *Sudarsan v. Ram* AIR 1950 P.C. 44, 29 Pat. 279, showed awareness of the possibility of possessing an undivided interest adversely to an equitable owner such as a transferee from a coparcener (29 Pat. 279, 290-1).

³ *Peramanayakam* (cited above).

⁴ Discussion in *Davud v. Radhakrishna* AIR 1923 Mad. 467.

⁵ *MR. LN. SM. Ramaswamy v. Adaikkammai* AIR 1960 Mad. 341; *Nihalu v. Chandar* AIR 1959 Pun. 115.

assets are ascertained, the share of the alienor is established, and at that stage only is the question decided whether or not the alienee is entitled to possession of any and if any which part or parts of the joint-family assets.

Because the alienee is entitled to work out his rights by a general partition, stepping into the shoes of his alienor, it might be supposed that, in those cases, to which we come presently (§ 500), where he asks the court to exercise its discretion in his favour, and to award or allot him as an equitable measure a particular item of property which he purported to buy, it would be essential, for the court to employ such discretion, that the alienor himself should still be alive at the date of the suit. This has actually been held in *obiter dicta* by a single judge in a recent Bombay case.¹ It is, however, untrue, since the alienee's rights are against the whole family, there is never any *actual* allotment to a specific coparcener, and the formal allotting to the share of the alienor is only done to establish the alienor's alienable quotient, and to secure that the equities of other parties, in particular other coparceners and their alienees, are protected. It is for this reason that neither the alienor's death nor his surrender or renunciation (§ 537) affect the alienee's equity.²

496. Ascertaining the maximum share which may be allotted to the alienee has been complicated by a doubt as to the effect of the existence of female members of the family who would be entitled to shares at the time of the alienation. It is true that when it comes to a partition by metes and bounds certain females in some parts of India³ are entitled to proportionate shares, from which certain separate property of their own may be deducted. It is notorious that these rights attach only in a hypothetical sense so long as actual partition has not taken place.⁴ But living potential claimants are usually made parties to the partition proceedings.⁵

¹ *Namdeo Govind v. Mumtaz Begum* (1961) 64 Bom. L.R. 467, 469 (a case which has a slip also in the decision, and should be consulted with caution).

² *Sellammal v. Periammal* AIR 1962 Mad. 144.

³ Excluding Madras, Andhra Pradesh, Kerala (Mitakshara law): § 528. Mysore has a statute of its own which is reproduced in part with notes of decisions below (App. II).

⁴ *Pratapmull v. Dhanabati* AIR 1936 P.C. 20, 63 I.A. 33, 63 Cal. 691.

⁵ On the effect of non-joinder of proper parties see *Devidas v. Shri-shaibappa* AIR 1961 S.C. 1277 (does not invalidate). § 539.

From this it was understood in *Parappa v. Mallappa*¹ that a father joint with his son and wife could prospectively alienate only one-third and not one-half of the family property, since his 'wife's share' could not be within his power of disposal. The fallacies and inconveniences in this line of reasoning are plain, for her right to a share may never materialize and there is no means of knowing whether when the time comes her right will not have been adeemed by gifts to her of *stridhanam* (§ 532). The basis of this extraordinary rule is a Privy Council decision in which in execution proceedings one-third was allotted to the auction-purchaser of a father's interest, and not one half: but the circumstances were peculiar, a partition by metes and bounds was in contemplation from the first, and until *Parappa's case* the rule had never been utilized in reference to voluntary alienations by a coparcener.² In any event the rule cannot be followed in Madras and other States where women (other than women of families governed by the Benares school)³ do not take shares at a partition at Mitakshara law (apart from statute), and in Mysore and Gujarat it may be overruled by a Full Bench.

497. A separate problem arose in *Peramanayakam v. Sivaraman*,⁴ the most authoritative case on alienation of undivided interests. When in South India a *manager* makes an alienation which is only partly supported by necessity, can the alienee tack the manager's undivided coparcenary interest to the manager's share of the necessity found by the court to be binding? This would have the effect of giving the alienee from a manager an advantage over an alienee from a non-manager. Since however the necessity binds the entire family, each interest must bear its distributive portion of it, and the result is that the alienee from a manager can have recourse to so much as corresponds to necessity *plus* the manager's interest *minus* the proportion of the family's necessity binding upon the manager as alienor.

¹ AIR 1956 Bom. 332, 58 Bom. L.R. 404 (FB), severely criticized at (1957) 20 S.C.J. (J.) 85-96.

² *Hurday v. Rooder* (1883) 11 I.A. 26, 10 Cal. 626 applied incorrectly in *Hushensab v. Basappa* (1932) 34 Bom. L.R. 1325, 140 I.C. 736 and *Muneswari v. Jugal* AIR 1952 Cal. 368, is noticed and explained at *Sheonandan v. Ugiat* AIR 1960 Pat. 66, 69-70.

³ *Kanyalal v. Cont. of E.D.* AIR 1961 An. P. 333, [1961] 2 An. W.R. 266.

⁴ AIR 1952 Mad. 419, [1952] Mad. 835.

The manager (who had one other coparcener) sold lands for Rs. 13,400 out of which only Rs. 7,022 was covered by necessity. The net assets of the family were worth Rs. 12,978 at date of suit; the manager's presumptive share was therefore worth Rs. 6,489. Could the alienee retain lands to the extent of Rs. 13,400 which is less than Rs. 7,022 + Rs. 6,489? No. The non-alienating coparcener can free his interest (half the lands) provided he bears his proportion of necessity (Rs. 3,511). The result is that the alienee lost Rs. 3,400 worth of his purchase. He could retain lands to the value of Rs. 7,022 + Rs. 6,489 — Rs. 3,511 = Rs. 10,000. If there had been two non-alienating coparceners the alienee's equity would have been worth Rs. 7,022 + Rs. 4,326 — Rs. 2,340.66 = Rs. 9,007.34.

498. If the plaintiff in the partition proceedings seeks possession of property corresponding to the alienor's share, the maximum he may obtain is the fraction of the assets to which the alienor would have been entitled at the date of the transaction itself, as applied to the net distributable assets at the date of suit.¹ Since the net value of the joint-family assets may fluctuate in the interval the alienee is at risk, and he is naturally not only entitled to question improper alienations of joint-family property which may be questioned, happening prior to his transaction (§ 471), but also any improper alienation which takes place thereafter which is not inferior to his own equity. The first right exists to enable him to ascertain and realize his right, the second to shake off and repudiate any claims which would prejudice the realization of his own equity.

499. If the transaction was a mortgage the question may arise whether the mortgagor's share as ascertained for this purpose in partition proceedings will be large enough to meet the liability secured by the mortgage and incidental to the litigation. If it is, an appropriate portion of immoveable property will be available (if necessary) in partition proceedings commenced by the purchaser of the mortgagee's interest (who is often permitted by the court to be the mortgagee himself). In this way money is available for the discharge of the family and the satisfaction of the alienee. If the share is insufficient the most that can be sold is the alienee's interest, and the mortgagee will have lost part of his security without remedy, unless he can have recourse to the interests of the male issue of the alienor for the unpaid

¹ *Peramanayakam* (cited above) at pp. 437, 441; *Sakarchand v. Narayan* AIR 1951 Bom. 10, 52 Bom. L.R. 888 (FB).

balance under the Pious Obligation.¹ Or the alienor may have separate property which will make good the deficiency. In neither case is the partition court bound to make available to the eventual purchaser any particular part of the family's lands, even if some have been named in the mortgage deed,² for the alienee is not, as we have seen, placed in the position of owner of any joint-family property prior to the partition, and the partition court has discretion to withhold from a stranger property which it would be inconvenient or unjust to take out of the possession of members of the joint family or persons to whom they have consigned possession of it.

Even a purchaser in possession is not sure of retaining it. In 1940 a father alienated a house to a female friend for one-third of its market value. He then had four sons. In 1951 they sued for possession and mesne profits. The defendant, who had lived in the whole house for eleven years and given an inadequate price, asked the court to exercise its discretion in her favour and allot her the house in right of her vendor. The court would refuse, holding that she was never entitled to more than a one-fifth interest in the house, and that no equity existed in her favour.³

500. The court's discretion will do little harm to the mortgagee, for he is interested only in his security, and if a sale is inevitable one portion of joint-family property is as likely to serve his turn as another. It is otherwise with the purchaser of a specific item of joint-family property. Whether or not he realized at the time that his vendor was a coparcener the effect is the same. The most that he can do is to ask the court in partition proceedings to exercise its discretion in his favour and to allot to him, in right of his alienor, the item in question, if it comes within the alienor's share as ascertained for the purpose.⁴ If it does not, he has an option to take less (as in the case of fields), and to seek a remedy against the alienor, and if necessary his male issue, for the balance (§ 503). If it does come within the share he has a good chance of receiving it if it is not the sole dwelling-house occupied by females of the family or otherwise in such occupation or use which would render it inconvenient or unjust to put him in possession. If he is unfortunate in this

¹ § 503.

² *K. Sitamahalakshmi v. K. Ramachandrarao* AIR 1957 An. P. 572, [1957] 1 An. W.R. 87.

³ *Namdeo v. Mumtaz* (see § 495 : facts adjusted).

⁴ *Jagdish v. Rameshuwar* AIR 1960 Pat. 54.

respect, as where he purported to buy lands, and all of them are in the possession of mortgagees personally working them, he is allowed, by analogy with the 'substituted security' available to the lender on a mortgage of joint-family property, to choose other items of the same market value or less.¹ He has again an option to take joint-family property in substitution for his original purchase, or to proceed against the alienor for failure of consideration and breach of warranty of title.² The court however whilst protecting the rights of the non-alienating members of the joint family whom it is bound to protect, seeks to make the alienee's equity a reality, and cases where no joint-family property is actually taken must be rare.

Auction-purchasers

501. A purchase of an item of coparcenary property at a court auction is a different matter from a purchase from a coparcener, etc., as an individual acting voluntarily. The purchaser from a coparcener is in relationship with the coparcener, and thus with the joint family. His equity is directly over the joint-family property. The purchaser at a court auction has no relationship either with the judgment-creditor or mortgagee, still less with the coparcener-debtor or mortgagor. The court does not warrant the availability at the eventual partition proceedings of any specific item of joint-family property which it may purport to sell. Hence when such a purchaser fails to receive at the partition stage the item which he purported to buy, he has no right to 'substituted security' and has no other remedy.³ Dicta to the contrary in a Bombay case⁴ are, it is submitted, no longer reliable in view of the careful study given to this question in recent Andhra Pradesh cases. An auction-purchaser should therefore hesitate to buy anything but the actual undivided interest. Such a claim allows the partition court sufficient

¹ *K. Sitamahalakshmi* (cited above).

² Transfer of Property Act, 1882, s. 55 (2).

³ *B. Venkata v. N. Srirangam* AIR 1956 Andhra 188, [1956] An. W.R. 251 (FB). The suggestion, in *Fatimunnisa v. Abubaker* [1962] 2 An. W.R. 46, that the auction-purchaser might obtain substitution of property if he intervened as a party in partition proceedings pending between the coparceners, requires reconsideration.

⁴ *Vasudeo v. Kankoochand* [1950] Bom. 777, AIR 1951 Bom. 226.

freedom of manoeuvre. He need not hesitate to buy a distinct item if he is certain that there exists no ground likely to cause the court's discretion to be exercised against him.

The alienee's alienee

502. It is evident that a transferee from the alienee can stand in no better position than his own transferor. A question arises whether he is in any worse position. In the case of a court auction the subsequent purchaser cannot in any event obtain 'substituted security'. What of the case of a voluntary alienation from a coparcener, etc.? Logically if the auction-purchaser is himself debarred from such 'security' by the fact that he is in no contact with the family, the same disability should prevent the voluntary alienee's alienee, who may have no idea of the nature of the equity that comes into his hands, from obtaining better treatment. It has been held that the subsequent holder may sue for partition like his predecessor, while he has neither more nor less chance of obtaining specific property than his predecessor had,¹ and that he has no right to a decree of specific performance and is confined to obtaining his remedy in a partition suit.² In *E. China v. P. Venkata*³ a Full Bench of the Andhra Pradesh High Court decided that an alienee from the original alienee had no right to 'substituted security' if his application in partition proceedings failed, and he is confined to a suit for damages against his own alienor.⁴ His position was in their view in no way improved if the original alienee had joined him as co-plaintiff, since the latter had by definition divested himself of the equity in question.

THE PIOUS OBLIGATION

The liability

503. The sons, sons' sons, and sons' sons' sons of a man (usually for convenience called his 'male issue') are liable

¹ *Jagdish v. Rameshwar* AIR 1960 Pat. 54.

² *Shamlal v. Yesaram* [1954] Nag. 866, AIR 1954 Nag. 334.

³ AIR 1959 An. P. 523, [1959] 2 An. W.R. 79 (FB).

⁴ *Dhada v. Muhammad* AIR 1921 Mad. 384, 44 Mad. 167.

to pay, to the extent of their interests in Mitakshara joint-family property, the private, untainted, pre-partition debts of their male lineal ancestor. The Pious Obligation has been described as a necessary corollary to the Mitakshara birth-right¹ with the result that Muslims and Christians following the Mitakshara joint-family system are as much bound by that Obligation as Hindus. Yet the liability exists in order that the soul of the ancestor (who may or may not be already dead at the time when payment is exacted) may be free from the load of binding indebtedness. The Supreme Court has expressed the obligation as follows: 'The basis of the doctrine is spiritual and its sole object is to confer spiritual benefit on the father. It is not intended in any sense for the benefit of the creditor.'² Nevertheless it is the creditor who is most interested in the Pious Obligation. When the son, etc., are separated from the father the Pious Obligation (as such) ceases to lie upon them in respect of debts subsequently incurred by the father, but if a debt existed before partition and has subsequently become time-barred, the father may revive the obligation in regard to it, for the limitation of actions bars the remedy but does not extinguish the indebtedness.³ We have already seen how the male issue are liable to suffer their interests' being sold to pay a private, untainted, antecedent, pre-partition debt (§ 446).

504. The word 'debt' expresses the Sanskrit *rinam*, which includes unliquidated liabilities, such as a liability discoverable on the closing of partnership accounts and the liability arising after settlement of a claim for breach of contract or in tort, or failure to pay a sum morally due but undetermined (because irrecoverable) during the lifetime of the father.⁴ Even a time-barred debt is still a debt for the purposes of supporting an alienation by the father himself so as to bind the interests of his male issue.⁵ But it has been held (somewhat anomalously) that where an insolvent father obtains his discharge his liability for debts proved in

¹ *Chinnaswamy v. Anthonswamy* AIR 1961 Ker. 161.

² *Luhar v. Doshi* AIR 1960 S.C. 964, 966 per P. B. Gajendragadkar, J.

³ *Gangadhar v. Dolgovinda* AIR 1956 Or. 193.

⁴ *Nachimuthu v. Balasubramania* AIR 1939 Mad. 450, [1939] Mad. 422; *Rupa v. Sriyabati* AIR 1955 Or. 28.

⁵ *Gajadhar v. Jagannath* AIR 1924 All. 551, 46 All. 775 (FB).

insolvency is extinguished and therefore his undivided sons could not be liable therefor.¹

505. Sons and other male issue cannot escape liability by separating between the incurring of the debt and a suit by the creditor. Though their separation is irrevocable, their separated shares (whether or not yet distinguished by metes and bounds) are liable to meet the obligation proportionately.² Nor will conversion to another religion, it seems, serve to dissolve a liability that had already attached to male issue.³ Where a partition of joint-family property takes place under the HSA (§§ 418, 598) and provision is not made for the payment of a father's debts, even female sharers take their shares burdened with the liability: the Act does not purport to liquidate debts binding under the Pious Obligation.⁴

506. It is traditional to consider under the heading of the Pious Obligation the liability of sons (only) to the extent of their interest in joint-family property for the suretyship debts of their father.⁵ The only suretyship debts of this character binding upon the sons are those which were incurred personally⁶ by the father as surety for payment — as contrasted with debts incurred as surety for honesty or good behaviour.⁷

Tainted debts

507. The male issue can escape liability by showing that the debts were 'tainted', that is, incurred for a tainted purpose, or in the course of and as a direct result of a tainted

¹ *C. Sriramamurthi v. Off. Rec.* AIR 1957 An. P. 692, [1957] 1 An. W.R. 216.

² *Pannalal v. Naraini* AIR 1952 S.C. 170, [1952] S.C.J. 211, [1952] SCR 544.

³ *Somasundara v. Narasimhachariar* AIR 1939 Mad. 69, [1939] Mad. 140, 143.

⁴ *Modi v. Chhotubhai* AIR 1962 Guj. 68, 72, 76 (ignore dictum on burden of proof).

⁵ *Sarwan v. Kunji* AIR 1951 M.B. 49; *Hindustan v. Sohan* (§ 446).

⁶ *Linghat v. Parappa* AIR 1951 Bom. 1, 52 Bom. L.R. 846, explaining *Kesar v. Uttam* AIR 1945 P.C. 91, 72 I.A. 165.

⁷ *K. Lakshminarayana v. K. Hanumantha* (1934) 58 Mad. 375, AIR 1935 Mad. 144.

act on the father's part. The connexion between the debt and the 'taint' must be clearly made out.¹ The plea must be made at the earliest appropriate moment, and it is normally suitable as a defence to a suit by a mortgagee or vendee, or as a reply to a written statement filed by a vendee or auction-purchaser who is already in possession of the male issue's interests. In all cases of alienations the male issue must show that the debt was tainted to the creditor's knowledge, otherwise collusive suits by sons whose father had recklessly incurred debts, alleging immorality by the father, would undermine the confidence of lenders.²

508. Cases are likely to be rare in which the creditor lent to the father, or the purchaser purchased an excessive proportion of the property from him, in full knowledge that the purpose behind the transaction was such as would be tainted and therefore not binding on the male issue, for moneylenders in particular are well apprised of the law on the subject. One supposes that the only creditor to be 'caught' will be one who does not know his Hindu law. This makes still more deplorable the degree of uncertainty regarding the limits of 'taint'. The subject is highly intricate.

509. Debts are tainted which were incurred by way of unpaid tolls or fines,³ an unpaid bride-price, for the enjoyment of women (and likewise for the purpose of supporting or meeting the customary needs of a kept concubine),⁴ or for the purchase of liquor.⁵ Costs in a cause, which are not fines, may be tainted when they were risked by fraudulent pleading.⁶ Debts are likewise tainted if they are 'illegal or immoral'. This last expresses in a paraphrase the Sanskrit term *avyavaharika* (which literally means, 'unenforceable by process') — a definition of a residuary class of 'tainted'

¹ *Udmiram v. Balramdas* AIR 1956 Nag. 76, [1955] Nag. 744.

² *Luhar v. Doshi* AIR 1960 S.C. 964 (very strong dicta).

³ *Said v. Raja* AIR 1932 Oudh 255, 263; *M. R. Radhakrishna v. Union* AIR 1959 Mad. 71, [1958] 2 M.L.J. 563.

⁴ *P. Lakshmanaswami v. Raghavacharyulu* [1943] Mad. 717, AIR 1943 Mad. 292.

⁵ *Smritis* cited by Mayne, 11th edn, p. 398, n. (j).

⁶ *Ramalingar v. Sec. of State* (1910) 20 M.L.J. 89, 4 I.C. 105; *Dar-beshwari v. Raghunath* AIR 1949 Pat. 515. Cf. *Sheodhar* (cited at § 510 below).

debts in terms which themselves need to be defined. Today the most favoured explanation is that it is not so wide in its meaning as 'what a decent and respectable man would not incur', nor so narrow as 'not lawful, usual or customary', 'what is contrary to public policy', but rather 'what is not customarily or properly incurred by a Hindu father of a family', being tainted by *moral turpitude*.¹ Colebrooke's translation, 'debt for a cause repugnant to good morals,' has been treated as making the nearest approach to what the word meant in the *Mitakshara* on the *Tajnavalkya-smṛiti* (II, 47), our basic text on the subject.² Naturally concepts of what is morally repugnant change with the times. Some cases are irreconcilable, but from more recent authorities a fairly clear picture emerges.

510. Illegal debts are those which arise out of a breach of the law, for example those incurred in the course of an act punishable under the Penal Code,³ or tainted by illegality as wagering contracts where the wagers in question are not recognized by law.⁴ Immoral debts are those which are incurred as a direct result of breach of the commonly accepted moral code. Highly tortious acts, acts which at their very inception are tainted with an evil purpose, may lead to debts, and these will be tainted even if the father escaped, or could have escaped, a criminal prosecution. There is thus a real distinction between stealing a client's money, and deliberately postponing accounting for what one has received on his behalf: the latter may well precede an 'untainted' debt.

A father was cast in damages for a malicious prosecution; another was sued for possession and mesne profits of an estate of which he had forcibly dispossessed the rightful owner. Both had contracted *avyavaharika* debts, and the sons' interests were free.⁵

¹ *Perumal v. Province of Madras* AIR 1955 Mad. 382, 385, [1955] 1 M.L.J. 370.

² *Hemraj v. Khemchand* AIR 1943 P.C. 142, [1943] All. 727; *Luhar v. Doshi* AIR 1960 S.C. 964, 966; *S. M. Jakati v. S. M. Borkar* AIR 1959 S.C. 282, 286.

³ *Toshanpal v. Dist. Judge* (1934) 61 I.A. 350, AIR 1934 P.C. 238, 56 All. 548; cf. *Hari v. Sant* AIR 1917 Cal. 495, 32 I.C. 969.

⁴ *Muthusami v. N. K. Mytheen* AIR 1937 Mad. 344, [1937] 1 M.L.J. 231.

⁵ *Raghunandan v. Badri* AIR 1938 All. 263; *Sheodhar v. Sitaram* AIR 1962 Pat. 308 (FB); *Krishnrao v. Deorao* AIR 1963 M.P. 49 disagrees.

Where a civil liability arises in *other* cases of irregularity, as for example where the father so deals with the property of others as to incur blame as well as debt, the male issue cannot escape it, for such a debt is morally untainted, they being held liable to pay what was morally owing, by way of restitution, to the aggrieved party.¹ The degree of wantonness in the father's wrongdoing appears to afford no secure test. Recent cases emphasize the need for immorality or illegality in the motive actuating the father at the moment when the liability arises, and the court is reluctant to extend the concept *avyavaharika* to any avoidable classes of case; for it is a concept which protects the sons of a Mitakshara coparcener from meeting his liabilities, and the policy is to keep the force of the ancient notion within the narrowest bounds, consistently with the case-law already accumulated.

A father was negligent in investing the monies of a Cooperative Bank of which he was managing director, and as a result he was ordered by the Registrar of Co-operative Societies to pay a contribution of Rs. 15,100. Land belonging to the joint family was attached and sold in execution of this payment order. Possession was sought by a son alleging that the debt was *avyavaharika* and not binding upon him. It was held that the debt was not *avyavaharika*. In this age, with the complex institutions of banks and joint-stock companies with their technicalities and complex system of laws such a liability could not be brought within the ancient concept.²

A father's income was assessed not on the basis of returns he had submitted but on the estimates of the income made by the income-tax department, on the ground that he had concealed his true income. The sons claimed the debt was *avyavaharika* as deriving from an attempt to cheat the revenue. It was held not so to be, for there was, it was said, no element of moral turpitude in the actual incurring of the debt.³

511. Mere incompetence or imprudence⁴ or breach of duty towards the male issue themselves will not serve to render the debt tainted.⁵ In *Perumal v. Province of Madras*⁶ a next friend appointed to prosecute a suit originally filed *in forma pauperis* by a natural guardian of her minor sons failed to instruct a pleader and allowed the suit to be dismissed. The next friend was ordered to pay the government Rs. 1,792,

¹ *Chhakauri v. Ganga* (1911) 39 Cal. 862; *A. Anandrao v. Co-op.* AIR 940 Mad. 828, [1940] 2 M.L.J. 23; *Sita v. Tarachand* AIR 1962 Raj. 136.

² *S. M. Jakati* (cited above) at p. 286.

³ *M. R. Radhakrishna v. Union* AIR 1959 Mad. 71, [1958] 2 M.L.J. 563.

⁴ *Bal v. Maneklal* AIR 1932 Bom. 136, 56 Bom. 36.

⁵ *P. Lingayya v. V. Punnayya* AIR 1942 Mad. 183, 185, [1942] 1 M.L.J. 57 (FB); *Ramamurthi v. Kuppuswami* AIR 1950 Mad. 621, [1950] 1 M.L.J. 499.

⁶ AIR 1955 Mad. 382, [1955] 1 M.L.J. 370.

being the court-fee payable on the plaint. It was held that this debt was not *avyavaharika*, since the debt was not incurred under the influence of moral turpitude. The debts of a father to pay for his cure from venereal disease are not tainted with immorality, since the immorality was not bound up with the debts.¹ His debts incurred to defend himself against a criminal charge, even on appeal against conviction and sentence, are untainted, whatever the merits or outcome of the proceedings — for here too the connexion between the debt and the illegality or immorality is too remote.²

Suits by the creditor

512. If the father and his male issue are still joint a decree against the father can be executed against all of them without the names of the male issue being added as co-defendants.³ Their rights are sufficiently protected by the opportunity left to them of challenging the execution proceedings on the ground that the debt was 'tainted'. The court directly utilizes the father's own power of sale because, apart from the question of taint, the male issue have no possible defence. The Pious Obligation is a corollary to the Mitakshara birthright.

513. If however the male issue or some of them have separated from the father prior to execution, the names of those who have separated must come on to the record, and this may be done by filing separate suits against each separated son (§ 505).⁴

514. The right to recover a debt under the Pious Obligation ranks *pari passu* with other debts of the male issue, and in an insolvency of a son, for example, the creditors of the father have no priority over those of the son.⁵ The creditors

¹ *P. Bholaiiah v. P. Budagaiah* AIR 1958 An. P. 89.

² *Ananga v. Uchhab* AIR 1955 Or. 179, 182.

³ *Pannalal* (cited below).

⁴ *Pannalal v. Naraini* AIR 1952 S.C. 170, [1952] S.C.J. 211; *Ramachandran v. V. S. Ramachandra* AIR 1956 Mad. 215. That the property may be undivided makes no difference: they must be added as parties or sued separately from their father.

⁵ *A. Achiah v. P. Papiiah* AIR 1945 Mad. 73, [1944] 2 M.L.J. 158.

of sons are, however, postponed to the State claiming from the son's interests their father's debt for unpaid income-tax, for the State has (in this instance) a statutory right to priority.¹

PARTITION

The right to sever

515. The right to sever the status of jointness is distinct from the right to a physically separated share. The right to separate possession is however dependent on the severance of status, which must precede the acquisition of a separate share (which is its natural end-product) by however short a time.² The coparceners can arrange to divide the family property or part of it for convenience of enjoyment and management, without necessarily severing their joint status³ and it is a question of fact whether coparceners who happen to live and dine separately and enjoy property separately are actually separated. Mere cesser of commensality or separation in residence, food and worship do *not* by themselves constitute severance in status.⁴ On the other hand coparceners who live together may very well be separated and unreunited (§ 557),⁵ and their property or parts of it may be held as tenants-in-common, the 'manager' being in fact either their agent or representative (§§ 454ff).⁶ From the way the family live and manage their affairs it is often difficult to distinguish whether they are such a family as has been mentioned last above, or a true joint Hindu family: but on the death of a coparcener his share must pass in the latter case by survivorship under the former system. Under the system in force in India since 17 June 1956 the undivided interest in a true joint family will pass in nine cases out of ten by succession, so that the distinction will, though no less important, be more difficult than before. Where no

¹ *Ch. Raghava v. State* AIR 1959 An. P. 631, 36 ITR 47.

² Mayne, 11th edn, § 448, p. 550.

³ *Palani v. Muthuvenkatacharla* (1925) 52 I.A. 83, AIR 1925 P.C. 49, 48 Mad. 254.

⁴ *D. Latchandhora v. D. Chinnavadu* AIR 1963 An. P. 31 (strong case).

⁵ *A. Venkatapathi v. D. Venkatanarasimha* AIR 1936 P.C. 264, 63 I.A. 397, 71 M.L.J. 558.

⁶ *Appovier v. Rama* (1866) 11 M.I.A. 75.

immediate division of property takes place great difficulties arise in practice to determine when precisely status was severed, and sometimes the court cannot get nearer to the date than a year or so: this is because where they do not demand immediate separate possession the members prefer to leave things vague and to appear to slide gradually into a position which is more agreeable to them, but which is, from the point of view of prestige, less desirable. The law however imputes a definite moment of severance of status, or, as is sometimes said, a severance in interest. Where coparceners and owners of coparcenary interests sever in interest, any property that is left undivided after a partial partition of the assets is held on a tenancy-in-common,¹ unless the dividing members convey it to themselves (as is very unusual) on conditions which resemble those of the coparcenary tenure.² If they do this it does not follow that after-born members will be entitled to participate. The Mitakshara birthright operates only with respect to undivided coparcenary property and, after a death of a coparcener or partition, between a father and his son as to a separated or separately-owned share.

516. The right to sever is free. Where, as for example under tenancy statutes, the existence of a right depends on severance having taken place, no court may consider the *fides* or motives of separating coparceners — the only question is whether they have actually separated.³ The right is not affected by the presence of minors or lunatics as coparceners,⁴ by alienation by the coparceners or by insolvencies (§ 489), or by contracts not to sever.⁵ The latter, if they are

¹ *Balkishen v. Ram* (1903) 30 I.A. 139, 30 Cal. 738, 5 Bom. L.R. 461 (PC).

² This will require a registered deed if the property is above Rs. 100 in value. Non-registration will render the transaction inoperative. Compare what took place in *Purnananthachi v. Gopalaswami* (1936) 63 I.A. 436, 71 M.L.J. 554, AIR 1936 P.C. 281 (agreement to remain joint).

³ *Arwindlal v. Khandu* (1961) 63 Bom. L.R. 929.

⁴ *Parbati v. Nawni* (1909) 36 I.A. 71, 78, 31 All. 412, 19 M.L.J. 517 (PC), citing *Balkishen* (cited above) at 30 I.A. 150; *Ratneshwari v. Bhagwati* AIR 1950 F.C. 142, [1949] FCR 715, [1950] S.C.J. 514.

⁵ *Ramlinga v. Virupakshi* (1883) 7 Bom. 538 is no longer sound: agreements not to partition (unlike agreements not to adopt) are not contrary to public policy.

broken, may give rise to actions for damages,¹ but *factum valet*, and the jointness is duly severed. The minor son is severed, however, by his father's taking him with him when separating himself from his collaterals.² The minor's right of severance is limited by the fact that unless severance is in his interest the court may, if the opportunity arises, declare it ineffective.³

517. An anomalous rule operates in Maharashtra and Gujarat. It prevents the son from severing from his father against the latter's will when the father is joint with his own ascendants or collaterals.⁴ A father can anywhere divide a son from himself at his mere will and pleasure, giving him his proper share of the joint-family property (§§ 524, 554). He may refer a dispute between himself and his sons or members of the family other than coparceners to arbitration, authorizing the arbitrator to partition the joint-family property. If the award is otherwise valid, and the sons are awarded separate shares, they are bound by it.⁵ By a widespread custom, which is (in vain) contradicted in the *Mitakshara*, the son may be prevented from separating by his father's veto.⁶

518. If one of several coparceners separates, the joint status of the others (not being his minor sons) is not necessarily affected.⁷ There is no presumption that the severance of one involves the severance of the others *inter se*. Nor is there a presumption, after one or more are shown to have left, that the others remain joint.⁸ After a partition the status of non-participant members must be shown by him who relies upon it. There is an *initial* presumption indeed that agnates are joint, but the presumption weakens sharply as the distance in point of generations from the common

¹ *Sobhagsingh v. Pirthisingh* [1950] Nag. 160, AIR 1951 Nag. 259.

² *Ramdas v. Chabildas* (1910) 12 Bom. L.R. 621, 7 I.C. 134; *Subba v. Subba* AIR 1936 Mad. 689, 71 M.L.J. 419.

³ See the discussion at § 83.

⁴ *Apaji v. Ramchandra* (1892) 16 Bom. 29 (FB).

⁵ *Ramsewak v. Ramaprasad* AIR 1948 Pat. 215, 26 Pat. 1.

⁶ *Rattigan, Digest*, 13th edn, 1953, p. 237.

⁷ *Bal v. Ram* (1931) 58 I.A. 220, 53 All. 300, 33 Bom. L.R. 1280 (PC); *Bhagwati v. Rameshwar* AIR 1952 S.C. 72, [1951] SCR 602, [1952] S.C.J. 115.

⁸ *Bhagwati* (cited above); *Bhagwan v. Reoti* [1962] 1 S.C.J. 348.

ancestor increases.¹ On the contrary there is a presumption that where the normal jointness of food, worship, and estate has been absent for several generations there must have been a separation of status at some time in the past.²

How severance occurs

519. We have noticed the power of the father (§ 517) and the special position of the minor coparcener (§ 83). The position of the widow under the Hindu Women's Rights to Property Act and associated Acts (now repealed) has also been noticed (§ 413). The major coparcener or owner of a coparcenary interest may sever in interest merely by the unequivocal communication of a settled intention to sever.³ It appears to be of no consequence whether the communication is to each coparcener or to the manager on behalf of all of them. The operative moment is when the intention is communicated (for example, if by post, then when the letter is posted) and not the moment when it is received. Otherwise the member's severance would occur at different times if the communication were received by non-managing members at different times.⁴ It does not matter in what type of document this communication is made, a plaint or written statement being equally suitable. One must notice, however, that the unequivocal communication must be the conscious, informed act of the coparcener, etc. Sham documents, or even statements and admissions serving a genuine purpose, but executed in ignorance of the true legal position of the parties, will not be accepted as satisfactory evidence of a severance of status.⁵

520. Where a suit for partition is filed this is an unequivocal communication. Even if the suit is withdrawn subsequently (for example if the other or some coparceners die shortly

¹ Slender evidence displaces the presumption in the case of cousins : *Devi v. Phulma* AIR 1961 H.P. 10.

² Compare *Inder v. Pirthipal* 72 I.A. 176, [1945] Luck. 391 (PC) with *Tellappa v. Tippanna* (1929) 56 I.A. 13, 53 Bom. 213 and *Suraj v. Ikbal* (below).

³ *Suraj v. Ikbal* (1913) 40 I.A. 40, 35 All. 80, 18 L.C. 30 (PC) ; *Girja v. Sadashiv* (1916) 43 I.A. 151, AIR 1916 P.C. 104, 31 M.L.J. 455.

⁴ *Narayana v. Purshotama* [1938] Mad. 315, AIR 1938 Mad. 390.

⁵ *Rukhmabai v. Laxminarayan* [1960] 2 SCR 253, AIR 1960 S.C. 335.

after the filing of the suit and the plaintiff hopes to take advantage of survivorship) the communication cannot be recalled. The position is similar where the intention to separate is recorded in the written statement. Status cannot be made joint, as it was before, by mere living or trading together or otherwise without actual reunion.¹ Exceptional circumstances may indeed occur, in which the filing of the suit took place otherwise than as an *unequivocal* communication of a *settled* present intention to sever.² So we are to understand those cases, where a son, for example, announces his severance, the father repudiates or hinders it, and mediators persuade the son to withdraw his severance: we must presume that the announcement was not unequivocal.

521. Coparceners become severed by marriage under the Special Marriage Act, 1954 (or its predecessor of 1872),³ by conversion to another religion (which operates as a loss of status though property rights are saved by the Caste Disabilities Removal Act, 1850),⁴ and by an award of arbitrators to whom family disputes have been referred with power, express or implied, to compose them by indicating a partition of the joint-family estate.⁵

In *Shantilal v. Munshilal*⁶ the father's squandering habits led to a dispute, which he and his son's mother referred to arbitration. The terms of the submission did *not* authorize a partition. The award gave the properties to the father and rights of maintenance to mother and son, and a decree was (surprisingly) passed in terms thereof. The son being sued for joint-family debts he answered that he was separate. It was held that the award amounted to a partition, which the arbitrator was authorized in the circumstances to effect. The father was competent to make the submission and to bind his son thereby, and his consent to the award indicated *at the latest* the moment from which his son was separate. The facts of the case were peculiar and it may be that the principle in it requires reconsideration. In any event the justice of the

¹ *Bhagwat v. Ramji* AIR 1947 P.C. 140, 142, 49 Bom. L.R. 693, [1947] 2 M.L.J. 67 (PC); *K. Radhakrishna v. K. Satyanarayana* [1949] Mad. 229; *E. C. Gurunadham v. P. Venkata* AIR 1959 An. P. 523, 528-9, [1959] 2 An. W.R. 79 (FB).

² As in *Bhagwant v. Bishambhar* AIR 1950 All. 54, [1950] All. L.J. 88.

³ *Girdharilal v. Fatechand* AIR 1955 M.B. 148, § 209.

⁴ For the effect of conversion see *Venkatasubbayya v. Venkataramayya* AIR 1943 Mad. 349, [1943] 1 M.L.J. 257.

⁵ *Syed v. Jorawar* (1922) 49 I.A. 358, 50 Cal. 84, AIR 1922 P.C. 353; *Panna v. Ram* AIR 1940 Lah. 120 (absence of power to effect a partition).

⁶ 56 Bom. 595, AIR 1932 Bom. 498.

decision turns on the equitable character of the award, the terms of which may not often be repeated in practice.

When proof of communication of intention to separate is impossible it is often sought to prove a past severance from a course of conduct. We have seen the difficulties inherent in such a plea (§ 515).

522. Severance in status or in interest must be unconditional. A partition of property, which completes the partition, need not be so, and the parties may bind themselves with agreements entitling one to preempt another's share, or otherwise modifying the right of free alienation.¹

Sharers and shares

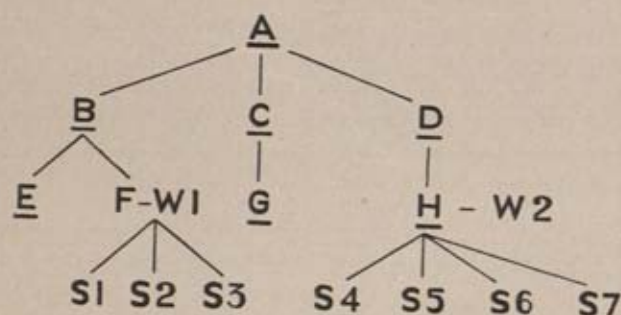
523. The quantitative size of shares at a partition is usually determined by the claims operative at the final decree for partition, or at the moment when the parties amicably separate the property by metes and bounds. Disqualified coparceners do not take shares. Disqualification before 1929 affected those suffering from the diseases and disabilities referred to below (§ 595) in connexion with succession. Since that date (except in Travancore: § 409) only the congenital idiot or congenital lunatic is disqualified. These disqualifications do *not* affect sharers in a coparcenary interest that has passed by succession under the Hindu Succession Act (see s. 28 of that Act). The sons of a disqualified coparcener conceived while he is unseparated from an undisqualified coparcener are not themselves disqualified, since their birthright, though obtained *through* their fathers, attaches by virtue of their own births independently and in their own right.² The date of conception, relative to the commencement of the grounds for disqualification that were in force before 1929, was never significant. If a disqualified coparcener lost his disqualification (a possibility no longer open since 1929 at Mitakshara law) his right to a share in undivided joint-family assets would revive.³

¹ *P. Prakas Rao v. P. Lakshmikantam* [1956] An. W.R. 801. On preemption see §§ 649f.

² *Krishna v. Sawi* (1885) 9 Mad. 64.

³ *Ratneshwari v. Bhagwati* AIR 1950 F.C. 142, [1949] FCR 715, [1950] S.C.J. 514.

524. The undisqualified coparceners and the owners of coparcenary interests take their shares upon the fiction that all divisible property was available to all the coparceners back to the common ancestor, the branches which have surviving representations are allotted shares *per stirpes*, and then these shares are allowed to descend. Extinct branches are ignored. The others share upon the same principle until the surviving members of a branch are reached. Those of the same generation share the proportion which comes to them by representing their ancestor equally *per capita*. A branch with more surviving members will not take collectively a larger share of the whole, but a brother's share, for example, is reduced by the number of brothers who share with him, and by the presence of his father, for the rule is that a father takes equally with his sons the fraction which devolves on their branch. As we shall see, wives of the father, or, where the father is dead or does not participate, the mothers and grandmothers take shares equal to those of their sons or grandsons as the case may be, that is to say in all States where the Mitakshara right to a share in lieu of maintenance still survives (§ 496).



525. In the above diagram the deceased members of the coparcenary are underlined. The branch of *B* is entitled collectively to no more than half the estate even though it might in fact have been acquired by *B* or *C*, or indeed by *F* himself and subsequently merged with the joint-family nucleus (§ 549). This half would be divided between *F*, *W1*, *S1*, *S2* and *S3* so that each receives one-fifth of it. If *S1* alone were separating he would obtain one-tenth of the divisible estate. The branch of *D* is likewise entitled to half. If *S4* is separating he is entitled to half \times one-fifth (allowing

an equal share to each son and to their stepmother W₂), that is to say once again one-tenth. If W₁ does not live to actual partition the calculation is made afresh, and S₁ obtains $\frac{1}{8}$. If F does not live to partition of the estate, on the other hand, his interest (subject to W₁'s rights under the Hindu Women's Rights to Property Act, 1937) passed to S₂ and S₃ by survivorship until 17 June 1956, after which date it passes to W₁, S₂ and S₃ by succession. If F had separated along with S₁ his share would pass by succession in any case, whenever he died. On the disability of a son who has 'separated himself before the death of the deceased' to share in the deceased's share taken at a partition see § 594.

526. Nothing in the 'Hindu Code' militates against females sharing at Hindu law.¹ Female sharers are not entitled to initiate a partition, and their rights to shares arise for the first time when the coparceners separate the property by metes and bounds.² The right to a share is not defeated by long disregard in any family or when sons separate without giving the mother or step-mother any share.³ Similarly the *dasiputra* of a Sudra cannot initiate a partition except against his legitimate brothers who have realized their share in the common father's joint-family property.⁴ He too is not jeopardized when his brothers separate the property between them, for he can oblige them to give him a half the share that he would have had had he been legitimate (§ 33). His father may give him a share during his lifetime, in which case the *dasiputra*'s claims against the family are finished. The father continues to have discretion to direct the size of the share the *dasiputra* shall have up to the last moment, when the property is actually to be divided.⁵ Where no *aurasa* competes with him the *dasiputra* of a Sudra is entitled to one-half of the estate against the father's widow, daughter, or daughter's

¹ *Samu v. Shahji* AIR 1961 Raj. 207, 208.

² *Pratapmull v. Dhanbati* AIR 1936 P.C. 20, 63 I.A. 33, 70 M.L.J. 296. This case does not apply to the rights acquired by females in Mitakshara joint-family property under or prior to the HSA, s. 6: § 675.

³ *Laltabai v. Krishnarao* AIR 1959 M.P. 100; *Kanyalal v. Cont. E.D.* AIR 1961 An. P. 333.

⁴ *R. Dorai v. T. Gopalakrishna* AIR 1960 Mad. 501, [1960] Mad. 904.

⁵ *Deivanai v. Chidambaram* AIR 1954 Mad. 657, [1955] 1 M.L.J. 120.

son.¹ Formerly the other half also would pass to him if he survived the limited owner,² but any female sharing with him since 17 June 1956 took an absolute estate.

527. Women who took interests under the Hindu Women's Rights to Property Act, 1937 (or associated Acts), whose interests were made into absolute interests by s. 14 of the HSA, are entitled to demand partition as if they were coparceners. Heirs, male and female, of a Mitakshara coparcener dying after 17 June 1956 are entitled to demand separate possession of their fractions of the coparcenary interest as if they were coparceners, for although their interests are non-fluctuating interests in coparcenary property they stand towards their coparcener-co-owners as if they were themselves coparceners for this purpose.

528. Which females are entitled to shares apart from those who have taken under the Act? It must be remembered that *prima facie* all benefits given by any statute are in addition to and not in derogation from the entitlement (where applicable) to shares at a partition at Mitakshara law. In Madras, Andhra Pradesh and Kerala females are excluded from shares at Mitakshara law. Within the pre-1956 boundaries of Mysore State other rules of partition of joint-family property have prevailed which are indicated briefly in an Appendix.³ Where females are debarred from taking shares their maintenance has to be provided for at a partition. These females elsewhere fall into two categories: wives and mothers. We have already seen that wives of the father are entitled to share equally with a son (§ 524). Whenever sons separate their mothers and step-mothers are entitled to share, each taking a share equal to a son. Under the former law these shares were held subject to the limited estate (§ 677), and the sons who separated might expect to recover the corpus after the cessation of that estate by the woman's death, forfeiture or surrender.⁴ Now by reason of the provisions of s. 14 of the HSA a share to which a mother is

¹ *Kamulammal v. Visvanathaswami* (1923) 50 I.A. 32, AIR 1923 P.C. 8, 25 Bom. L.R. 577; *Bhagwantrao v. Punjaram* [1938] Nag. 255, AIR 1938 Nag. 1.

² *Singhai v. Ujagar* AIR 1961 S.C. 1334, 1337, [1961] 2 S.C.J. 680, [1961] 2 M.L.J. 193 (SC).

³ Appendix II.

⁴ *Bhagwantrao v. Punjaram* [1938] Nag. 255, AIR 1938 Nag. 1.

entitled at a partition will not return to them as reversioners, but will pass to the woman's testamentary or intestate heirs under s. 15 of the Act.

529. There has been some doubt as to which 'mothers' are entitled to share outside the South Indian States that have been mentioned above, though it is clear that the word includes step-mothers and grandmothers and even step-grandmothers.¹ Where the partition is between a son and the son of a predeceased son, or between the sons of predeceased sons (so that the partitioning coparceners are her descendants or step-descendants)² no difficulty arises. The liability to maintain her out of the joint-family property would lie on the separating parties, and the supposed fragmentation of the property gives rise to the right to a share. But where the partition is between her son and his sons the better opinion is that her maintenance remains the responsibility of her son, and she is not entitled to a share. The Calcutta and Patna High Courts take a different view.³ The latter specifically base their decision on justice and equity, and on the Calcutta case. This had little of authority to support its decision but both are now unquestionable under *stare decisis*.

530. In *Rambhau v. Bala*⁴ a mother and a grandmother were allowed to participate at a partition between a son and his uncle. Though the mother was not a 'mother' for our purpose, for there was no partition between her sons (she had only one son), she was thought entitled upon an 'equitable' basis. This novel decision, depending upon a reinterpretation of the basic *smṛiti* texts, may not commend itself to other High Courts, and as the High Court which gave it (Nagpur) is now defunct the rule may be obsolete. If every mother in the family were to count as a 'mother' for the purposes of partition at Mitakshara law the effect

¹ *Vithal v. Prahlad* AIR 1915 Bom. 35, 39 Bom. 373; *Sriram v. Hari-charan* AIR 1930 Pat. 315, 9 Pat. 338.

² *Jotiram v. Ramchandra* [1941] Bom. 638, AIR 1941 Bom. 382.

³ *Badri v. Bhugwat* (1882) 8 Cal. 649; *Krishnalal v. Nandeshwar* AIR 1918 Pat. 91. *Badri's case* is based on an irrelevant Dayabhaga case (7 Cal. 191).

⁴ [1946] Nag. 732, AIR 1946 Nag. 206. The grandmother took one-third, the mother one-sixth.

on shares passing by succession under ss. 6 and 8 of the HSA would be alarming.

531. A question arises whether, if coparcenary property is held, after 1956, by two sons and the mother, widow and daughter of a deceased son, the mother would be entitled to share if (for example) the widow separated from her brothers-in-law and the other owners of coparcenary property. It would seem that the rule of Mitakshara law is not to be extended by analogy.

532. The share of a wife of the father or mother or grandmother at a partition at Mitakshara law¹ may be diminished or totally adeemed by previous gifts of income-producing *stridhanam* made to her by her husband or father-in-law, and (presumably) still in her ownership.² The joint family need not provide for her twice over. If the *stridhanam* from that quarter exceeds what would be the value of her share she is not, of course, obliged to participate. Some restrictions have sought to be placed on females' rights to shares by recent developments in Anglo-Hindu law. These claim to be based upon the fact that the shares are in lieu of maintenance. In a Dayabhaga case it was held that a mother who had inherited from a son was disentitled to claim a further share at a partition.³ The decision (in conflict with an older ruling of the Calcutta High Court)⁴ was unsympathetically commented upon by a Full Bench in Andhra Pradesh.⁵ Later the Nagpur and still later the Bombay High Court held that where a mother had taken under the Hindu Women's Rights to Property Act, s. 3 (2) (see § 413) she was disentitled to share at Hindu law.⁶ Since this attributes to the legislature an intention it certainly did not express, these decisions may be held by the Supreme Court to have been wrongly decided.

533. In the discussion of the shares of sons above (§ 524) no account has been taken of the adopted son, whose rights

¹ *Baburao v. Savitribai* [1952] Nag. 578, AIR 1952 Nag. 270.

² *Kishori v. Moni* (1885) 12 Cal. 165.

³ *Indu v. Mrityunjay* [1946] 1 Cal. 128.

⁴ *Poorendra v. Hemangini* (1908) 36 Cal. 75 (ignore the will point).

⁵ *N. Varahalu v. N. Sithamma* AIR 1961 An. P. 272 (FB).

⁶ *Bhiwra v. Renuka* [1949] Nag. 400; *Shyamu v. Vishwanath* AIR 1955 Bom. 410, 57 Bom. L.R. 807, criticized at 58 Bom. L.R. (J). 97-102.

were dealt with in § 186, or those of sons of a different caste from their father. At present both *anuloma* and *pratiloma* marriages are valid. Sons by *pratiloma* marriages are not entitled to any *share*, being illegitimate from the point of view of the Anglo-Hindu law which still rules in matters of joint-family and partition. Sons of *anuloma* marriages, valid since 1949, may not share equally with *aurasa* sons. The Mitakshara law, about which information is scanty in practice (for *anuloma* marriages are still rare) appears to give shares to the Brahman, Kshatriya, Vaisya, and Sudra sons of a Brahman in the proportions of 4 : 3 : 2 : 1, and similarly for the permissible *anulomaja* sons of a Kshatriya, etc.¹ We know that the Sudra son of a Brahman cannot take more than one-tenth of his father's property (we are concerned only with the joint-family property).² Since 1955 successive marriages of which sons of different castes are born may well give rise to this type of partition problem. The equalizing of shares of all sorts of sons (other than illegitimate sons) by the HSA has not produced any corresponding amendment of the situation in the law of the joint-family.

534. The size of the shares taken at a partition can vary with the views of the High Courts on the question raised by successive partitions. If coparceners who separate later were to take proportionate shares as if their branch were represented only by the existing members, the coparceners of one branch might, by successive partitions, soon engross the greater part of the property by taking shares in the balance on every occasion on the rigid *per stirpes* principle. If they then reunited the iniquity of such a rule would become very obvious. This situation, which enables every member of a branch to forget that a proportion of the family property was lost by every previous partition, is actually followed at present in Maharashtra and Gujarat,³ but it is rightly repudiated elsewhere.⁴ Subsequent partitions must take account of the proportions of the estate which have been withdrawn by previous separations in the same branch.

¹ Mitakshara, I, viii.

² § 607.

³ *Pranjiwandas v. Iecharam* (1915) 39 Bom. 734: excessive and literal reliance on *Appovier's case* 11 M.I.A. 75.

⁴ *A. M. Narayana v. A. Sankar* (1930) 53 Mad. 1, AIR 1929 Mad. 865 (FB); *C. D. Deviah v. Karigowda* AIR 1954 Mys. 128, 131.

In the illustration given at § 525 above, if S₁ separated he would take one-tenth of the estate. When S₂ separates he is entitled to one-tenth of the estate, not one-eighth of the estate (as is the rule in Maharashtra and Gujarat).

535. Where a father has deliberately given his male issue inadequate, that is to say, smaller shares than the law permits in the joint-family property, their right to insist at a later stage upon a redistribution depends on whether they were then minors or majors. In the former case the partition can be adjusted to secure their proper participation;¹ in the latter case their acquiescence at the time of the distribution may amount to laches, the law of limitation may bar the claim, and adjustment may not be open to them.² Occasionally unequal shares may be accounted for by reference to an equality of income, rather than an equality of size, for example of agricultural holdings, or blocks of shares. It can happen that a smaller share may produce a better income. Another valid explanation of inequality of shares lies in the impossibility of making exactly proportionate division without seriously diminishing the value of an item (such as a membership card of a Stock Exchange),³ and this is given undivided to one member subject to an owelty, whereby an equitable charge is created over that or other assets to enable the portions to be equalized.⁴ Owelties have the special characteristic of binding the shares (or portions thereof) of co-owners who are parties to a distribution in priority to all other encumbrances, whenever created.⁵

Registration of partitions

536. A partition is completed when all the fractions are in the hands of the sharers and, if the land amounts to more than Rs. 100 in value, a deed of partition (which is a transfer by all from all as common owners to all as individual owners) has been registered under the Registration Act.

¹ *Ratnabai v. Bholadeo* [1956] Nag. 645, AIR 1956 Nag. 247.

² *Brijraj v. Sheodan* (1913) 40 I.A. 161, 35 All. 337, 15 Bom. L.R. 652 (PC); *M. S. M. M. Meryappa v. Comm. I.T.* AIR 1951 Mad. 506, [1950] 2 M.L.J. 353. ³ *Champaklal v. Sodagar* [1944] Bom. 619.

⁴ For an exhaustive discussion see the judgment of Raghavan, J. in *Parvathi v. Makki* [1961] K.L.T. 937, 942-5 (FB).

⁵ *T. S. Swaminatha v. Off. Rec.* AIR 1957 S.C. 577, [1957] S.C.J. 501, [1957] 2 M.L.J. (SC) 53.

Registration is essential to prove title, and this requirement is not avoided by simulated mergers of property with a divided joint-family corpus after a division in status between the members, as was unsuccessfully attempted in the curious case of *Kisansing v. Vishnu*.¹ A deed which does not in fact evidence a present allocation of property is not registrable,² nor one that refers to a past division.³ The division of the coparceners in status can be proved by an unregistered deed,⁴ or by oral evidence; and even though the deed does not serve as evidence of the transfer, and although in such circumstances oral evidence of what the deed contains is inadmissible,⁵ it is permitted to prove orally what action was taken independently or upon the faith of the deed which is itself inadmissible, and in that indirect way it is possible to establish what shares were actually taken by the separating parties.⁶

Renunciation

537. When a partition is contemplated a participant, whilst accepting his separation from the others, may renounce his share, thereby extinguishing his interest in the property under partition.⁷ He may renounce only his own share. In such cases the shares of the remaining coparceners will certainly be increased.⁸ If a father renounces and then, even after partition, a son is conceived to him, the son is entitled to call upon his brothers for a share notwithstanding his father's ill-considered renunciation (§ 556). Renunciation is not a contractual act, but a step in the nature of self-effacement. It may either operate to separate the renouncing member (as we have seen) or it may operate merely to renounce a share at a particular partition, reserving to him

¹ AIR 1951 Bom. 4, [1951] Bom. 148, referred to in *Manabai v. Ramchandra* (1958) 60 Bom. L.R. 1431, 1433. The case is condemned by Raghavachariar at p. 347.

² *Nani v. Gita* AIR 1958 S.C. 706, 61 Bom. L.R. 523 (SC), [1958] S.C.J. 925.

³ *Narayan v. Co-op.* [1938] Nag. 604, AIR 1938 Nag. 434.

⁴ *Panchapagesa v. Kalyanasundaram* AIR 1957 Mad. 472.

⁵ *Ramayya v. Achamma* AIR 1944 Mad. 550, [1944] 2 M.L.J. 164 (FB).

⁶ *Ram v. Permanand* AIR 1946 P.C. 51, 73 I.A. 28, 48 Bom. L.R. 363.

⁷ *A. Venkatapathi v. D. Venkatanarasimha* AIR 1936 P.C. 264, 267, 63 I.A. 397, 41 C.W.N. 7.

⁸ *Krishnan v. Cheria* AIR 1959 Ker. 336.

the right to remain joint in all other respects. If such a member wishes to forgo a share on a subsequent partition between himself and other members of the joint family who did not participate at the previous partition (for example, if they were not then born), he must renounce once again.

538. Renunciation of a share, as such, does not exclude the renouncing member from membership of the family, still less does it destroy the right to be maintained. A renunciation on condition that the renouncing member's maintenance is secured by the separating coparceners, etc., is therefore not improper.¹ But since renunciation implies self-effacement *quoad* a particular partition it follows (i) that there cannot be a renunciation in favour of one or more particular members of the family,² for that would operate (if at all) as a gift of a coparcenary interest (§ 463), and (ii) that a share or interest in any property excluded from the partition because of its impartibility or otherwise is not renounced by a simple renunciation of a share, and when it becomes available the persisting joint status can be relied upon to enable the former renouncing member to share or acquire it unless he has unequivocally renounced all such expectations.³

A joint family consisted of *F* and his sons *S*₁ and *S*₂. In dividing the joint-family property between *S*₁ and *S*₂ *F* took nothing, as he had a profitable self-acquired business. He excluded from the partition a business that had belonged to his own father and which was in fact joint-family property. Some time after the partition this last business made large profits and *S*₁ and *S*₂ demanded a half share each in it. *F* insists on giving them one-third each only. He is entitled to do so.

There is a yet further possibility that the renouncing member, instead of renouncing a share at any partition (whether one is in contemplation or not), may renounce all interest in the joint-family property beyond a bare right to maintenance. The court will determine from the evidence of the coparcener's intention whether he took* this somewhat extreme step.

¹ *Gurusteami v. Marappa* AIR 1950 Mad. 140, [1950] Mad. 665.

² *Subbanna v. Balasubbareddi* AIR 1945 Mad. 142, [1945] Mad. 610 (FB). Renunciation in favour of a sole coparcener is valid: *Ram v. Prithipal* AIR 1950 All. 224.

³ *Chinnathayi v. Kulasekara* AIR 1952 S.C. 29, [1952] S.C.J. 1, [1952] 1 M.L.J. 292 (SC).

A joint family consisted of *F*, his wife, and his son. *F* was induced to execute a 'release deed' in which he declared that his own debauchery, etc., had led to waste, and he relinquished his interest in the joint-family property for the benefit of the other members of the family. It was held that on a fair construction of the plain words the only possible conclusion was that this was a relinquishment *in toto*, and the executant became separated from the family. The stipulation which he had added, namely that the other parties should maintain him properly, was valid and binding upon the son. *F* was therefore separate from the son, but the latter was obliged to provide *F* with adequate maintenance out of the joint-family property which he held as sole coparcener.¹

Parties to partition-suits

539. There are desirable (or 'proper') parties and necessary parties. For non-joinder of necessary parties the plaint may be rejected. Desirable parties are the coparceners, the owners of coparcenary interests, the females who would be entitled to shares if they lived to final partition decree (§496), the strangers and others holding equities against the joint-family property, the Official Assignee or Official Receiver after a coparcener's insolvency and prior to his discharge, and any persons who hold property which is alleged to be partible coparcenary property.² Persons entitled to maintenance are proper parties. Naturally a renouncing member is neither a necessary nor a desirable party. Minors must ordinarily be represented separately by guardians when they are defendants in a partition suit, in order that their interests may not be prejudiced by the arrangements of their seniors.³

540. Necessary parties are those, without whose representation in the litigation the state of the family's affairs and the allotment of shares cannot be supervised by the court. Thus normally only the coparceners, females entitled to shares, and owners (by purchase or statute) of coparcenary interests are necessary parties.⁴ Where the partition is merely between the heads of branches acting for their respective branches which are not contemplating internal divisions the heads themselves are the only necessary parties.⁵

¹ *K. China v. C. Venkanraju* AIR 1954 Mad. 864, [1954] Mad. 834 (FB).

² *Ramanathan v. Veerappa* AIR 1956 Mad. 89, [1955] 2 M.L.J. 602.

³ Trevelyan, *Minors*, p. 260.

⁴ Gupte, *Hindu Law* (1947), pp. 291-2.

⁵ *Subba v. Subba* AIR 1936 Mad. 689, 71 M.L.J. 419; *Ramanathan v. Veerappa* AIR 1956 Mad. 89.

Suits by and against alienees

541. To realize their equities alienees must bring suits for partition (failing agreement) against the entire joint family represented by the manager and the other coparceners and owners of coparcenary interests. As we have seen, a suit for partial partition, as for example to obtain a specific item, is out of the question (§ 493). On the other hand the coparceners may bring suits for partial partition against the alienee, in order to oblige him to realize his equity, and to clear the encumbrance off the joint-family estate.¹ Another exception is the rule that one alienee of a specific item from one coparcener may sue another alienee from another coparcener of the same item for partition and possession of his share: for assuming that the debts do not exhaust the joint-family assets including the item in dispute it is evident that there is no need for a general partition.² Plainly the first exception operates only where the assets suffice to meet the equity: naturally if this is not the case, and there is a danger that if he is obliged to accept less than his consideration from the joint-family property he will turn to his alienor and satisfy himself as to the balance from that quarter, the family may hesitate to initiate proceedings. In such cases the possibility of suing the alienee for partial partition is an empty possibility.

542. We have discussed the period of limitation within which the alienee may institute a suit (§ 494): as long as he has the right of suit against them there is an equity in existence which they or their alienees have a right to clear off.

Partial partition

543. There is a presumption that a partition, once it is known to have taken place, was complete. However, partial partitions (apart from the suits against alienees) are well known in the following instances:—by mutual agreement the coparceners, etc., may divide only portions of the property by metes and bounds, the remainder falling

¹ *Kandaswami v. Venkatarama* AIR 1933 Mad. 774, 65 M.L.J. 696.

² *Ibaramsa v. Thiruvengatasami* (1911) 34 Mad. 269, 7 I.C. 559 (FB); *N. Subbarayudu v. R. Ramanaiah* AIR 1949 Mad. 235, [1948] 2 M.L.J. 181.

to be divided according to the agreement, or failing agreement according to the shares operative at the initial partition, when the time comes for the partition to be completed. Partitions are bound to be partial where the parts in question cannot be partitioned because they lie out of the jurisdiction,¹ where statute forbids their fragmentation,² the consent of the government is needed,³ when it is by nature impartible (i.e. either it is an impartible right, as the right to share in the profits of a partnership,⁴ or it is an old customary impartible estate that has not yet passed by succession under the HSA: § 835), when it is in the possession of strangers, e.g. usufructuary mortgagees,⁵ or where it is doubtful whether it is owned, whether it is free to be partitioned, or when it is just forgotten.⁶ Where the property is held jointly with strangers who have no interest in the family partition it is likely to be left over for subsequent partition. Yet whatever the weight and importance of these exceptions, the fundamental rule that a partition should embrace all property remains unaffected.⁷

544. So far we have dealt with partitions which are partial as to property. It is understood (§ 518) that there is no rule that severance of one coparcener, etc., means severance of all; or that, because it is proved that most of the coparceners took shares at a particular date, the remainder also must have been divided *inter se*. In every case the intention must be proved,⁸ if not from contemporary facts, then at least from conduct subsequently to the time when it is alleged that they separated, for the burden of alleging a partition of status lies on him who asserts it.

Ascertaining the partible assets

545. *Property liable to partition.* A source of disputes is uncertainty whether property belonging to coparceners is

¹ *Ramacharya v. Anantacharya* (1893) 18 Bom. 389. § 428. ² § 640.

³ *Purushottam v. Atmaram* (1899) 23 Bom. 597, 1 Bom. L.R. 76.

⁴ See *Derrett* in (1961) 63 Bom. L.R. (J.) 17-23.

⁵ *Purushottam* (cited above); *Kristayya v. Narasimham* (1900) 23 Mad. 608.

⁶ *Subramanian v. Ramachandra* AIR 1925 Mad. 333, 47 M.L.J. 908.

⁷ *Rajendra v. Brojendra* AIR 1923 Cal. 501, 77 I.C. 790.

⁸ *Balkrishna v. Ram* (1931) 58 I.A. 220, AIR 1931 P.C. 154, 53 All. 300 (PC).

joint-family property and so partible, or the separate property of the undivided member. In default of evidence presumptions must be relied upon. The presumptions indicate where the burden of proof lies. Accordingly we should review these before we approach the rules which determine whether property is joint-family property when the circumstances of its acquisition can be proved by evidence.

546. There is no presumption that a joint family has any property,¹ but when once it is shown that it possessed a nucleus, the income of which, if handled frugally, would have sufficed to purchase the item in question, there is a presumption that if it was acquired by the manager, or other coparcener, it was acquired out of joint-family funds.² When a coparcener, etc., seeks to prove that an acquisition made by another coparcener is partible his first task is to show that at the relevant time the joint-family funds were ample enough to have enabled the acquisition to be made. If he fails here, the acquirer need not be put to prove out of what funds he acquired it, in order to establish that it is impartible.³ If a manager, in charge of adequate funds, claims that immoveable property which he acquired was acquired out of his separate assets the burden of proof lies on him to show that this claim is sound.⁴ There is no presumption at all to help us where an acquisition was made by a *non-managing* coparcener of whom it is known that he had access to sufficient family funds, and that he had a separate income, sufficient to enable him to purchase the item.⁵ For this reason in such a case the subsequent conduct of the acquirer must be looked to in order to make out his intention at the time of acquisition: if he treated his purchase as joint-family property in every respect we are justified in presuming that he bought it out of the joint, and not his separate, funds.⁶ In much the same way we determine, in a

¹ *Nisar v. Raja* AIR 1940 P.C. 204, 67 I.A. 431, 191 I.C. 94.

² *Shrinivas v. Narayan* AIR 1954 S.C. 379, [1954] 1 M.L.J. 630, 57 Bom. L.R. 678 (SC).

³ *Mallappa v. Yellappagouda* AIR 1959 S.C. 906; *Chandramoni v. Kshetramoni* [1951] Cut. 104; *Ramakrishna v. Vishnumoorthi* AIR 1957 Mad. 86, [1956] 2 M.L.J. 550.

⁴ *Mallesappa v. Mallappa* AIR 1961 S.C. 1268, 1273.

⁵ *Bhuru v. Jagannath* AIR 1942 P.C. 13, [1943] 1 M.L.J. 70, 44 Bom. L.R. 767 (PC).

⁶ *Dattatraya v. Shakuntalabai* AIR 1956 Nag. 95 is so to be read. § 549.

case where a *gift* has been made to a father, the question whether the intention was that it should be enjoyed by him with his male issue as coparcenary property, by seeing in what way the donee and his family dealt with the property and/or its income.¹ Fortunately there is no rule that where a coparcener buys property partly with his own and partly with family funds the other members of the family are entitled to the entire property (cf. § 456) : for the members do not stand towards one another as trustees, and are not entitled as beneficiaries to a charge over each other's purchases.

547. All property is partible which

(i) is ancestral in that it descended on intestacy² from a male lineal ancestor in the male line within four degrees inclusively of the senior participant in the partition — unless it was a share in joint-family property taken by the ancestor and the heirs are his divided descendants when it will not be partible between *them* (§ 411) ; or

(ii) has accrued to the joint family and become assimilated to ancestral property in that

A. it is produce of, or bought out of the produce of, ancestral property, or

B. it has been given to the joint family by the acquirer's merging his self-acquisitions with the common stock³ or renouncing his separate interests in it in favour of the entire family (including himself), or

C. it has been gained with the expenditure of, or to the detriment of, any nucleus of joint-family property, however small in extent,⁴ *excepting*

¹ *Kedarnath v. Ratan* (1910) 37 I.A. 161, 32 All. 415 (PC); *Ganesh v. Purushottam* AIR 1961 Or. 97.

² Whether property *bequeathed* to male issue is joint-family property must be gathered from the will itself: *Arunachala v. Muruganatha* AIR 1953 S.C. 495, [1953] S.C.J. 707, [1954] SCR 243.

³ *Lal v. Kanhaia* (1906) 34 I.A. 65, 29 All. 244. *Shiba v. Prayag* AIR 1932 P.C. 216, 59 I.A. 331 was criticized in *Mallesappa v. Desai* AIR 1961 S.C. 1268, 1271 (cited above).

⁴ *Gokal v. Hukam* AIR 1921 P.C. 35, 48 I.A. 162, 2 Lah. 40; *Comm. I.T. v. Kalu* AIR 1959 S.C. 1289, 37 ITR 123; *Parbati v. Sarangdhar* AIR 1960 S.C. 403. The statement in *Sidramappa v. Babajappa* AIR 1962 Mys. 38, that an insurance policy taken out by a father-manager must be assumed to have been taken out for the son's (individual) benefit, must be confined to the facts of the case.

- (a) property which is within the meaning of the Hindu Gains of Learning Act, 1930, that is to say, which has been gained as a result of training or education, by way of salary, wages, etc.;¹
 - (b) property acquired out of savings from joint-family property given to the acquirer by the manager, without liability to account for any balance arising after he has maintained himself;² and
 - (c) property gained as a result of the immobilization of joint-family property (as by hypothecation or deposit) if the resulting inconvenience to the family or loss of possible profit is so small that the family cannot be said to have suffered a detriment due to the immobilization,³—or, finally,
- D. it has been gained by several coparceners belonging to the same branch of the family⁴ working jointly, *without* utilizing any coparcenary nucleus, but treating the earnings from their accrual as if they were joint-family property,⁵ and not as if they were partnership property or property held on a joint tenancy.

548. There is no presumption that joint earnings without use of a joint-family nucleus are automatically coparcenary property, dicta to the contrary⁶ being *per incuriam*. In *Rampershad v. Sheo*⁷ the likelihood that they had treated their earnings as joint-family property was much strengthened by the brothers' living together in every way as a normal joint Hindu family. Where those who acquire jointly and treat their earnings as joint-family property belong in fact to *one* branch and do not admit others, who are members of another branch, to the benefits, the acquisition may be held to be coparcenary property of that branch exclusively.

549. It must be understood that although it is common for coparceners who have made acquisitions by way of salary or otherwise, separately and without detriment to the joint

¹ *Ramakrishna v. Vishnumoorthi* AIR 1957 Mad. 86, [1956] 2 M.L.J. 550.

² *D. Latchandhora v. D. Chinnavadu* AIR 1963 An. P. 31. So *Karuppa v. Palaniammal* [1963] 1 M.L.J. 86, 90-2 (insurance policy taken out by a member).

³ *Piyare v. Comm. I.T.* AIR 1960 S.C. 997, [1960] S.C.J. 1282, [1960] 3 SCR 669.

⁴ *Bhagwan v. Reoti* [1962] 1 S.C.J. 348.

⁵ *Haridas v. Devkuwarbai* (1926) 50 Bom. 443, AIR 1926 Bom. 408. No other condition is required, despite the dicta to the effect, e.g., that they must live jointly (*Mohan v. Ram* AIR 1941 Oudh 331).

⁶ As in *Sitalprasad v. Ramprasad* AIR 1943 Nag. 321; *K. Venkata v. K. Ramalingam* AIR 1957 An. P. 744, 746b, relying too literally on a dictum in *Sudarsanam v. Narasimhulu* (1902) 25 Mad. 149, 156.

⁷ (1865) 10 M.I.A. 490, 505-6.

stock, to allow their coparceners or dependants to enjoy their acquisitions or the fruits of them, mere generosity does not amount to renunciation of separate interest or merger,¹ and the burden of proof lies heavily on him who asserts that property known to have been separately acquired has ceased to be the separate property of the acquirer.² Mere failure to keep separate bank-accounts, where the acquirer was the manager, has been held not in itself to be sufficient proof of an intention to merge if he did not confuse the incomes,³ but every case must be taken on its own facts. Where the acquirer asserts that his acquisitions are by nature joint-family property no doubt remains.⁴

550. Deductions. From the assets as determined above deductions must be made for the following :

(i) debts binding upon the joint family including Estate Duty payable on the deaths of coparceners already dead ;

(ii) debts binding upon the male issue under the Pious Obligation,⁵ whether or not the creditor is pressing for payment (for unless provision is made for payment of these debts, and the father squanders his share or his share is inadequate, the creditor can have access to the sons' shares) ;

(iii) the cost of maintenance until their marriages of unmarried sisters and likewise the expenses of their marriages (though not their dowries, which are illegal), but we note that the cost of the marriages of daughters of separating members are not expected to be charged on the undivided fund, since these will be the responsibility of their respective fathers' shares ;⁶

(iv) the cost of maintenance of those mothers, step-mothers, grandmothers, and other females who are entitled to be maintained at the joint family's expense, but who have not received a share of the property sufficient for their

¹ *Mallesappa v. Desai* AIR 1961 S.C. 1268, 1272; *Pratap v. Gyanendra-nath* AIR 1951 Or. 313, 319.

² *Pratap* (cited above); *Narayanaswami v. Ratnasabapathy* AIR 1938 Mad. 136, [1937] 2 M.L.J. 906.

³ *Nutbehari v. Nanilal* AIR 1937 P.C. 61, 39 Bom. L.R. 748, 41 C.W.N. 612 (P.C.).

⁴ *R. Subramania v. Comm. I.T.* AIR 1955 Mad. 623, [1955] 2 M.L.J. 405.

⁵ *Anumula v. Perumalla* AIR 1945 Mad. 73, [1944] 2 M.L.J. 158.

⁶ *Subbayya v. Ramayya* AIR 1929 Mad. 586, 53 Mad. 84 (FB), distinguished in *Ramchandra v. Seenithal* AIR 1954 Mad. 1011.

maintenance by provision of the manager, or by the operation of the Hindu law of partition, or the Act of 1937 or that of 1956: in all such cases the rule is that the widow's right of maintenance attaches to the undivided interest of her deceased husband, and cannot normally exceed in amount the estimated income of that interest in the hands of the surviving coparceners, etc.;¹

(v) the estimated cost of the funeral expenses of female ascendants whose funerals will take place at the charge of the joint family;²

(vi) the cost of maintenance of disqualified coparceners, the immediate dependants, e.g. widow and daughter, of disqualified coparceners, and lastly illegitimate sons (but not illegitimate daughters: § 36) if they are not entitled to shares as Sudra's *dasiputras* (§ 526) during their lives (§ 36);

(vii) the cost of maintaining the faithful kept-concubines of deceased coparceners (for the rights of maintenance of such women, though obsolete under the 'Code', remain in vigour with reference to joint-family property at Mitakshara law) so long as they remain chaste;³

(viii) the cost of maintaining widowed daughters of deceased coparceners where their rights to maintenance attach to the joint-family property (§§ 660-1); and finally

(ix) the cost of the thread-ceremony of separating brothers in twice-born castes where such ceremonies have to be performed by custom, and brothers have not yet undergone the ceremony.

551. In the direction to take accounts of the assets and liabilities of the joint family it is understood that all these deductions have to be made,⁴ thus considerably reducing the net assets available for distribution at the partition.

The Partition Act, 1893

552. Difficulties were experienced where property of value to the coparceners could not be partitioned practicably, or

¹ *Comm. I.T. v. Bhagwati* AIR 1947 P.C. 143, 74 I.A. 142, 49 Bom. L.R. 678. See also § 270.

² *Vaidyanatha v. Ayyasamy* (1909) 32 Mad. 191, 19 M.L.J. 94.

³ *A. Ramamoorthy v. A. Sitaramamma* AIR 1961 An. P. 131 (FB).

⁴ *Kokila v. K. M. Rajabather* AIR 1957 Mad. 470, 472, [1957] Mad. 968.

could not be partitioned without grave loss: there was no power to compel the coparceners to sell it, and the result was that partial partitions were encouraged with disagreements over the years as to the distribution of the profits. The Partition Act provides that where in a suit for partition 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 circumstances 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, on the request of the persons interested individually or collectively to the extent of one half or more, direct a sale.¹ Members of the family may apply to the court to have the property valued and then the coparceners have the right to bid for the entire property in question in what amounts to an auction amongst themselves. The highest bidder above valuation obtains the property, and if no member is prepared to pay the valuation price the costs of the application for valuation must be met by the applicants. If a dwelling-house is subjected to this procedure, and a share has been sold to a stranger to the family (understood in a wide sense),² a coparcener may offer to buy the share and the court will have it valued and sell it to the coparcener at valuation. If there are more than one applicants the procedure mentioned above follows.³ In either case the proceeds are distributable along with the rest of the assets.

Reopening partitions

553. The fundamental proposition of Hindu law has always been that a partition is final and cannot be reopened. This is true of a severance of status. But as regards the distribution of the net assets, this may be reopened, or adjusted, in a number of commonly-recurring contexts.

554. Reopening a partition means in effect the nullifying of the shares originally distributed, and substitution therefor of new shares, varying most commonly in extent rather than

¹ Act IV of 1893, s. 2.

² *Makhan v. Sushama* AIR 1953 Cal. 164, 57 C.W.N. 81.

³ Act IV of 1893, s. 4.

in the identity of particular components, though a redistribution may conveniently be done in some cases by taking items from one sharer and giving them to another. The rights of *bona fide* purchasers for value from the sharers will naturally be respected in any such redistribution. A partition is liable to be reopened (i) where fraud is proved against a party to the original partition, whereby worthless assets have been distributed as valuable assets, or property that does not belong to the family (as for example property dedicated to family or other idols) has been included in the distribution;¹ (ii) where distribution was made in disregard of the prospective rights to participate of a son in the womb at the time of severance;² (iii) where an adopted son has a right to reopen a partition made in disregard of his 'birth-right' (§ 187). Where inequality of shares in ancestral property has been acquiesced in by major coparceners, etc., they cannot use it as a ground for reopening partition;³ but where minors are allotted inadequate or unequal shares they retain the right to upset the partition *ab initio* in order that their rights may be properly realized.⁴

555. A partition must be 'adjusted' when property which was withheld by accident or oversight becomes available for distribution, or a lost object is recovered, or property, partition of which had to be postponed (§ 543), becomes capable of distribution. So also when slight inequalities are ordered to be adjusted at the suit of a minor coparcener or other member, for the rule is that the least possible disturbance should be caused to the sharers and their alienees, and that where small adjustments can be made without reopening the entire partition this should be done.⁵

556. It very rarely occurs that a right to reopen a partition arises on behalf of a person who was alive and adequately represented at the partition. Exceptions are the cases of the disqualified coparcener who recovers from his disqualification and can claim as if he were an after-born son conceived

¹ *M. Seshanna v. M. Sankaranarayana* AIR 1958 An. P. 695, [1957] An. P. 491; *Debabrata v. Jnanendra* AIR 1960 Cal. 381; *Ramakotayya v. Sundararamayya* (1931) 54 Mad. 883, AIR 1931 Mad. 707.

² *Hanmant v. Bhimacharya* (1888) 12 Bom. 105.

³ § 535.

⁴ § 84. *Thangavel v. Rathna* [1959] 2 M.L.J. 279.

⁵ *Krishnan v. Janaki* AIR 1951 T.C. 38; *M. Seshanna* (cited above).

before the partition;¹ and the case of the son who is not only born but also conceived after the partition, and therefore has no *prima facie* right to participate in the shares not allotted to his father,² but has, as we have seen (§ 537), a special right to reopen the partition because his father did not reserve a share for himself at the partition, thus denying his future male issue their prospective birthright in the ancestral and joint-family property.³ In such cases although the right is to 'reopen', the attempt is made to take a proportion from each of the sharers so as to constitute an adequate share for the plaintiff without disturbing the entire partition; but if that is necessary the court will not flinch from it. In the cases of these plaintiffs the sharers are not obliged to allot to their shares the alienations which would not have been binding upon the plaintiffs if they had been alive and joint at the time of the partition and thereafter (as is the case with reopening of partitions at the suits of adopted sons in some cases: § 187), for their rights arise for the first time on the recovery of the formerly disqualified coparcener, or the birth of the after-conceived son, as the case may be, and it will seldom happen that a long delay will intervene during which alienations might take place that could give rise to these difficulties.

Reunion

557. The *sastra* regarded agnates as joint by nature, and when agnates had separated they retained for the most part a residual right to recreate their joint status by agreement. Since this agreement would tend to defeat the expectations of relatives who could succeed to the property of a divided coparcener, it became necessary to restrict the relations with whom a reunion could take place, and *smṛiti* texts imposing such restrictions have on the whole been followed at Anglo-Hindu law. The essence of reunion is agreement to reconstitute a joint Hindu family, free from purely commercial objects, and without regard to the

¹ *Krishna v. Sami* (1885) 9 Mad. 64, 77 (FB).

² *Bhagwat v. Ramji* AIR 1947 P.C. 140, 49 Bom. L.R. 693, [1947] 2 M.L.J. 67.

³ *Athilinga v. Ramaswami* [1944] 2 M.L.J. 146, [1945] Mad. 297. This case illustrates the capacity of Hindu law to grow under Anglo-Indian administration.

amount, if any, of the original joint-family property which is contributed by the reuniting members;¹ and the main effect of reunion is to give reunited members an advantage in a competition with unreunited collaterals for succession to the share of the deceased reunited member, whose share passes partly by succession and partly by survivorship, depending upon the nature of this competition and the relationship of the claimants. It is to be understood that the Hindu Succession Act, s. 6, applies equally to reunions, and that the devolution of a share will be governed in India exactly as the devolution of an undivided interest in coparcenary property of an undivided coparcener at Mitakshara law.

558. *The right to reunite.* We must consider first the actual parties to the reunion, and what are called 'constructive' parties, and then their descendants who are reunited by virtue of the reunion of their ascendants. A text of Brihaspati lays down that only a son, a brother or a nephew may reunite with his father, his brother, or his uncle respectively. The implication, accepted by the Privy Council,² is that persons who were not parties to the original partition cannot reunite. The strict view that only these relations may ever reunite, and that too only where they were once joint, is authoritative.³ The only dissent is that of the Bombay High Court, now operative in Maharashtra and Gujarat, to the effect that whereas reunion may take place between those who were once joint, and not others, relations other than those mentioned expressly by Brihaspati may reunite.⁴ As this peculiar view is founded upon the text of the *Vyavaharamayukha* it cannot be contraverted at this stage.

559. It is believed that a guardian cannot cause his ward to reunite, since reunion is based specifically upon agreement, and the minor cannot agree (§ 85); but the position of the father is thought to be different, and by his own will and at his pleasure the father can reunite his minor sons

¹ *Venkanna v. Venkatanarayana* [1947] Mad. 382, AIR 1947 Mad. 49.

² *Balabux v. Rukhmabai* (1903) 30 I.A. 130, 30 Cal. 725, 5 Bom. L.R.

469.

³ *Ram v. Pan* AIR 1935 P.C. 9, 62 I.A. 16, 14 Pat. 268.

⁴ *Vishwanath v. Krishnaji* (1866) 3 Bom. H.C.R. ACJ. 69.

along with himself.¹ These are constructive parties to the reunion.

560. The descendants of those who reunite are reunited themselves if they were born after the reunion, and their position is as near as may be analogous to coparceners born joint in a normal Mitakshara coparcenary.²

561. *The effects of reunion.* The effects of reunion flow from proof that parties, or their ascendants (§ 559), reunited. Mere living together does not amount to a reunion, and the presumption that those who have separated remain separated in status continues until rebutted.

562. The principal effect of reunion is to recreate the legal condition of a joint Hindu family, the benefits of which accrue to the after-born members as well as to those who reunite. Survivorship operates, subject to the provisions of the HSA, and where that Act is not applicable, to the special provisions of the law relating to succession to a reunited coparcener. Briefly these provisions enable a non-reunited full-brother (where the succession devolves on brothers) to share equally with a reunited half-brother, and a full sister to share with these; but where a reunited full brother is present he will exclude all collaterals, though even a non-reunited son will exclude even him. Where a half-brother reunited and half-brothers are unreunited the former exclude the latter. Apart from this rule any relation who is reunited will exclude a relation of the same degree who is not reunited.³

At a partition of reunited collaterals, or father and son, no account is taken of the proportions of joint-family or other property contributed to the reunion, and the shares are taken as at a division of undivided joint-family property.⁴

¹ *Babu alias Govinddoss v. Gokuldoss* AIR 1928 Mad. 1064, 55 M.L.J. 132.

² *Narasimha v. S. Venkata* (1909) 33 Mad. 165; *Nana v. Prabhudatt* AIR 1914 Pat. 647, 650-1.

³ It will seldom be necessary to look beyond the propositions laid down in *Ramasami v. Venkatesam* (1892) 16 Mad. 440 to the highly involved and controversial propositions of the *sastra* on this notoriously difficult subject. Kane, *Hist. of Dharmasastra*, III, 767-9.

⁴ *Narasimha v. Venkata* (1910) 33 Mad. 165, 19 M.L.J. 719; *Krishnaya v. Venkatramayya* (1903) 19 M.L.J. 723 (FB).

The ability to reunite, and the right to benefit from the deaths of reunited coparceners, has been extended by means of the Hindu Women's Rights to Property Act, 1937 (now repealed) to widows taking under s. 3 (2).¹ It seems that this ability is not shared by heirs who have taken shares in a coparcenary interest under HSA, s. 6. The shares obtainable under the current law upon the death of a coparcener are fixed in proportion from the moment of the death (§ 418) and are not capable of enlargement or decrease fractionally with the births and deaths in the family as was the case under the Act of 1937. As a result one of the fundamental requirements of the institution of reunion, that the reunited persons re-enter a previous state of coparcenary jointness, is missing.

THE DAYABHAGA JOINT FAMILY

563. The great differences between the Mitakshara joint family (which is relatively more important in practice outside Bengal and Assam, and is frequently applied even in those States) and its contrasting system, the Dayabhaga joint family, lies not so much in any fundamental difference of attitude in the Bengalis and Assamese as contrasted with the rest of Indian Hindus, as in the fundamental theories whereby the two schools of law reach results which, while very different juridically, happen to be equally satisfactory from a social standpoint. The sharp differences which make the Dayabhaga system so much easier for the student to understand than the Mitakshara system arise out of the pugnacious and somewhat specious argumentation of Jimutavahana, an eleventh-century Bengali jurist, who has dominated thought on the subject of the joint family and succession in Bengal ever since. His book, the *Dayabhaga*,² places complete reliance in the sense of responsibility of the living ancestor, gives no birthright to his descendants, provides for compulsory shares in the estate only when the ancestor dies or becomes a *sanyasi*, and in that way ensures that when sons inherit they shall be, and remain until partition, fractional owners, and not owners of anything

¹ *Manorama v. Rama* AIR 1957 Mad. 269, where the law relating to reunion is usefully rehearsed.

² § 22.

fluctuating and uncertain — except that until an actual partition by metes and bounds no one knows whether *his* fourth or *his* third (whatever the fraction may be) contains a particular coveted object.

MEMBERSHIP OF THE JOINT FAMILY AND THE COPARCENARY

564. Membership of the family is gained precisely as in the Mitakshara system, and the spirit and make-up of the household can hardly be distinguished from its Mitakshara counterpart, but the distinction between 'members' and 'coparceners' is entirely different. A Dayabhaga coparcenary joint family and a Bengali 'joint family' may be very different things. The latter may not be a joint family in the Dayabhaga sense at all. This comes into existence only when a common male ancestor dies leaving male issue, whereupon, if he leaves no will which is capable of taking effect, the nearest representative or representatives of each branch amongst his descendants takes or take a share *per stirpes* in his estate. These persons are selected exactly as if they were heirs to separate property at Mitakshara law, but the result is according to the Dayabhaga law, for their male issue have no birthright in what they take.¹ The estate is taken subject to the payment of the debts of the deceased and this simple situation obviates any institution such as the Pious Obligation. Subject to the rights of a posthumous son, or a son adopted to a predeceased son, the estate falls to them in fixed fractions. If they remain undivided, they are a Dayabhaga joint family together with their dependants, including the dependants of their deceased ancestor.

F had a wife and two sons, *S*₁ and *S*₂. *F* died in 1936. *S*₁ and *S*₂ succeeded to *F*'s property in half-shares, subject to the rights of maintenance of the widow. Until partition, *S*₁ and *S*₂ constitute a coparcenary at Dayabhaga law, *S*₁ being the manager.

F had a wife and three sons, *S*₁, *S*₂, and *S*₃. *F* died in 1955. The widow and three sons succeeded to property to which the Hindu Women's Rights to Property Act applied (§ 412), for quarter-shares each. The sons formed a coparcenary in respect of *F*'s estate, but it did not include the widow. So also with regard to any property not within the statute, subject in that case to the wife's right of maintenance, which attached *pro rata*.

¹ *Gouranga v. Mohendra* AIR 1927 Cal. 776, 104 I.C. 694.

565. Since the coparcenary share is held in full ownership subject to the rights of maintenance of dependants it passes on death by will or on intestacy.¹ The legatees or heirs succeed to the rights of the coparcener, and are entitled either to leave the share in the family undivided, thus becoming coparceners themselves, or to separate as if they were coparceners.

¹ *F* had a wife and two sons, *S1* and *S2*. *F* died in 1935. *S1* dies undivided in 1957 leaving his widow, *SW*, his predeceased son's daughter, *SSD*, and his predeceased daughter's son, *SDS*. *SW*, *SSD*, and *SDS* are coparceners with *S2* until their respective partitions to the extent of $\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$ each. The burden of maintaining the widow lies upon all rateably.

MANAGERSHIP

566. The manager's powers and liabilities and the rules relating to acquisition and managerial alienation are identical with those at Mitakshara law,² although he has no interest in his coparceners' shares, and although some coparceners will be related to him only remotely. In practice managerships of coparcenaries consisting of relations more remote than brothers or nephews do not endure long, and partitions follow rapidly upon succession to or transfer of the shares. The manager must provide accounts at all times, unlike his Mitakshara counterpart (§ 427). There is no reason to doubt that he is liable personally for making away with property out of which dependants of his predecessors should be maintained (§ 402) but the analogy with the Mitakshara manager does not extend far, since the dependants of deceased coparceners with him look only to the heirs of their respective properties, for he will have taken nothing by survivorship from their deaths — there being no such thing as survivorship at Dayabhaga law.

ALIENATION

567. This subject, which looms so large in Mitakshara law, is of little difficulty at Dayabhaga law. All coparceners may

¹ *Soorjeemoney v. Denobundoo* (1857) 6 M.I.A. 526, 553.

² *Charandasi v. Kanai* AIR 1955 Cal. 206. The Dayabhaga system does however recognize an acquirer's equitable right to a larger share in property he acquires through the employment of relatively little joint assets: *Lal v. Swarnamoyee* (1909) 13 C.W.N. 1133, 31 Cal. 102.

freely alienate their shares gratuitously or for value without notice to their coparceners. The alienee obtains title as soon as the transfer is registered, if this is required by the law of registration. He comes into possession of definite items of property only after suing the coparceners (if necessary) for partition. His suit must be for a general partition of the joint-family property, except in cases where a share in a specific item was sold, or the plaintiff's interest is confined to the subject-matter of the suit.¹

568. One instructed in the Mitakshara system would find in the Dayabhaga situation no distinction between 'ancestral' and self-acquired property, except that a transfer of a share in the former involves partition in order to ascertain that the alienated objects (if objects have been alienated) fall to the share of the alienor. The coparcener cannot alienate more of the joint-family property than would fall to his share if a partition of the assets would be carried out at the time of suit by the alienee: this means taking into account the claims of mothers and grandmothers to shares at partitions by sons and grandsons. Partition at Dayabhaga law means only partition of property and upon such a partition the rights of females to shares arise (§ 528).

PARTITION AND REUNION

569. The rules applicable to partition and reunion are like those applicable at Mitakshara law, except for these differences: (i) we have seen that partition at Dayabhaga law amounts only to a partition of property, since interest is separate from the moment when the coparcenary arises; (ii) females who have inherited coparcenary interests may initiate partitions; (iii) the disqualifications that formerly applied at Mitakshara law (§ 595) continue to apply to partitions of property which vested prior to 17 June 1956, since the removal of certain sources of disqualification by the Act of 1928 (§ 409) did not operate at Dayabhaga law, and the HSA does not affect the right of succession to an estate

¹ *Tarinicharan v. Debendralal* (1935) 62 Cal. 655, 39 C.W.N. 1044, a case which deals with the topic exhaustively. Each plaint asking for partial partition must, however, be considered on its own merits.

passing prior to its own commencement; and (iv) step-mothers,¹ or mothers of only one son who are not claiming as grandmothers, cannot share at a partition between coparceners. Grandmothers may share both at a partition between son and grandson and at a partition between grandson and greatgrandson or between grandchildren representing different sons.²

THE MALABAR JOINT FAMILY

INTRODUCTION

570. Kerala and S. Kanara know various systems of personal law of which the Mitakshara (known locally by that name and also as *makkattayam*) is only one. Numbers of communities which are not *marumakkattayis* are governed to some extent by the Mitakshara law as custom, though variations from it may be proved, or have attained judicial notice.³ For example the *makkattayi* Ezhavas are not governed by the Pious Obligation,⁴ nor do they enjoy the birthright. As a result they hold ancestral property as tenants-in-common and not as coparceners after the Mitakshara pattern.⁵ But this is a long way from showing that they are matrilineal: they are merely examples of joint families that fit neither into the typical Mitakshara, nor into the matrilineal categories. As might be expected, customs which reveal a tendency of *makkattayam* communities to take some advantage from the matrilineal customs of their neighbours are sought to be proved from time to time — but such questions are beyond the scope of this book.

571. By the 'law of the Malabar joint family' we mean the law relating to the *aliyasantana* and *marumakkattayam* and other (*misrattayam*) joint families, which are sharply

¹ *Hemangini v. Kedar* (1889) 16 I.A. 115, 16 Cal. 758 (PC).

² *Sibbosoodery v. Bussoomutty* (1881) 7 Cal. 191; *Purna v. Sarojini* (1904) 31 Cal. 1065.

³ Relations between 'Hindu law' and *makkattayam* are shown in *Dharmodayam v. Balakrishnan* [1962] K.L.T. 712.

⁴ Many *makkattayis* were once polyandrous, and the Pious Obligation would be inappropriate: *Dharmodayam* (cited above).

⁵ *Ayyappan v. A. Unnaman* AIR 1955 T.C. 279.

distinguished from the Mitakshara joint family. It is also traditional to include that significantly different type of family (called *illam* or *illom*), that of the Nambudiris or 'Malabar Brahmans', other than the few groups which actually follow the *marumakkattayam* system. The laws governing these main classes are not homogeneous because, *inter alia*, they are governed by statutes locally enacted¹ but forming parts of the personal law of the members of the castes in question. To give even a summary of the family law of all these groups would be beyond the scope of this book. But the beginner must understand the provisions of the HSA, which expressly refers to the communities in question and provides for succession to the properties of their members, and some acquaintance with the characteristics of the systems is needed.

572. The family itself is called *tarwad* ('house') in the *marumakkattayam* system and *kutumba* ('family') in the *aliyasantana*. Relationships are basically matrilineal in both, but both know to varying extents the effect of superimposition of marriage (§ 390) upon a previous system which had no use for marriage as such. Any descendant in the female line is *prima facie* a member of the family, entitled to live in the family house and to be maintained, it is presumed, out of family funds. The children of a husband and wife would be members of their mother's *tarwad*, but they would have no place in their father's, unless this were agreed to by all the members of the latter (whereupon they would enjoy only such rights as were then granted to them), and in practice the modern tendency is for husband, wife, and their issue to form a separate home drawing allowances, if necessary, from both families and living in greater part on the husband's earnings.² Those that live by agriculture, however, are more conservative, and the *tarwad* retains its importance.

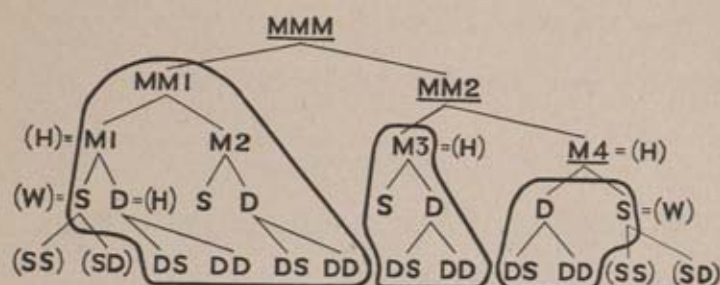
573. In time ancient *tarwads* split into *tavazhis*,³ which are sub-*tarwads* or miniature *tarwads* within the *tarwad*. A single

¹ e.g. the Madras Marumakkattayam Act, 1932 as amended in 1947, 1951 and 1958, and the Kerala Nambudiri Act, 1958.

² In *Amma v. Mathai* (1947) Trav. L.R. 461 sons were held liable to pay out of their *tarwad* funds for the funeral of their father, notwithstanding the fact that he belonged to a different *tarwad*.

³ *Narayana v. Sankara* [1947] Trav. L.R. 623.

tarwad may in fact be run as if it were a group of separate units, *tavazhis*, consisting of a mother and her descendants in the female line, but even when separation has become evident the members of a *tavazhi* retain expectations of succeeding to the property managed and enjoyed by other *tavazhis* should any become extinct. In default of all members of a *tavazhi* the remaining members of the *tarwad* take by survivorship property undisposed of by the last survivor of an extinct *tavazhi*. The structure of a *tarwad* may best be seen in a diagram. Deceased members are here underlined. Persons indicated in brackets are not members of the *tarwad* at all. The three *tavazhis* within the *tarwad* are encircled.



It will be seen that relations by marriage are never members of the *tarwad*, nor are the descendants of sons. The diagram is necessarily defective in that where a woman has issue by more than one husband the resulting duplication of the *tavazhi* (§ 578), which is not significant to the *tarwad* as such, is not indicated here.

574. The Nambudiri *illam* is, by contrast, severely patrilineal, though the position of female members is somewhat more equal with that of the males than would be acceptable under pure Mitakshara law. Nevertheless Mitakshara law is applicable to *illams* as a residual law when statute law, or custom, fails.¹ This may not be due entirely to the patrilineal character of the Nambudiris, for we have seen (§ 570) that some *makkattayis* do not have the Mitakshara as their fundamental system, but rather to the status of the

¹ *Narayanan v. K. Ravi* AIR 1956 T.C. 74.

Mitakshara as a residual law for Malabar families, *makkattayam* and (surprisingly) *marumakkattayam* alike.¹

575. Like Nambudiris and *marumakkattayis*, *misrattayis*² are also governed to a large degree by statutes and, where statute is silent, by custom. In their cases the *marumakkattayam* family exists, but the natural family of husband, wife and children exists, as it were, superimposed upon it. The property of a male member descends partly upon his natural and partly upon his matrilineal heirs, who have, in addition, to respect customary rights in favour of the natural family which may be intended to protect them from the competing claims of the *marumakkattayam* family. This pattern has been imitated to some extent in the statutory revisions of *marumakkattayam* law itself.

PROPERTY AND INTERESTS IN PROPERTY

576. The traditional picture of the *tarwad* and *illam* is of an impartible joint family, which takes by survivorship all the property left by a member dying intestate. This is not necessarily the case with the *kutumba*, and indeed the introduction of the power of testamentary disposition in the various localities greatly diminished the expectations of *tarwads*. The traditional picture, again, sees the family properties as inviolable: nothing can be obtained out of them for the members (let alone strangers) except by way of maintenance, which will be in the house itself unless members live away for a good cause. The notion grew up that the Malabar family could not be dissolved, or its property distributed, except upon a footing of equality and *per capita* shares. No doubt this is misleading, but the doctrine left marks on the statutes. It is believed — though doubts have not been removed — that where the right of partition at pleasure was granted by statute the member's right to sue for maintenance was restrained;³ but the basic proposition that the member must be maintained is nowhere contradicted, whether by statute or otherwise.

¹ *Iravi v. Mathevan* AIR 1955 T.C. 55 (FB).

² Such as *Ezhavas* and *Thiyyas*. See *Narayanan v. Kali* AIR 1951 T.C. 135, where 'homestead' rules, which are very rare in India, are mentioned.

³ *Umayamma v. Arumukaperumal* [1961] 2 M.L.J. (NRC) 35.

577. On the whole it is still true to say that the property vests in the family and not in individuals. The modifications we must add are due (i) to the habit of accumulating *tavazhi* funds through gifts and bequests by fathers and others, and (ii) the effects, direct and indirect, of the statutory grant of the absolute or conditional right (as the case may be) of partition. To partition we shall return later, but some explanation is required, at this stage, of the former development.

578. Although *tavazhi* property might be thought to be also *tarwad* property, in fact the custom has grown up whereby property may be donated or bequeathed to a woman and her children. Since it would be ultra-philanthropic to provide for one's wife's or widow's children by a subsequent husband,¹ a man may create *tavazhi* property for his wife and issue to the exclusion of her issue by another, with the result that a woman may be the head of two or more *tavazhis* for this limited purpose. The children of *A* will form one *tavazhi* with their mother (and their descendants matrilineally), and the children of the same woman by *B* will form another *tavazhi* for the purpose of enjoying their respective fathers' gifts or bequests. The children of *A* will have no interest in the *tavazhi*-property left by *B* and vice versa,² although they are equally members of the *tarwad* and of their common mother's *tavazhi* or sub-*tarwad*, to speak in *marumakkattayam* terms. The result is normally that the *tavazhis* may own funds in which present and future members of each *tavazhi* concerned have and will have interests, but the other members of the *tarwad* have no interest in it. With the somewhat strange, but established, exception of *marumakkattayis* in the Cochin area and others to whom contrary statutory rules apply, it is presumed that when a man gives or bequeaths property to his wife and children, or to either of these, or a mother to her daughters, or an uncle to his niece, the donor or testator intends the property to become *tavazhi* property and not the property of the donees or legatees in shares absolutely as tenants-in-

¹ *Mariamamma v. Narayana* 2 T.L.J. 15 cited in *Kalliani* (below) at p. 238.

² *Imbichi v. Raman* (1919) 42 Mad. 869; *Kalliani v. Anandan* [1962] K.L.T. 234.

common.¹ But if the deed or will specifies certain individuals as beneficiaries it is not easy to rebut the contrary presumption that they alone were intended to take, and that too in shares, without benefit of survivorship.² The same custom explains why, in order of priority of succession to a member of a *tarwad*, the members of the deceased's *tavazhi* excluded members of remoter *tavazhis*, that is to say the remainder of the *tarwad*. Where a female took a share in *tarwad* property at a partition this share was held by her as *tavazhi* property in which her descendants in the female line had interests by birth, whereas her brother's share taken in the same partition was owned by him absolutely.³ Unlike the position at Mitakshara law (§ 518) there is a presumption when members separate (§ 585) that they themselves remain joint *inter se* and that the others are likewise joint notwithstanding the partition of the first-mentioned members from them.⁴ This position continues, and is in part recognized by statute.⁵

579. Many royal *tarwads* possess *sthanams*. These have no counterparts outside Africa. Portions of *tarwad* property are set aside by ancient custom for the upkeep of the dignity of the *sthani* or *sthanamdar*, i.e. the holder of the *sthanam*, which amounts in effect to a position of honour, similar in kind to a throne.⁶ These impartible properties used to pass from one *sthani*, usually a very senior member of the family, to his or her successor in the dignity. The other members of the *tarwad* meanwhile had no interest in the *sthanam* until the *sthani*'s death. A *sthani* may alienate *sthanam* properties only for legal necessity (§§ 437-8, 582),⁷ and the

¹ *Bhaskaran v. Kavunni* [1954] 2 M.L.J. 294, AIR 1945 Mad. 987; *Parvati v. Padmanabha* AIR 1957 T.C. 77 (FB); *Janaki v. Kunjikali* AIR 1957 T.C. 80 (FB); *Lekshmi v. Narayana* AIR 1957 Ker. 81. Cochin Marumakkattayam Act, s. 47; Nanjinad Vellala Act, s. 32.

² *Narayanan v. Kumaran* AIR 1951 T.C. 11; cf. *M. Govinda v. Lekshmi-kutty* AIR 1951 T.C. 67 (FB).

³ *Kamakshi v. Gangadharan* AIR 1954 T.C. 60, [1953] K.L.T. 706 (FB).

⁴ *C. Kuttimalu v. C. Lakshmi* AIR 1961 Ker. 166 (FB).

⁵ Kerala Act 26 of 1958, s. 9; Explanation I of the new s. 38 of Madras Act XXII of 1933.

⁶ *S. C. Sreemanavikrama v. Cont. E. D.* [1957] Mad. 764, AIR 1957 Mad. 522; *K. K. Kochuni v. State* AIR 1960 S.C. 1080, [1960] K.L.T. (SC) 31, [1960] 3 SCR 887.

⁷ *Venkateswara v. Shekhari* (1881) 3 Mad. 384 (PC); *Parukutty v. Madras* AIR 1962 Ker. 93, [1961] K.L.T. 846, 849-51 (FB).

last *sthani* of the *tarwad* has no wider powers than any of his predecessors, for the State may step in as 'reversioner'.¹ The position of *sthanams* was radically affected by HSA, s. 7 (3), which will eventually disrupt the institution. On the application of ten heirs of a deceased *sthanamdar* or members of his family, or one-fifth of that group, whichever is less, the Kerala Government may assume temporary management of *sthanam* properties to preserve and protect them until partition amongst those entitled to shares under the subsection.² The rule that a female takes a share in *tarwad* property as *tavazhi* property has not been abrogated, however, by the HSA, so that the spirit of the old system will remain despite the disappearance of *sthanams* and the break-up of old *tarwad* properties, which is bound to result from every death after the HSA came into force, unless the event has been anticipated by suitable settlements *inter vivos*.

580. Because the *marumakkattayi* had originally no interest beyond his right to maintenance he could not alienate his interest, nor could it be attached in satisfaction of his creditors. This position no longer applies where the right of partition has been granted (§ 585). The right to attach and sell the share which a member would obtain if he separated is now established in some communities.³ It may be universal where the right to partition is not encumbered with serious handicaps.⁴ The Madras High Court, both in cases of Nambudiris⁵ and *marumakkattayis*,⁶ held that the right to severance at the member's option carried with it the Hindu law rule (as understood in South India) that an equity could be created to the extent of the undivided interest and that therefore a member could alienate his *per capita* presumptive share. But the proposition that a general right *voluntarily* to alienate the undivided interest had been conferred by statutes permitting partition was vigorously denied in *Atherman v. Kannan*,⁷ where the

¹ *Parukutty* (cited above).

² (Kerala) *Sthanam Properties (Assumption of Temporary Management and Control) and Hindu Succession (Amendment) Act, 1958*, 28 of 1958.

³ *Bank of New India v. Sukumari* AIR 1961 Ker. 105 (FB).

⁴ *Indo-Commercial v. Narayanan* [1945] Mad. 129, AIR 1944 Mad. 400.

⁵ *Madhavi v. Subramanian* AIR 1939 Mad. 584, [1939] 1 M.L.J. 487.

⁶ *Kunhikrishnan v. Anantharaman* [1959] K.L.T. 1160.

⁷ AIR 1961 Ker. 130 (FB).

characteristic *marumakkattayam* position was upheld against attempted encroachments by Mitakshara law as administered by the former British High Courts of South India.

In view of this decision it is difficult to accept the proposition in *Mohammed v. Appi*¹ that a purchaser of the shares of a branch of a *tarwad* can be forced to partition the *tarwad* properties with the non-alienating members; but the decision that, assuming this liability, the plaintiffs will take their shares *per stirpes* (and not *per capita*) is significant for communities not governed by a statutory definition of the share a member may take at partition.

MANAGEMENT

581. The manager of the *tarwad* is called the *karnavan*, while his counterpart in the *kutumba* is called a *yejamana* (not *ejamana*). In the *aliyasantana* system the senior female may be manager, but normally in both systems the senior male who has not prospectively renounced the position obtains the right to be manager by birth. Though only the *karnavan* (and *yejamana*) may alienate *tarwad* properties² or bind the *tarwad* (or *kutumba*), unless he has for practical purposes abandoned his duties and so estopped himself from questioning the act of a junior member, and thus the position of a *karnavan* resembles that of a *karta* (§ 422), the latter has very few points of similarity with the former.

582. The *karnavan* represents himself, the female members, and the *anantaravans*, who are the other male members who may one day themselves become manager in turn. The latter are related to him only through the female line, and their interests, like his own, are spread between the *tarwad* and their individual homes (if any), their wives and legitimate children. Thus less trust is reposed in the *karnavan* than is reposed as a matter of course in the *karta*. The *karnavan* may resign but he cannot delegate his entire powers,³ unless a statute permits this.

¹ [1962] K.L.T. 340.

² *Chathar v. Kuttisankaran* [1957] 2 M.L.J. 603.

³ *Krishnan v. Ammulu* AIR 1942 Mad. 90, [1942] 2 M.L.J. 472. Statutes also provide for this.

When the *karnavan* is absent for long periods he retains his powers but it may be difficult to consult him. It is therefore proper for him to appoint an *anantaravan* or a stranger by power of attorney to attend to *tarwad* business until he is in a position to resume personal control.¹ He may become disqualified by abandoning the *tarwad*, or by becoming a *sanyasi*. He may be deposed, and suits for his deposition are not unknown.² He must submit accounts periodically for the inspection of the *anantaravans*,³ and if there are deficiencies due to his misfeasance or fraud he may be personally liable. His alienations enjoy a facility in some respects, though he is hampered in others by comparison with the *karta*. There is no actual presumption in favour of an alienee that what the *karnavan* undertakes is undertaken for the benefit of the family, but it is presumed that alienations of moveables are justified in the family's interest. The presumption is rebutted if it is shown that an alienation took place in circumstances inconsistent with the family's welfare. This would happen where, for example, it was not supported by necessity,⁴ but, on the contrary, it was made to start a 'new business' (§ 439).⁵ To sales and mortgages of immoveable property, however, all *anantaravans* should assent, according to custom, though in many communities it was provided by statute that in order to bind the family one or more *anantaravans* must join in certain transactions, e.g., sales and also mortgages and leases for five, or twelve years or more (as the case might be). In the former Madras area of Kerala since 27 July 1950 all leases which would confer indirectly a fixity of tenure upon the lessee required the previous consent in writing of a majority of the *anantaravans*.⁶ *Marumakkattayis* in that area have been subject to a simpler rule since 20 April 1958. Sales, leases and mortgages require *tarwad* necessity or benefit and the written consent of the majority of the major members, whilst other transactions need only to be justified by necessity or benefit, proof of

¹ *Anna Cherian v. Achuta* [1962] K.L.T. (SC) 125, 134.

² *Chindan v. Kunhi* (1918) 41 Mad. 577, 34 M.L.J. 400 (FB); *Thachunni v. Unniappan* [1945] Mad. 558, 560.

³ Mad. Nam. Act, 1932, s. 4; Mad. Marum. Act, 1932, s. 32; Trav. Kshat. Act, 1932, s. 32; Cochin Nayar Act, 1938, s. 50; etc.

⁴ *Govinda v. Karthiyayani* AIR 1931 Mad. 726, 61 M.L.J. 35.

⁵ *Thevi v. Subbarayayan* AIR 1954 T.C. 462; *Sreedevi v. Parameswara* [1963] K.L.T. 285.

⁶ Malabar Tenancy (Amendment) Act, 1951.

which must be furnished by the alienee or creditor, unless the majority of the major members have participated or given their written consent.¹ In other areas the written consent of *all* members is needed in default of necessity.

The words 'tarwad necessity'² are construed in a manner similar to 'legal necessity' at Mitakshara law (§§ 437-8). Yet it may include 'manifest advantage'. Thus alienations of *tarwad* property may be considered binding if they have been made to acquire fresh property to the *tarwad*'s 'manifest advantage'.³ But where the effect of the alienation is to give the *karnavan* full control over the consideration it cannot be said to be for the *tarwad*'s advantage, let alone for necessity. Thus sales to acquire mortgage rights will normally be held invalid.⁴

In litigation, likewise, the *karnavan* represents the family only when *anantaravans* representing other *tavazhis* join with him. Yet, as in Mitakshara law (§ 430), decrees suffered through his gross negligence cannot be set aside without proof of fraud and collusion as well as (or rather than) incompetence.⁵ Apart from statute it was settled that if the senior *anantaravan* joined with the *karnavan* in alienating or incurring a debt it might be presumed in favour of the alienee that the act was supported by necessity or benefit of the family.⁶ Naturally, that presumption was rebuttable.

583. *Anantaravans* and female members may sue to set aside improper alienations,⁷ or they may ignore them and sue for possession. Such acts are voidable and not void, as determined in the Full Bench case of *Mathew v. Ayyappankutty*,⁸ which has an exhaustive judgment. The unprotected alienee is usually liable for mesne profits. They may also obtain an injunction to restrain the *karnavan* from alienating improperly.⁹ When an alienation is set aside, however, the

¹ (Kerala) Madras Marumakkattayam (Amendment) Act, 1958, ss. 6-8.

² As in Travancore Nayar Act, s. 25.

³ *Karunakaran Pillai v. Devakipillai* [1953] K.L.T. 452.

⁴ *Ramachandran Nair v. Krishnan* [1962] K.L.T. 804, explained in *Gangadharan v. Narayana* [1962] K.L.T. 952.

⁵ *Nagamma v. Korathi* [1950] Mad. 326.

⁶ *Kesavan v. Lakshmi* AIR 1939 Mad. 137, [1939] 1 M.L.J. 568.

⁷ *Ananthamathi v. Thochappa* AIR 1960 Mys. 304; *Mahammad v. Kunhi Kutti* AIR 1929 Mad. 451, [1928] M.W.N. 867.

⁸ [1962] K.L.T. 61 (FB). *Pailoth v. Arya* [1961] K.L.T. 1127, 1131 is no longer good law.

⁹ *Puzhako v. Mahadeva* (1918) 35 M.L.J. 96, 47 I.C. 778.

anantaravans must repay to the alienee any benefit that was received by the *tavazhi* or *tarwad* from the consideration, and decrees are made on such terms.¹ Where the alienation was voidable (e.g. for want of written consents required by a statute to be given prior to a sale or mortgage) but the consideration was applied to *tarwad* or *illam* necessity, mesne profits are ordinarily not awarded against the alienee for the period before suit.²

Since improper alienations are voidable, it was held in *Mathew's case* (cited above) that a purchaser from a member of the family in a voluntary transfer could not impeach a prior transaction which was contrary to s. 21 of the Travancore Ezhava Act. Cases in Mitakshara law, however, persuaded S. Velu Pillai, J., that an auction-purchaser of a member's interest was not unable to impugn such an improper alienation.³

584. Though there are important variations from community to community the suspicion of the *karnavan* constantly reappears. It is presumed, for example, that what he acquires is acquired out of *tarwad* funds;⁴ this appears to be a presumption extending beyond the rule otherwise common to Hindu law and *marumakkattayam* law that an acquisition is presumed to be joint-family property if a sufficient nucleus of joint-family property existed which, in the hands of a good manager, could provide the purchase-price.⁵ The apparently generous provision of the Cochin Nayar Act, s. 52, that the *karnavan* may take a limited proportion of the *tarwad's* surplus income for his separate enjoyment, and of the Travancore Nayar Act, s. 40 and the Travancore Ezhava Act, s. 19, expl. 1, that he may treat as his self-acquisition, on partition, one-fourth and one-half, respectively, of the acquisitions made by him out of the joint-family income during his managership, seem not to stem from generous sentiments. However the 'common' law holds that a *karnavan* is, even apart from statute, entitled to reasonable compensation (amounting, according to

¹ *Chandrasekhara v. Kochu* [1961] K.L.T. 1018.

² *Eastwaran v. Krishnan* [1961] K.L.T. 5, 12.

³ *Cheeru v. Muhammad* [1962] K.L.T. 520.

⁴ *N. Govinda v. N. Madhava* [1943] Tr. L.R. 731; *Velumpi v. Sankaran* [1951] K.L.T. 670.

⁵ *Kunhi v. Appu* [1962] K.L.T. 99, 103 (overruled on another point).

creditors.¹ A fictional severance can thus be achieved for the benefit of creditors. But the attachment of a share does *not* affect the jointness of the debtor's status as such.² The balance, if any, will remain until an actual partition takes place. The HSA, by s. 7, provides that at every death of a *marumakkattayi* or *aliyasantani*, male or female, the interest in the family properties (not excepting 'impartible' *tarwads*)³ shall pass by testamentary or intestate succession, and this 'interest' is to be calculated in all cases as if the entire family were to separate and take each a share *per capita*. Since this will in most cases devolve upon some relatives who are actually members, or have been members, of the *tarwad* itself (the mother will often be an heir if she survives, and the sons and daughters of a female *proposita* will normally be amongst her heirs) the result will be that members of a *tarwad* or *tavazhi* will take *tarwad* properties by two like titles, if they are females (§ 578), but by two different titles if they are males; and since the whole will not be distinguishable until a partition by metes and bounds, confusion should be provided against by appropriate family arrangements and settlements.⁴

FURTHER READING

The law of the joint Hindu family is not one of the topics which is best handled in the general textbooks. J. D. Mayne, 11th edn, 1950, chh. viii–xi and xvii, and N. R. Raghavachariar, 4th edn, 1960, chh. viii–ix and xix, contain the material as understood at the periods in question, but the effort to digest the great developments of the last thirty years within a framework conceived before that time has not achieved a synthesis which would satisfy a newcomer. To understand the joint family and the peculiar state of its law a better perspective is sometimes obtained by taking a long look from the remoter past. P. V. Kane's *History of Dharma-sastra* (vol. III) stands too far off for our purpose, since the *sastra* hardly envisaged most of our problems. The otherwise hopelessly out-of-date K. K. Bhattacharyya, *Law relating to the Joint Hindu Family*, Calcutta, 1885 (Tagore Law Lectures, 1885), is useful for the purpose in question here. The student may neglect the income-tax elements in P. N. Chadha, *Law relating to Joint*

¹ Accepted in all parts of Kerala.

² *Cherutty v. Krishna* [1961] K.L.T. 879, 881–2, applying Mitakshara law by analogy. ³ § 585.

⁴ Cf. the position in *Soman v. Ramakrishna* [1962] K.L.T. 863.

Hindu Families, Agra/Allahabad, 1955, but he will find the law as it then stood very conveniently set out. There is a general survey in my 'History of the juridical framework of the joint Hindu family,' *Contributions to Indian Sociology*, no. 6 (1962), pp. 17-47.

Some problems in the current law of the Mitakshara joint family are discussed in the following articles:

- J. D. M. Derrett, 'The Supreme Court and acquisition of joint family property,' (1960) 62 Bom. L.R. (Jour.), pp. 57-71.
- J. D. M. Derrett, 'The right of purchasers at court sales of items of joint family property,' (1957) 20 S.C.J. (Jour.), pp. 111ff.
- J. D. M. Derrett, 'Alienations at Hindu law: a revolutionary Full Bench decision,' (1957) 20 S.C.J. (Jour.), pp. 85ff.
- J. D. M. Derrett, 'The devolution of a separated interest in joint family property . . . prior to June 17, 1956,' (1957) 59 Bom. L.R. (Jour.), pp. 81ff.
- J. D. M. Derrett, 'Two difficult Bombay cases in Hindu law,' (1956) 58 Bom. L.R. (Jour.), pp. 97-102.
- H. K. Shah, 'Hindu Women's Rights to Property Act,' (1957) 59 Bom. L.R. (Jour.), pp. 148-55, 161-7.
- R. K. Ranade, 'Pious Obligation in Hindu law,' (1950) 52 Bom. L.R. (Jour.), pp. 1-7.
- R. K. Ranade, 'Illegal and immoral debts in Hindu law,' (1950) 52 Bom. L.R. (Jour.), pp. 33-41.
- R. K. Ranade, 'Debts by a manager of a joint Hindu family,' (1951), 53 Bom. L.R. (Jour.), pp. 33-8.
- R. K. Ranade, 'Antecedent debt,' (1953) 55 Bom. L.R. (Jour.), pp. 94-102.
- R. K. Ranade, 'Doctrine of antecedent debt,' (1961) 63 Bom. L.R. (Jour.), pp. 81-4.
- J. D. M. Derrett, 'Hindu law: Mitakshara: the pious obligation and the doctrine of "antecedency" . . . , ' (1955) 18 S.C.J. (Jour.), pp. 139-50.
- J. D. M. Derrett, 'Misdeeds of a manager and the pious obligation,' AIR 1960 Jour. 2-5.
- J. D. M. Derrett, 'Five doubtful cases on Hindu law from Madras,' [1963] 1 M.L.J. (Jour.), pp. 1-13, 20-4.

The Malabar joint family (in the systems special to Kerala and S. Kanara) presents special problems. The quondam leading textbooks, Wigram and Moore, and P. R. Sundara Ayyar, being very much out-of-date, the best treatment of *aliyasantana* and *marumakkattayam* is still App. III of Mayne, 11th edn (1950). This little treatise is the work of P. Govinda Menon (later Mr Justice P. G. Menon), revised by B. Sitarama Rao and later again revised by Mr Justice Menon for the edition referred to.

It is accepted as a work of authority by the Kerala High Court. But it does not reflect the vastly important statutory changes nor the recent developments of case-law, some of which have been little less than dramatic. N. R. Raghavachariar (1960) is more up-to-date, but still not comprehensive: ch. xvii covers much the same ground and contains the Malabar Wills Act and the Madras Marumakkattayam Act, 1933 (since much amended), with useful notes to some sections. If the student has access to a recent edition of V. N. Subramonia Iyer's *Hindu Law including Marumakkathayam Law* (published from Ernakulam) he will find it an excellent summary introduction. A comprehensive up-to-date treatment of the Malabar joint family as governed by the law administered in the Kerala High Court is a desideratum: no doubt when the law is more settled one can be looked for from a teacher or practitioner at Ernakulam.

CHAPTER SEVEN

Intestate Succession

INTRODUCTION

587. No one has any right to control the manner in which his property shall be enjoyed after his death, except in so far as the community which survives him provides, by law, for him to express his wishes in proper form. It lays down rules selecting which of those wishes may be carried out and governing his legal representatives in carrying out those approved wishes. The law in fact makes, on the whole, adequate provision for the man whom death has caught before he can formally express what he would wish to be done with his property. In India the law of inheritance has been so recently and so comprehensively reformed that no one need fear dying intestate, that is to say, without leaving a will which is capable of taking effect.¹ In a sense Parliament has made, in the Hindu Succession Act, a will for everyone, and whoever proposes to make a will should consider whether every eventuality has not been foreseen by Parliament, and whether his own preferences would be an improvement. In cases where special friends and favourite charities cannot be appropriately helped during his lifetime he may well wish to make provision for them by will; and in those sad cases where the nearest relations are likely to quarrel over the estate it may well be the best thing to have a will drawn up which anticipates all equitable claims, and forestalls litigation and wasteful disputes. A man whose family have grown up and who expects no catastrophic changes would do well to make any such special provisions in due form while he is in good health and of sound judgment; for the notions of the aged and the sick are often exaggerated and out of focus, and many a perfectly valid will has caused more annoyance than the testator could have expected. On the whole the natural pleasure inherent in making a valid will may be offset in modern India by the confidence that to die intestate will leave no close relation

¹ HSA, 3 (1) (g).

unprovided-for, let alone destitute, and may well be the wisest course. This applies equally to men and women and to Hindus formerly governed by any of the schools of Hindu law or by customary law.

588. The law of intestate succession is founded upon the doctrine that the estate of the deceased should pass to those amongst his survivors who have the best claims by virtue of their needs and their merits. Parliament has considered and set out, in an order of priority, the relations that in most cases are most close to the deceased and whose claims have, through the centuries, been recognized by law or in the wills of those classes which normally leave wills. The predominantly patrilineal structure of the Hindu family has been recognized, but considerably modified by the undeniable claims of close cognate relations (§ 601). In the Malabar matrilineal castes a recognition of the claims of kindred related through females has been preserved, but subject to the established development in favour of the natural, nuclear, family at the expense of the *marumakkattayam* heirs (§ 575).¹ As against this scheme, based upon presumptions drawn from natural connexion and nearness of blood, presumptions of natural love and affection, Parliament has provided in the Hindu Adoptions and Maintenance Act for the whole rights of the selected heirs on intestacy to be subject to the claims of those whose needs and merits might cut across the presumptions of natural love and affection. Moreover, if the deceased left a will distributing his estate amongst strangers as well as relatives, not only have protected relatives (claiming as statutory 'dependants') a right to call upon the executors to reduce the legacies *pro rata* in order that their reasonable needs may be met for the period which the law lays down, a right which will operate to reduce the shares of legatees who are themselves relatives but not dependants, but relatives, also, who are legatees remain at an advantage over stranger-legatees. As we shall see, the latter are liable to lose their legacies entirely, while the former, if they would themselves be entitled to claim

¹ Although the *aliyasantanis* of S. Kanara district of Mysore State are comprehended within the scope of Malabar matrilineal families, the scheme applied to them under the HSA is called, for convenience, the 'Kerala system' since most of the castes specified by that Act reside in Kerala.

as 'dependants' had no substantial legacy been left to them, can keep their legacies to the extent to which provision would in such a case have been made for them. As a result, in cases of intestacy, partial intestacy, or full testamentary succession the 'dependants' set out in the statute are protected: no one can defeat the rights of his 'dependants' by making a will in favour of others, and if he fails to provide for them by will the court may divide the estate between them taking all the circumstances into account. In this respect, it should be noted, it often happens that the court is better informed than the deceased was when he thought of leaving a will.

WHEN DOES THE SUCCESSION OPEN?

589. The expression, 'the succession opens,' has an unfortunate connotation, and a misunderstanding must be cleared up at the outset. In Anglo-Hindu law it was established that when a male owner died leaving a widow or daughter or other female heir (for Maharashtra and Gujarat see § 675) the succession did not 'open' on his death, but on the death of the female limited owner (§ 696), who was a qualified owner and not a full heir. On the death of the widow or daughter (or if the deceased left both widow and daughter and the daughter survived the widow, then on the death of the daughter) leaving a male immediate reversioner, the latter came at length into an inheritance which had been potentially his since the date of the last male owner's death. Thus when, in 1929, the order of distribution of a male deceased's estate at Mitakshara law was altered by the Hindu Law of Inheritance (Amendment) Act, the effect of a widow-heiress's death after 1929 was to bring into his inheritance not the reversioner who would have taken had the selection been made from the order as before 1929, but him who was indicated by the new statute.¹ It must be understood that the Act of 1929 merely *altered the order of distribution* thereafter, so that when it was referred to to discover the reversioner it had changed from its form as subsisting prior to the Act and at the time of the last male holder's death. Since the abolition of the woman's

¹ *Duni Chand v. Anar* AIR 1946 P.C. 173, 73 I.A. 187, [1946] All. 748.

limited estate by the Hindu Succession Act, and the disappearance of reversionary rights, except in regard to property not in the 'possession' of female limited owners on the day when the Act came into force (§ 676), the position has been that succession 'opens' when the deceased owner, the *propositus* as we shall call him, dies, and at no other time. It has been alleged that where a widow died after, her husband having died before, the Hindu Succession Act came into force, the reversioners retaining rights in his estate by reason of an improper alienation by the widow prior to the coming into force of the Act (§ 683), the reversioners must be chosen according to the Schedule of that Act. In some cases in the Punjab¹ this has actually been decided, upon analogy with the Privy Council decision referred to above in connexion with the Act of 1929.² But the cases, as the Patna High Court recognizes, are not comparable, the function of the Acts of 1929 and that of 1956 were different in this regard, and since reversionary rights subsist only in cases where the Act of 1956 does not operate at all, the succession does indeed open on the widow's death in respect of that very limited category of property, and the reversioner must be selected according to the old law.³

In *Bapurao v. Neroji*⁴ the widow had improperly alienated in 1953 some of the lands she inherited from her husband, who died some time previously leaving sons of predeceased cousins. These sued in 1953 for a declaration that the sale did not affect the rights of the next reversioners. It was held (in 1960) that the passing of the HSA did not affect the positions of the alienees or of the reversion, and the appellants were entitled to their decree. As sons of the husband's cousins they were reversioners as indicated by the old law.

590. Actual death calls into action the law of succession to property. On the problem of the 'civil death' of a *sanyasi* and his eventual actual death something must be said separately (§ 592). Where the time of death is known there

¹ *Banso v. Charan* AIR 1961 Pun. 45; *S. Kuldip v. Karnail* AIR 1961 Pun. 573.

² *Duni Chand* (cited above).

³ *Renuka v. Aswini* AIR 1961 Pat. 498. See (1958) 21 S.C.J. (J.) 262. The offending case of *Lateshuwar* AIR 1958 Pat. 502 was overruled as to the offending part in *Ram v. Palakdhari* AIR 1961 Pat. 60. *Duni Chand* is properly distinguished in *V. Sampathkumari v. M. Lakshmi* [1962] 2 M.L.J. 464.

⁴ (1960) 63 Bom. L.R. 576.

is usually no problem. When the owner is missing, his relations may distribute his estate according to the law of intestate succession (or, more rarely, where he left a will, according to the law applicable in a case of testamentary succession) when, as a matter of evidence, it may lawfully be presumed that he is dead. When it is proved that a man has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is upon the person who affirms it.¹ If he returns after his estate has been distributed in reliance upon the presumption of his death, and the law of limitation has not protected the possessors of his estate, he may have it back from them, but (it would seem) without mesne profits, to which in equity he would hardly be entitled.²

591. A difficult problem arises when two or more persons who are so related that they would be heirs in each other's succession, or people who are legatees in each other's will, or others, die in such circumstances that it is impossible to show to the court's satisfaction that one survived the other. India has adopted a rule which, though it certainly differs from the common law rule and from the rule formerly applied (or thought to be applied)³ to Hindus, is so good that it will certainly be applied as a rule of justice, equity and good conscience outside India. Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property (i.e. even in cases where the question is of the passing of property by the will of a third party) it shall be presumed, until the contrary is proved, that the younger survived the elder.⁴

H and his wife, *W*, were in a tall building which caught fire. *W* was on the top floor, which was destroyed first, and *H* was on the ground floor on to which the top floor collapsed. Neither was found after the

¹ Indian Evidence Act, 1872, s. 108.

² § 467.

³ *K. S. Agha v. Mir* AIR 1944 P.C. 100, 71 I.A. 171, [1944] 2 M.L.J. 354; *Digendra v. Kuti* AIR 1944 Cal. 132. *Kulkarni v. Laxmibai* AIR 1922 Bom. 347, 47 Bom. 37 and *Manorama v. Rama* AIR 1957 Mad. 269, 278 (where the court used the word 'presumption' but really proceeded upon probabilities) are not followed in the authoritative *Manni v. Paru* AIR 1960 Ker. 195, [1959] K.L.T. 1302, which relies on *Hickman v. Peacey* [1945] 2 All E.R. 215, [1945] A.C. 304 (HL).

⁴ HSA, s. 21. *In the matter of Mahabir* AIR 1963 Pun. 66, 72-5 (dicta).

fire. *W* left all her property to *H* by her will; *H* by his will left all his property to *W*. Since it is not uncertain whether *W* survived *H* (for all the evidence suggests that *H* survived *W*, if by a few minutes only), *W*'s estate passes to *H*, and *H*'s estate, including hers, passes as on an intestacy.

K and his younger brother, *B*, were driving in a fast two-seater car, collided head-on with a lorry, and were both dead when removed from the wreckage. Under the will of their grandfather, *G*, on the death of *K* property bequeathed to *K* for life by *G* passes absolutely to *B*. It is uncertain whether *K* or *B* survived, and therefore *B* is presumed to have survived, and the property bequeathed by *G* will pass to the heirs of *B*.

F and his son, *S*, went on separate fishing expeditions by night. Neither returned in the morning, their respective vessels having been overwhelmed in storms. *S* is presumed to have survived *F*, until evidence is forthcoming that the vessel in which *F* was remained afloat later in the night than that in which *S* was.

592. The Hindu Succession Act makes no provision for the distribution of the estates of hermits, ascetics, or perpetual students. Section 8 of the Act commences, 'The property of a male Hindu dying intestate . . .', and there can be no doubt but that natural death of a person leaving property is contemplated, and not the 'civil death' of the *sanyasi* who is ceremonially accepted into the ranks of those who have abandoned the world, and who, according to a common custom, performs his own obsequial rites and extinguishes his householder's sacred fire (if he has one). There are no words in the statute abrogating the Anglo-Hindu law on the subject, and the whole scheme of the Act as depicted in s. 8 is irrelevant to the situation of a *sanyasi* or *vairagi* or perpetual *brahmachari*, for the relatives who are mentioned and set out in detail are not related to a *sanyasi*, etc., at all. On the completion of his formal *sanyasa* he acquires as his relatives the teacher who initiates him, and the fellow-ascetics who share that teacher and that way of life. His blood relations are no longer related to him, and his wife is no longer his spouse. This state of affairs is recognized in the Hindu Adoptions and Maintenance Act¹ and in the Hindu Minority and Guardianship Act.² The position, therefore, seems to be as follows:—the completion of *sanyasa* is a 'death' to the world of ordinary property-concerns, and the property of the *sanyasi* passes as if he had

¹ HAMA, ss. 7, 8, 9. The theory that a *sanyasi* can be compelled to maintain his wife remains a theory: certainly his pre-*sanyasa* property can be charged for the purpose.

² HMGA, s. 6.

died actually. The heirs will be those who would have inherited according to Mitakshara law, Dayabhaga law, or customary law if he had died actually before the Hindu Succession Act came into force. To become a *sanyasi*, etc., the proper customary forms must be followed,¹ and Sudras may not become *sanyasis* unless a custom allowing this can be proved in their favour (apparently not an unduly difficult fact to prove, to judge by the number of ascetics of Sudra caste that are to be seen).² When the ascetic dies, his heirs are in order his pupil, teacher, or fellow-ascetic; in the case of a *vairagi* (if he is a genuine ascetic and not a titular *vairagi* living as a normal householder) the nearest member of his order; in the case of a perpetual *brahmachari* his teacher or his nearest teacher's heir.³ The key to distribution of the effects of these hermits and others lies in their spiritual relationships and not in their former blood-, or marriage-, relationships.⁴ There is no reason to doubt but that women may take up *vairagya* as well as men,⁵ with similar effects on the successions to their properties, and indeed this is contemplated in the Hindu Adoptions and Maintenance Act (s. 7).

593. A more difficult question is whether the character of a *shebait* (§ 790) is to be inherited, since 17 June 1956, under the Hindu Succession Act. It is clear that *shebaiti*, that is to say the character of a *shebait*, is property within the meaning of the law of succession (§ 789). It is also clear that, except in the cases of a founder-*shebait* or a *shebait* to whom the founder has delegated this power, or a *shebait* exercising an unexpired power to appoint a successor by will, *shebaiti* cannot be disposed of by will.⁶ Most customs have been abrogated by the HSA, so that customary succession to *shebaiti* ceased on the date of its commencement. The vast majority of *shebaitis* will therefore pass by intestate succession to a group of heirs, who will be entitled to appoint agents

¹ *Sital v. Sant* AIR 1954 S.C. 606; *Baldeo v. Arya* AIR 1930 All. 643, 52 All. 789.

² *Ramdas v. Baldevdasji* (1915) 39 Bom. 168, AIR 1914 Bom. 116; *Gulabrao v. Nagorao* [1952] Nag. 591, AIR 1952 Nag. 102.

³ *Parma v. Nihal* (1938) 65 I.A. 252.

⁴ *Sital* (cited above).

⁵ *Hem v. Sarnamoyi* (1894) 22 Cal. 354, 361; *Krishna v. Jhora* AIR 1942 Pat. 429.

⁶ *Banku v. Kashi* AIR 1963 Cal. 85, in a probate matter, does not hold otherwise.

to carry on the duties of management, and to take and distribute the surplus income, if any. Thus multiple *shebaitis* will be more common than previously, and since disposition by will, and acquisition by purchase, are out of the question, infinite fragmentation of the proprietary right of the *shebaitis* will progress, with the years, until agnates and cognates who have hardly heard of each other will be joint managers of the property of idols in whose worship few of them may have a close or, even, hereditary interest. This problem does not seem to have attracted the attention of Parliament. A minority of *shebaitis* will still pass under instruments of appointment, but since no one can create an estate of inheritance unknown to the Hindu law it is only a matter of time before *shebaiti* in every case becomes heritable property subject to the general law of succession as stated above.

DISQUALIFICATIONS

594. No one can take by succession, or benefit as a 'dependant', if he is disqualified. The only¹ disqualifications are (i) having murdered or abetted the commission of murder of the *propositus*, (ii) having murdered or abetted the commission of murder of someone other than the *propositus* in furtherance of the succession to the property under discussion,² (iii) being the non-Hindu descendant of a relative of the *propositus* who changed his religion, i.e. ceased to be a Hindu,³ and (iv) having abandoned the world.⁴

C killed *P*, but was found unfit to plead and was consigned to an insane asylum. After a few years *C* was released as sane. *C* was entitled to participate in *P*'s estate as if he was at all material times undisqualified.

P left his property by will to *A* for life, with remainder absolutely to *B*. *B* killed *A* out of hatred, since in a faction fight *A* had set *goondas* on to *B*'s family and many of them had been killed. *B* has not killed *A* in furtherance of the succession to the property bequeathed by *P*, and he is not disqualified.

W killed her husband, *H*, and immediately afterwards committed suicide. By her will *W* left all her property to her parents; by his will *H* had left all his property to *W*. The court will determine whether *W* murdered *H* (almost certainly it will hold that this cannot be proved

¹ HSA, s. 28. The section saves provisions in the Act, the provisions of s. 4 of which show that the ascetic, etc., are not within its contemplation.

² HSA, s. 25.

³ HSA, s. 26.

⁴ See § 592.

beyond reasonable doubt in view of her immediate suicide), and if it holds that she did not *H*'s estate will pass to *W*'s parents.

C and *K* were brothers. *K* was converted to Islam, and took his share of the joint-family property. *K* died leaving three sons, *A*, *J* and *I*. *I* was converted to Hinduism. *A* died intestate and his property was taken (under Muhammadan law) by *J*, who remained a Muslim. *C* died intestate. *C*'s estate (in default of nearer heirs) will pass to *I*, but not to *J*.

By virtue of explanation 2 to s. 6 of the HSA a person who has separated himself from the coparcenary before the death of the *propositus* and would otherwise have shared in the undivided interest passing under the proviso on an intestacy is disenabled to take that share. This continues an old rule of Anglo-Hindu law that a joint son excludes a separated son,¹ but with these modifications that only the son who separates on his own initiative is disenabled, and that he is disenabled whether or not a joint son survives the *propositus*. The disability of an ex-widow under s. 24 of the HSA (§§ 601, 602) is, strictly speaking, not a disqualification: it is merely logical. They cease to be widows and so cease to be related.

595. Formerly at Mitakshara law only those were disqualified who were (i) criminally responsible for the death of the *propositus*,² (ii) congenital idiots (idiots are normally congenitally so), (iii) congenital lunatics,³ and (iv) ascetics and others that abandoned the world. Prior to the coming into force of the Hindu Inheritance (Removal of Disabilities) Act, 1928, in places outside British India until the extension of the Act there before or after Union, and until the Hindu Succession Act, 1956, came into force in respect of the estates of persons governed by Dayabhaga law, a much longer list of disqualifications had to be consulted. The disqualifications were of mixed religious and practical origin. Persons were disqualified if they were (i) insane at the time the succession opened,⁴ (ii) born

¹ See Derrett in (1956) 19 S.C.J. (Jour.) pp. 103ff. § 607.

² *Kenchava v. Girimalappa* (1924) 51 I.A. 368, AIR 1924 P.C. 209, 26 Bom. L.R. 779; *In the estate of Hall* [1913] P. 1 (CA). *Chanda v. Chambeli* AIR 1962 Pun. 162 is *per incuriam* (see AIR 1963 Jour. 5-6).

³ Hindu Inheritance (Removal of Disabilities) Act, 1928, s. 2.

⁴ *R. Muthammal v. Subramaniaswami* AIR 1960 S.C. 601, [1960] 2 SCR 721, [1960] S.C.J. 963.

idiots,¹ (iii) born blind,² (iv) lame from birth, if the lameness amounted to deficiency in respect of a limb,³ (v) deaf and dumb from birth,⁴ (vi) infected with a virulent or ulcerous form of leprosy,⁵ (vii) sexually impotent, and (viii) ascetics or others that had abandoned the world. In addition, at Mitakshara law, the *propositus*'s widow was disqualified by unchastity at the time the succession opened, unless it continued then with the husband's connivance or consent;⁶ and at Dayabhaga law all female heirs without exception were disqualified by unchastity.⁷ It was some embarrassment to find in the Hindu Women's Rights to Property Act, 1937, the words 'notwithstanding any rule of Hindu law or custom to the contrary . . .' prefixed to the rules enabling a widow to inherit. Could an unchaste widow take? In a literal approach to the statute Bombay held that she might.⁸ Madras, whom Mysore follows,⁹ took in *Ramaiya v. Mot-tayya*¹⁰ the strict view that the antecedent and fundamental Hindu law could not be repealed without express words. Calcutta, though its position is not clear,¹¹ leans towards the Madras view,¹² which undoubtedly attracts us more. It was never determined finally whether the husband's condonation served to remove unchastity as a bar,¹³ and it seems most unlikely that a daughter's unchastity, for example, could be condoned by the *propositus*. Fortunately at Dayabhaga law unchastity was no bar to succession to *stridhanam* (§ 637).¹⁴ The disqualification of the person

¹ *Tirumamagal v. Ramaswami* (1863) 1 Mad. H.C.R. 214.

² *Gunjeshwar v. Durga Prasad* AIR 1917 P.C. 146, 44 I.A. 229.

³ *Venkata v. Purushottam* (1903) 26 Mad. 133.

⁴ *Anukul v. Surendra* [1939] 1 Cal. 592, AIR 1939 Cal. 451; *Venkata-lakshmmammal v. Balakrishnachari* AIR 1960 Mad. 270 (on this case see the remark made above at § 409).

⁵ *Ramabai v. Harnabai* (1924) 51 I.A. 177, AIR 1924 P.C. 125, 46 M.L.J. 537.

⁶ *Gangadhar v. Yellu* (1912) 36 Bom. 138.

⁷ *Ramananda v. Raikishori* (1895) 22 Cal. 347.

⁸ *Akoba v. Sai* AIR 1941 Bom. 204, [1941] Bom. 438.

⁹ *Appa v. Gurubasawwa* AIR 1960 Mys. 79.

¹⁰ AIR 1951 Mad. 954.

¹¹ *Surja v. Mammatha* AIR 1953 Cal. 200, 56 C.W.N. 841, dissented from in *Kanailal* (cited below).

¹² *Kanailal v. Pannasashi* AIR 1954 Cal. 588.

¹³ *Rani v. Golapi* AIR 1930 Cal. 779, 34 C.W.N. 648.

¹⁴ *Nogendra v. Benoy* (1903) 30 Cal. 521, 7 C.W.N. 121. But a degraded woman does not succeed to her degraded sister: *Charu v. Province* AIR 1950 Cal. 473, 54 C.W.N. 940.

criminally responsible for the death of the *propositus* may safely be assumed to have been part of the law both of the States and of British India from the earliest times (this has been doubted, strangely) ; and it is certain that, in those States which did not enact a law relieving converts and persons deprived of caste, 'being a *patita*', (i.e. a person deprived of caste for failure to perform penance for a breach of caste-morality or -regulation) was an absolute bar to inheritance. In British India the convert from Hinduism and the *patita* were relieved by the Caste Disabilities Removal Act, 1850, and some States enacted similar laws prior to the Union. A Travancore statute of 1939 removed *all* disqualifications by reason of disease, deformity or physical or mental defect, in respect of successions within the Act itself.

596. A disqualified person was treated as having predeceased the *propositus*.¹ No one, therefore, might claim property through him. Under the former law no disqualified person who recovered from his disqualification might divest an estate which had already vested in another person.² The position is the same under the current law of India.

SUCCESSION TO MALES

Introduction

597. While certain general provisions apply to both cases, the law draws a broad distinction between succession to males and succession to females. We shall deal with the order of distribution of the property of males on intestacy, then the order of distribution of the property of females, and lastly the special conditions which apply to inheritance either by certain heirs or by any heirs in certain circumstances. Although a system of law which distinguishes between males and females ought to provide for succession to the property of persons of indeterminate sex or hermaphrodites, Hindu law does not, with the result that if it is in doubt whether the *propositus* was male or female a rule of Islamic law may be drawn upon under the authority to apply justice, equity and good conscience in cases where the

¹ For the purposes of the distribution of the estate. So HSA, s. 27.

² *Venkatalakshammal* (cited above).

positive law is silent, and the property must be distributed according to the order applicable to the sex which the *propositus* most closely resembled.¹ A eunuch, therefore, who is decidedly not a male, is more like a male than a female, and his property will be distributed as if he were a male, subject to such modifications as the case demands (thus a woman purporting to be his widow must be excluded from the succession).

598. The property which passes² on the death of a Hindu male may fall into certain of the following categories: (i) property belonging to the estate of a deceased testator or settlor, limited in the will or settlement to pass to someone on the death of the *propositus* (property which we dismiss from our consideration in this chapter); (ii) the *propositus*'s interest in joint-family property at Mitakshara law; (iii) the *propositus*'s interest in joint-family property at customary law (other than property to which the HSA relates); and (iv) the *propositus*'s entire property at Dayabhaga law, or his separate and self-acquired property if he is governed by Mitakshara law. The property of a male who does not own an interest in Mitakshara coparcenary property will never pass by survivorship (§ 408), nor will property of a female (even one who has taken formerly under the Hindu Women's Rights to Property Act, 1937 or associated statutes: § 412). But in those rare situations where the *propositus* owns by birth or inheritance an interest in a Mitakshara coparcenary and dies leaving no female relative in class I of the Schedule to the HSA, nor a daughter's son, survivorship operates and the interest passes to the 'surviving members of the coparcenary'. These cannot include widows who have taken under the Act of 1937 or any owners of coparcenary interests under the HSA, for they are not 'coparceners' (§§ 413, 418). Since a *propositus* governed by Punjab customary law is not affected by ss. 6 or 30 of the HSA, survivorship will continue to operate in all cases where custom requires it (§ 408). Those who have taken a share by inheritance under the

¹ It is submitted that in the case of a person governed by the Cochin Makkathayam Thiyya Act, 1115/1940, whose sex is doubtful, he must be treated for purposes of succession as a female (s. 5). The rule in Islamic law is to be found at Hamilton's *Hedaya*, LIII, 1.

² We are not concerned here with the terms 'passing' and 'deemed to pass' as understood in the context of the Estate Duty Act.

HSA cannot themselves *take* by survivorship, because although they have interests in Mitakshara coparcenary property these are quantified (§ 418) and do not fluctuate: nevertheless their interests *pass* by survivorship in the rare cases indicated.¹ Where (as is most usual) survivorship cannot operate, the Mitakshara interest will pass by testamentary or intestate succession like the separate and self-acquired property other than an inherited interest in Mitakshara coparcenary property. The share of coparcenary property which passes is that share which, at a partition by metes and bounds, would have been allotted to the *propositus* if he had separated immediately before his death.² Naturally, if in his case separation would not have been legal (§ 517), the restraint on separation is to be ignored for the purpose of this calculation.

599. It is widely believed that s. 30 of the Hindu Succession Act provides that a coparcenary interest at Mitakshara law can be disposed of by will in all circumstances.³ This is not so. The governing section is s. 6 which provides for an exception to the general proposition, namely that survivorship shall operate in respect of that interest.⁴ The function of s. 30 is to enable, for the first time, the direct testamentary disposition of such an interest, since formerly it might be disposed of as a sequel to a testament subject to special conditions (§ 723), none of which are now required once survivorship is ruled out. A male proprietor of ancestral immoveables at Punjab customary law has no power to dispose of this by will, notwithstanding the HSA, since Mitakshara law does not apply to him in this regard.⁵

The order of distribution (non-Kerala system)

600. The property of a male passes to the heirs in the Schedule, followed by other classes specifically enumerated in s. 8 of the Hindu Succession Act. All the members of Class I exclude all the members of Class II, and each sub-class in Class II excludes all subsequently-enumerated sub-classes.

¹ HSA, s. 6.

² HSA, s. 6, expl. 1.

³ Ragh., p. 858.

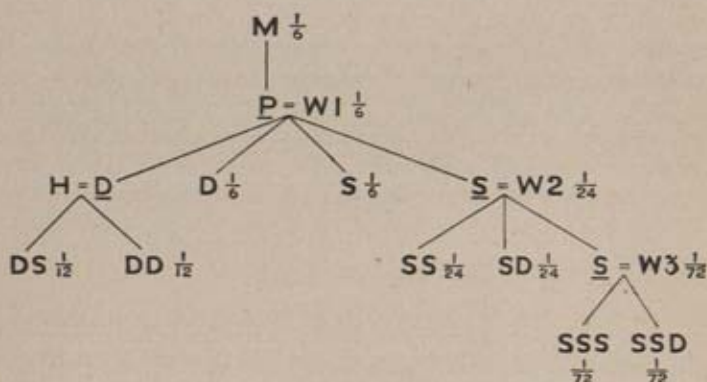
⁴ *Sundara v. Girija* AIR 1962 Mys. 72, 77 (FB) (dicta: Aliyasantana Act problem).

⁵ *Kaur v. Jaggar* AIR 1961 Pun. 489.

601. The heirs in Class I take together, but in a special scheme to be explained below. They are:

- Son; Son of a predeceased son;
- daughter; daughter of a predeceased son;
- widow; widow of a predeceased son;¹
- mother; son of a predeceased daughter;
- daughter of a predeceased daughter;
- Son of a predeceased son of a predeceased son; daughter
- of a predeceased son of a predeceased son;
- widow of a predeceased son of a predeceased son.¹

It will be seen that they comprise (with the exception of the father) all the *propositus*'s close relations, envisaging a joint family extending to its fullest natural limits, and embracing also descendants of daughters for one generation, since they are from the point of view of affection as near as the inhabitants of the patrilineal household itself. The property is shared in such a way that the share of a predeceased child² is taken equally by his widow, if any, and his son and daughter, and the share of a predeceased son of a predeceased son² is taken equally by his widow and children similarly.³



The very small share given to the great-grandchildren in the male line compared with the much larger share given to grandchildren by daughters is explained partly by the survival in our diagram of two widows in the patrilineal family

¹ Under s. 24 of the HSA former widows are by remarriage disabled to inherit: § 594.

² Here underlined.

³ HSA, s. 16.

as against the absence of claim by the deceased daughter's husband (for he is a stranger to the scheme), and partly by the intention on Parliament's part to benefit the *propositus*'s mother, from whom the unexpended residue will, it is expected, descend to *P*'s full brothers and sisters and, to a small extent, to *P*'s own descendants. *P*'s greatgrandchildren will not in any case take any property from *P*'s mother or widow by intestate succession (§ 621).

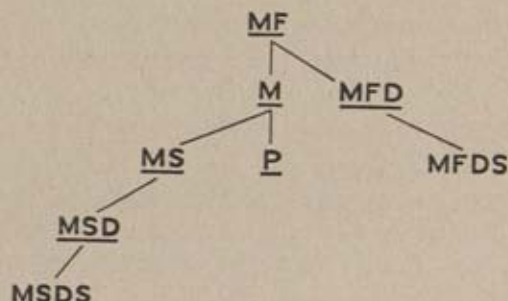
602. Class II consists of the following heirs, arranged apparently in an order corresponding to the average man's notion of relative nearness, once the privileged close relations in Class I have been sought for in vain :

- (i) Father ;
- (ii) The brother and sister, and the remaining grandchildren of sons, namely the son's *daughter's* son and the son's *daughter's* daughter ;
- (iii) All the *grandchildren* of daughters, by sons and daughters equally ;
- (iv) The children of brothers and sisters ;
- (v) The father's parents equally ;
- (vi) The father's widow and the brother's widow ;¹
- (vii) The father's brothers and sisters ;
- (viii) The mother's parents equally ;
- (ix) Finally, the mother's brothers and sisters.

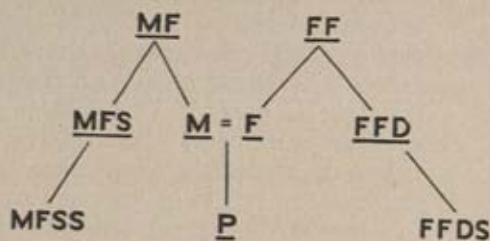
One may ask, what has become of the children of the paternal and maternal uncles and aunts? They are, after all, quite close relations. The answer is that they are agnate or cognate collaterals, and stand on a similar footing with others such, which are enumerated in s. 8 as classes by themselves. Thus if no relative in Class II can be found the property passes to the nearest agnate. If no agnate can be found (and one may search back through any number of degrees), then the mother's brother's son or other cognates will take the inheritance in order of priority. Priority is determined by counting the degrees from the *propositus* to the common ancestor and down to the claimant, or merely from the claimant to the *propositus* where the claimant is a

¹ Under HSA, s. 24, the brother's widow is disabled to inherit by remarriage, and, *semble*, the father's widow : § 594, cf. § 665.

descendant (which will very rarely happen, since all descendants who are likely to claim are specifically enumerated in the Schedule). Where the degrees of ascent from the *propositus* are not equal, the claimant with fewer degrees must take, for he or she belongs to a nearer line, irrespective of the number of degrees of descent from the common ancestor to the claimant. Where the degrees of ascent are equal the claimant who has fewer degrees of descent must take.¹



In this diagram the competition is between two cognates, the son of *P*'s maternal aunt, who has three degrees of ascent (s. 13 (2)) and two generations of descent, and *P*'s uterine half-brother's daughter's son. The latter has two degrees of ascent and three degrees of descent. In fact each claimant is equally distant from *P*, but *MSDS* must take the inheritance since he belongs to the nearer line.



Here the competition is again between two cognates, the son of *P*'s maternal uncle and the son of *P*'s paternal aunt. Their numbers of degrees of ascent from *P* are the same (three), and their numbers of degrees of descent from the respective common ancestors are the same (two). Therefore they share the estate equally between them.

¹ HSA, ss. 12, 13.

603. On failure of cognates the government (that is to say the Union government acting through the State government) takes the property by escheat like any other heir.¹ The burden of proof lies upon the government to show that no prior heir is alive and competent to take.²

604. Formerly the order of distribution at Mitakshara law differed according to whether or not the *propositus* was governed by the Mitakshara as influenced by the Mayukha sub-school, and if he was not, according to the line of decisions authoritative in the High Court in which the case fell to be decided. In the account of the old system given below the leading rules are first given, followed where necessary by the deviations established by *stare decisis* in dissident High Courts. It is submitted that the High Courts of Rangoon and Dacca, and the courts of Malaya and of East Africa, will follow the decisions of the High Courts of Madras, Calcutta, Madras, and Bombay respectively.

605. The separate and self-acquired property of a deceased male (other than a *sanyasi*) passed at Mitakshara law in order to his *sapindas*, *samanodakas*, *bandhus*, spiritual heirs, and the government. In each class the nearest took and excluded all others, with the very special exception of the male issue (§ 607). The guiding principle was propinquity, but the notion of nearness expressed in the *Mitakshara* itself was strongly coloured by the patrilineal prejudices of former Hindu society: thus the mother was 'nearer' than the father because she was shared only by full brothers; and the *bandhus* known to a man through his father, the so-called *pitri-bandhus*, were 'nearer' than cognates of exactly similar relationship connected through the *propositus*'s mother (*matri-bandhus*) because the paternal kindred were in practice 'nearer' than their maternal counterparts once first cousins had been passed.

606. *Sapindas* were originally exclusively agnates (§ 242), but the daughter's son was intruded as, first, a substitute son and later an heir in his own right but after all daughters, and the daughter herself gradually won a right to succession after the widow. The widow's right to compete on an equal

¹ *Gridhari v. Bengal* (1868) 12 M.I.A. 448.

² *State v. Ramanatha* AIR 1960 Mad. 436, 439, [1960] Mad. 800.

footing with sons or other male issue was introduced in British India by the Hindu Women's Rights to Property Act, 1937, § 3 (1), an enactment copied elsewhere prior to the HSA (§ 412). The widowed daughter-in-law, and the widow of a predeceased son of a predeceased son, likewise benefited along with the widow, sharing as if they had been their respective husbands in case the latter left no male issue, but as the latter's son if male issue were left. With these exceptions the agnatic male relations within seven degrees inclusive of the common ancestor, himself not more than seven degrees from the *propositus*, took, followed by the *samanodakas* (§§ 607, 608) who reached up to the fourteenth degree.

607. In the case of *samanodakas*, who very rarely took in any case, no problem existed: the nearest claimant in the nearest line succeeded, counting to the full extent of fourteen degrees inclusive from the common ancestor.¹ In the case of *sapindas*, whom we must call *sagotra sapindas* for ease of distinction from the *bhinna-gotra sapindas* or *bandhus*, the order of distribution was not so simple.

We are already aware that *dattakas* and *aurasas* under the old system did not share equally except amongst Sudras, and that certain *dasiputras* obtained in some circumstances a half-share. It is very curious to find that the *aurasa* son of a twice-born in seeking to inherit the property of a relation *other than his father* was handicapped if he was a Sudra (his mother being a Sudra). It has been held, by analogy from the ancient rule that a Sudra could take only 1/10th of the property of his father if he were a Brahman, that the same disability applied when he sought to succeed to a collateral of his father.² Fortunately this anomalous extension of a virtually obsolete rule can very seldom be called upon: nevertheless marriages between Brahmans, or Vaisyas, and Sudras after 1949 in India, and after the recent ordinances in Kenya and Uganda, will happen and the Anglo-Hindu law may well be called into play with reference to the distribution of some of the property left both by the parents and by the latter's relatives.

¹ *Atmaram v. Bajirao* (1935) 62 I.A. 139, AIR 1935 P.C. 57, 37 Bom. L. R. 553.

² *Natha v. Chhotatal* AIR 1931 Bom. 89. Note the doubts of Shighe J., at p. 96 col. ii.

After the male issue, who took as a single heir (unless any of them had been advanced out of joint-family property in the *propositus*'s lifetime (§§ 517, 594) or the property was the residue of a share taken by the *propositus* at a partition in which his male issue became divided not merely from him but also from one another, in which case they would take as tenants-in-common¹), came the widow (unless she was entitled to share with the male issue under the Act of 1937 and associated statutes). There followed, in her default, the daughters. The order of preference between them was: unmarried daughter, poor married daughter, married daughter who was not poor,² and finally, as a result of a controversial decision in Bombay, any unmarried prostitute daughter.³ Thereafter the daughter's son took, any number of daughters' sons taking as tenants-in-common. Then the inheritance ascended to the parents, to the mother first (in pure Mitakshara law) and then to the father, next descending to the brother, the brother's son, and the brother's son's son⁴ in strict order of propinquity without representation of predeceased brothers.⁵ One might expect that the line would continue until the seventh inclusive degree was reached, and again ascend to the father's mother, thence to the father's father, and thence down to the seventh degree and so ascend again and descend in turn until all *sagotra sapindas* were exhausted. However by analogy with the special position of the male issue themselves, the Privy Council held that the spiritual benefit doctrine established in the rival Dayabhaga school (§ 615) must apply to determine the propinquity of *sagotra sapindas* also,⁶ with the result that succession ascends after the brother's son's son,

¹ *Ragho v. Shantabai* (1957) 59 Bom. L.R. 999, AIR 1957 Bom. 274.

² *Shivprasad v. Jankibai* AIR 1953 Bom. 321.

³ *Tara v. Krishna* (1907) 31 Bom. 495.

⁴ *Buddha v. Laltu* (1915) 42 I.A. 208, AIR 1915 P.C. 70, 37 All. 604 (cousins); *Ram v. Kodai* AIR 1932 All. 117 (cousins). Both contain strong dicta on grandnephews. *Appaji v. Mohanlal* (1930) 54 Bom. 564, AIR 1930 Bom. 273 (FB) was wrongly decided and should not be followed in Gujarat or overseas.

⁵ *Chinnaswami v. Ponginanna* [1956] 2 M.L.J. 567, AIR 1957 Mad. 40. At Mitakshara, as at Dayabhaga, law no brother has a preference merely because he was joint with the *propositus* at the time of his death: *Deivanayagam v. Subbiah* AIR 1954 Mad. 727, [1954] Mad. 741.

⁶ *Buddha* (above). The principle was applied in *Soobramiah v. Nataraja* AIR 1930 Mad. 534, 53 Mad. 61; *Venkateshuwara v. Adinarayana* (1935) 58 Mad. 323, 69 M.L.J. 256.

descending until the father's brother's son's son, and again ascends and descends until all those who give the most valuable spiritual benefit to the *propositus* are exhausted. Thereafter the further agnatic descendants, and remaining *sapindas* in order of line and degree, take in conformity with the order of succession of those who give the principal spiritual benefit.

P was survived by his father's father's son's son and his brother's son's son's son. The latter could give only *pinda-lepa* (§ 618) to an ancestor of *P*, while the former could give a *pinda* to an ancestor of *P*, albeit a remoter ancestor. Therefore the former excluded the latter.

When the succession reaches the seventh descendant (counting inclusively of the common ancestor) of the fourth ascendant, that is to say the last *sapinda* of the *propositus*'s father's father's father, the remaining *sapindas* can give no principal spiritual benefit at all, but may give (according to the *prayoga* known in Bengal) *pinda-lepa*, i.e. the wipings of the fingers of the right hand from which *pindas* have been offered to named ancestors. There is no reason therefore why the line should not pass directly and in one stage from the son of the fifth ascendant to the latter's seventh descendant counting inclusively, and so in each higher line until at length the seventh descendant of the sixth ascendant is reached.

608. We have already seen that no problem arose with regard to *samanodakas*. These are technically the relatives to whom neither *pindas* nor *pinda-lepa* would be regularly offered by the *propositus* but to whom an offering of water would be made, and (to be practical) the descendants of these, who make the like offerings or better offerings to those to whom the *propositus* would offer water only. They took conformably with *sapindas* descended from the fourth ascendant and the rest. It was with regard to *bandhus*, *sapindas* connected through at least one female, that difficulties and uncertainties occurred. Propinquity was still the criterion, but every attempt was made to prefer on one or more of several grounds one claimant of equal degree from another.¹ The tests of propinquity were as follows :

¹ On the applicability of the test of spiritual benefit see *Jatindra v. Nagendra* (1931) 58 I.A. 372, AIR 1931 P.C. 268, 35 C.W.N. 1153 and *Balasubramanya v. Subbaya* [1938] Mad. 551 (PC), 65 I.A. 93, AIR 1938 P.C. 34.

1. A descendant of the *propositus* will exclude a descendant of an ascendant of the *propositus*.¹

2. A descendant of a grandparent of the *propositus* (an *atma-bandhu*) excludes a descendant of a remoter ascendant.²

3. Amongst descendants of a remoter ascendant than a grandparent the *pitri-bandhu*, descendant of an ascendant of a father's parent, will exclude a descendant of the mother's parent's ascendant (a *matri-bandhu*). Thus a mother's father's father's son will be excluded by a father's mother's father's son's daughter's son, though the latter is remoter in mere degree.³

4. When both claimants are of the same class of *bandhus*, e.g. *atma-bandhus*, the member of the nearer line excludes the member of a remoter line. Thus a father's son's daughter's son excludes a father's father's daughter's son.⁴

5. When both are of an equally near line that *bandhu* succeeds who is nearer in degree. Thus a mother's father's son excludes a father's father's daughter's son.⁵

6. When both are equally near in degree, belonging to equally near lines, or the same line, the male excludes the female on the basis that he may more directly confer spiritual benefit. Thus the father's daughter's son's son excludes the father's daughter's son's daughter.⁶

7. Where both are equally near, in equally near lines or the same line, and of the same gender, he who stands on the mother's side is excluded by him who stands on the father's side of the *propositus*'s family tree. Relations on the mother's side, however near, cannot afford as valuable spiritual benefit as those on the father's side. Thus the father's father's daughter's son excludes the mother's father's daughter's son.⁷

8. Where both are equally near, etc., of the same gender, and on the same side, e.g. the father's side, he is preferred

¹ *Kalimuthu v. Ammamuthu* (1935) 58 Mad. 238, AIR 1934 Mad. 611.

² *Adit v. Mahabir* AIR 1921 P.C. 53, 48 I.A. 86, 23 Bom. L.R. 692.

³ *Adit* (above).

⁴ *Kisan* (cited below); *Debi v. Behari* [1943] All. 131, AIR 1943 All. 177; *Sahodra v. Shri* [1943] All. 155, AIR 1943 All. 87.

⁵ *Balasubramania v. Subbaya* [1938] Mad. 551 (PC), 65 I.A. 93, AIR 1938 P.C. 34.

⁶ *Kisan v. Shevantabai* AIR 1950 Bom. 254, [1950] Bom. 407 (FB).

⁷ *Viranganda v. Tellappa* [1943] Bom. 259, 45 Bom. L.R. 17 (FB);

Jatindra v. Nagendra (1931) 58 I.A. 372, AIR 1931 P.C. 268, 35 C.W.N. 1153.

between whom and the common ancestor fewer females intervene. Thus the father's daughter's son's son excludes the father's daughter's daughter's son.¹

9. Where both are equally near, etc., on the same side, and having the same number of females intervening in the tree, it appears that he is preferred whose female links are nearer to the common ancestor. Thus the father's father's daughter's son's daughter's son excludes the father's father's son's daughter's daughter's son.²

10. Where no distinction can be made between claimants by any of the foregoing tests they may share the estate equally.³

609. But no *bandhu* might succeed at all if more than five degrees (counting inclusively) must be counted between the *propositus* and the common ancestor, or between the claimant and the common ancestor, as the case might be, if in that branch of the tree a female intervened. Only where the branch was totally agnatic might the sixth and seventh descendants (counting inclusively of the common ancestor) successfully claim. The frequently repeated dictum that the leading case, *Ramchandra v. Vinayak*,⁴ had laid down the requirement of a limit of five degrees on *both sides*⁵ is incorrect on principle and not supported by adequate authority.⁶ It is still not established whether the intervention of a female higher than the claimant's, or the *propositus*'s, mother would certainly cut down the degrees of heritable bandhuship to five; but the better opinion seems to be that it does.⁷ Other limitations are imposed anomalously by certain High Courts. Female *bandhus* are not permitted at all by Allahabad, Punjab and Calcutta.⁸

¹ *Rami v. Gangi* AIR 1925 Mad. 807, 48 Mad. 722; *Ram v. Rahim* (1916) 38 All. 416.

² By parity of reasoning from the general preference for a male over a female line: *Ram* (cited above).

³ The general principle in *Rajappa v. Gangappa* (1922) 47 Bom. 48, which is itself no longer good law.

⁴ (1914) 41 I.A. 290, 42 Cal. 384 (PC). *Ram v. Idu* (1932) 13 Lah. 249 applies the rule.

⁵ *Hanmant v. Vasudev* [1943] Bom. 465; *Brij Mohan v. Kishunlal* AIR 1938 All. 443.

⁶ *S. I. Nambi v. S. Bhagavathiammal* [1943] Tr. L.R. 541; *Harihar v. Ram* (1925) 47 All. 172, 178.

⁷ *Gajadhar v. Gauri* (1932) 54 All. 698, AIR 1932 All. 417 (FB).

⁸ *Gajadhar* (cited above).

In Madras and Andhra Pradesh, and presumably in Kerala, female *bandhus* are divided into two classes, genuine *bandhus*, i.e. cognates, who rank after all male *bandhus*, apparently class by class,¹ and spurious *bandhus*, namely the female descendants of agnate *sapindas*, themselves within the limits of sapindaship, e.g. the father's father's daughter, or the brother's son's daughter. The latter, as a result of an eccentric, but now unshakable, decision, rank as *anya-gotra sapindas* (i.e. *bhinna-gotra* in a different sense), *sapindas* by birth who have lost their natal *gotra* by marriage, and precede all genuine female *bhinna-gotra sapindas*.² Thus the brother's daughter would exclude the father's daughter's son's daughter, but not the mother's father's son's daughter's son.

610. The Allahabad High Court in a dictum denies the right of descendants of ascendants higher than the great-grandparents to claim as *bandhus*.³ And it is established in Allahabad that only *bandhus* in the five 'families' recognized by Dr R. Sarvadhikari may succeed, and that even in those 'families' no *bandhu* may claim whose connexion with the common ancestor, or with the *propositus*, passes through two females who are not related as mother and daughter, or through more than two females.⁴ The firmness with which the Madras High Court rejected these theories is amply justified.⁵ Dr Sarvadhikari's notions were based upon the now exploded theory that the *bandhus* enumerated in the text of the *Mitakshara* gave a clue to bandhuship, that is to say, *bhinna-gotra-sapindaship* in general. Drawing upon the fact that these belonged to certain 'families' or lines, and assuming that their original selection had sprung from some desire to lay down a foundation upon which analogous distinctions might be grounded, Dr Sarvadhikari erected a thesis which left eventually traces only in Allahabad, and which the student need not explore too seriously.

¹ *Sivathwaja v. Sami* AIR 1949 Mad. 779, [1949] 1 M.L.J. 448; *Lekshmana v. Ponnu* AIR 1952 T.C. 317, [1952] K.L.T. 155.

² *Jagannadham v. Adilakshmi* [1940] Mad. 734, AIR 1940 Mad. 797; *Venkatasubramaniam v. Thayarammah* (1898) 21 Mad. 263.

³ *Gajadhar* (cited above).

⁴ *Gajadhar* (cited above).

⁵ *Nagamma v. Lingareddi* [1943] Mad. 759, AIR 1943 Mad. 437 (FB). Cf. *Panchu v. Pratap* AIR 1949 Cal. 157, [1949] 2 Cal. 209.

611. In the absence of any *bandhu* the estate went to the spiritual heir, that is to say in order the teacher, the pupil, and the fellow-student. In order to qualify for this inheritance the heir must be related according to the manner of orthodox scholarship,¹ so that a tantric teacher may, it seems, not claim to succeed as *guru*. In practice, as may be imagined, such heirs very seldom took.

612. Where the *propositus* was governed by the Mitakshara as influenced by the Mayukha sub-school numerous modifications had to be entertained. The *sagotra-sapindas* did not differ, nor did the *bandhus*. But two classes of females were introduced between these classes and this special provision has given rise to some peculiarities in the Schedule to the HSA itself. The first were the widows of *sagotra-sapindas*, who gained their sapindaship by virtue of their marriage and so are sometimes called *gotraja-sapindas*, a term that ought to be reserved for males who are *sapindas* by birth or adoption. These (unless they were promoted by the Hindu Women's Rights to Property Act, 1937, etc., s. 3 (1)) were arranged in the order of succession at intervals after the groups of *sagotra-sapindas* themselves; after the last of these the female agnates, to whom we have referred above (§ 609) as 'spurious *bandhus*', were inserted in front of the first male *bandhu*. The effect of these insertions is best shown in a table, which will reflect, too, the Act of 1929 (§ 613). Widows who had remarried before the succession opened were naturally not *sapindas* for purposes of inheritance.

FORMER ORDER OF DISTRIBUTION AT MITAKSHARA LAW AS MODIFIED BY THE *VTAVAHARAMATUKHA*

Son, predeceased son's son, predeceased son's predeceased son's son, widow sharing equally. The claims of a widow of a predeceased son and a widow of a predeceased son of a predeceased son are explained in § 606.

Daughter
Daughter's son
Mother
Father
Full brother
Half-brother

¹ *Sambasivam v. Sec. of State* AIR 1921 Mad. 537, 44 Mad. 704.

Brother's son of the full blood*
 Brother's son of the half blood*
 Father's mother¹
 Son's son's son's son
 Son's son's son's son's son
 Son's son's son's son's son's son
 Widow of a predeceased son of a predeceased son of a predeceased son²
 Widow of a pr. son of a pr. son of a pr. son of a pr. son
 Widow of a pr. son of a pr. son of a pr. son of a pr. son of a pr. son.
 Brother's son's son*
 Brother's son's son's son*
 Brother's son's son's son's son*
 Brother's son's son's son's son's son*
 Father's widow
 Brother's widow
 Brother's son's widow
 Brother's son's son's widow, and so on up to
 Brother's son's son's son's son's son's widow
 Father's father
 Son's daughter
 Daughter's daughter
 Full sister³
 Half-sister
 Full sister's son
 Half-sister's son
 Father's brother
 Father's brother's son
 Father's brother's son's son, and so on up to
 Father's brother's son's son's son's son's son
 Father's father's widow
 Father's brother's widow, and so on up to
 Father's brother's son's son's son's son's son's widow
 Father's father's mother
 Father's father's father
 Father's father's brother, and so on up to
 Father's father's brother's son's son's son's son's son
 Father's father's father's widow
 Father's father's brother's widow and so on up to
 Father's father's brother's son's son's son's son's son's widow
 Father's father's father's mother, and so on up to
 Father's father's father's brother's son's son's son's son's son
 Father's father's father's father's widow
 Father's father's father's brother's widow and so on up to
 Father's father's father's brother's son's son's son's son's son's widow

* All these may share with collaterals of higher degree by representation: *Chandika v. Muna* (1902) 29 I.A. 70, 24 All. 273 (dicta).

¹ For her peculiar position see *Appaji v. Mohanlal* (1930) 54 Bom. 564, AIR 1930 Bom. 273 (FB).

² For the position of widows see *Lallubhoy v. Cassibai* (1880) 5 Bom. 110, 7 I.A. 212; *Rachava v. Kalingapa* (1892) 16 Bom. 716.

³ *Ben Madhu v. Bai* AIR 1950 Bom. 66, 51 Bom. L.R. 813.

Father's father's father's father's mother and so on up to

Father's father's father's father's brother's son's son's son's son's son's widow

Father's father's father's father's father's mother, and so on up to

Father's father's father's father's father's brother's son's son's son's son's son's widow, who is the last of the *sapindas* truly possessing the *gotra* of the *propositus*

After *sagotra-sapindas* come the *samanodakas*, in every respect as in Mitakshara law. Between these and the *bandhus* (who also are not to be distinguished from the *bandhus* of pure Mitakshara law as understood by the Bombay High Court) comes the group of females known as *gotraja-sapindas*, because of their retention of connexion with the *gotra* of the *propositus* notwithstanding their marriage into another *gotra* (under the old system of exogamy):¹

Son's son's daughter

Son's son's son's daughter

Brother's daughter

Brother's son's daughter

Brother's son's son's daughter

Father's sister²

Father's brother's daughter

Father's brother's son's daughter

Father's brother's son's son's daughter, and so on until the daughter of the last but one male *sagotra-sapinda*, i.e. the Father's father's father's father's father's brother's son's son's son's son's daughter

Strangers inherit as in the Benares school.

613. Both under the Mitakshara school and under that school as influenced by the Mayukha sub-school, and indeed under the pure Mayukha sub-school itself (which differed little from the latter),³ modifications were introduced in British India by the Hindu Law of Inheritance (Amendment) Act, 1929. This statute introduced the son's daughter, the daughter's daughter, the sister, and the sister's son, between the father's father and the father's brother.

614. The order of distribution at Dayabhaga law appeared to be more complicated, but was in reality more easy. Apart from the anomalies introduced by special texts and some

¹ For these female *gotraja-sapindas* see *Saguna v. Sadashiv* (1902) 26 Bom. 710 (old-fashioned nomenclature).

² *Ganesh v. Wagh* (1903) 27 Bom. 610.

³ At pure Mayukha law the father excluded the mother, and sons of brothers who predecease the *propositus* shared along with brothers by representation. The full brother's son followed immediately after the full brother, but the sister excluded the half-brother's son. The half-sister followed the half-brother. Both these rules (see *Bhagwan v. Warubai* (1908) 32 Bom. 300) were abolished when the sister's position was moved by Act II of 1929.

extraneous arguments utilized by Jimutavahana, one set of principles governed the entire succession from the male issue, who were once again the first heirs (though not simultaneously in the Mitakshara manner: § 607) to the last *sakulya*. Attempts to broaden the basis of Dayabhaga law have failed, and also attempts to extend the line of heirs beyond those that give spiritual benefit.

615. The claim to heirship at Dayabhaga law was founded principally (though not always exclusively) on the heir's capacity (independently of his inclination or intention) to confer or offer spiritual benefit to the *propositus*. A widowed sonless or barren daughter, or a sonless daughter who was disqualified from adopting,¹ could not inherit, as she could not afford spiritual benefit through a son. The quality of the benefit determined the heir's position in the order of distribution. The quality turned upon several considerations, which operated with nearly perfect regularity. Attempts to modify the order as apparently laid down by Jimutavahana himself on the authority of his more recent followers have not been countenanced by the court.² The considerations are these:

(i) An heir who gives in the *parvana-sraddha* ceremony (in which offerings are made to deceased ancestors both in the father's and in the mother's line) a whole *pinda* ('riceball') to the deceased himself is preferred to one who gives a *pinda* to the deceased's ancestor or ancestors; in all cases a whole *pinda* was of more value than *pinda-lepa*, the wipings (§ 607);

(ii) but one who gave *pindas* to ancestors in the paternal line of the deceased and also in the maternal was preferred to one who gave *pindas* only in the paternal line of the deceased;³ still more to one who gave only to ancestors in the maternal line;

(iii) yet, of those who gave *pindas* to an ancestor, those who gave to nearer ancestors, e.g. the father, were preferred to those who gave to remoter ancestors;

¹ *Uma v. Bedbati* [1942] 1 Cal. 299, AIR 1942 Cal. 265.

² *Prasanno Kumar v. Sarat* (1908) 36 Cal. 86 (general proposition).

³ A full brother excludes a half-brother, but a half-sister's son shares equally with a full sister's son: *Bhola v. Rakhal* (1884) 11 Cal. 69.

(iv) and between those that gave to the same line of ancestors those were preferred that gave more *pindas*.¹

(v) On the other hand where *pindas* were offered by sons of daughters descended from the deceased or the deceased's ancestors, even the greatest possible number of *pindas* could not exceed the spiritual benefit given by an agnate heir who could give one *pinda*. For *pindas* given by any cognate could not equal in efficacy for spiritual benefit a *pinda* given by any agnate.²

It must be remembered throughout this discussion that no one gives more than three *pindas* in the paternal line, or three in the maternal line, or, at best, both. *Pinda-lepa* is given, according to the Bengal *prayoga*, to three further ancestors on the paternal side only.

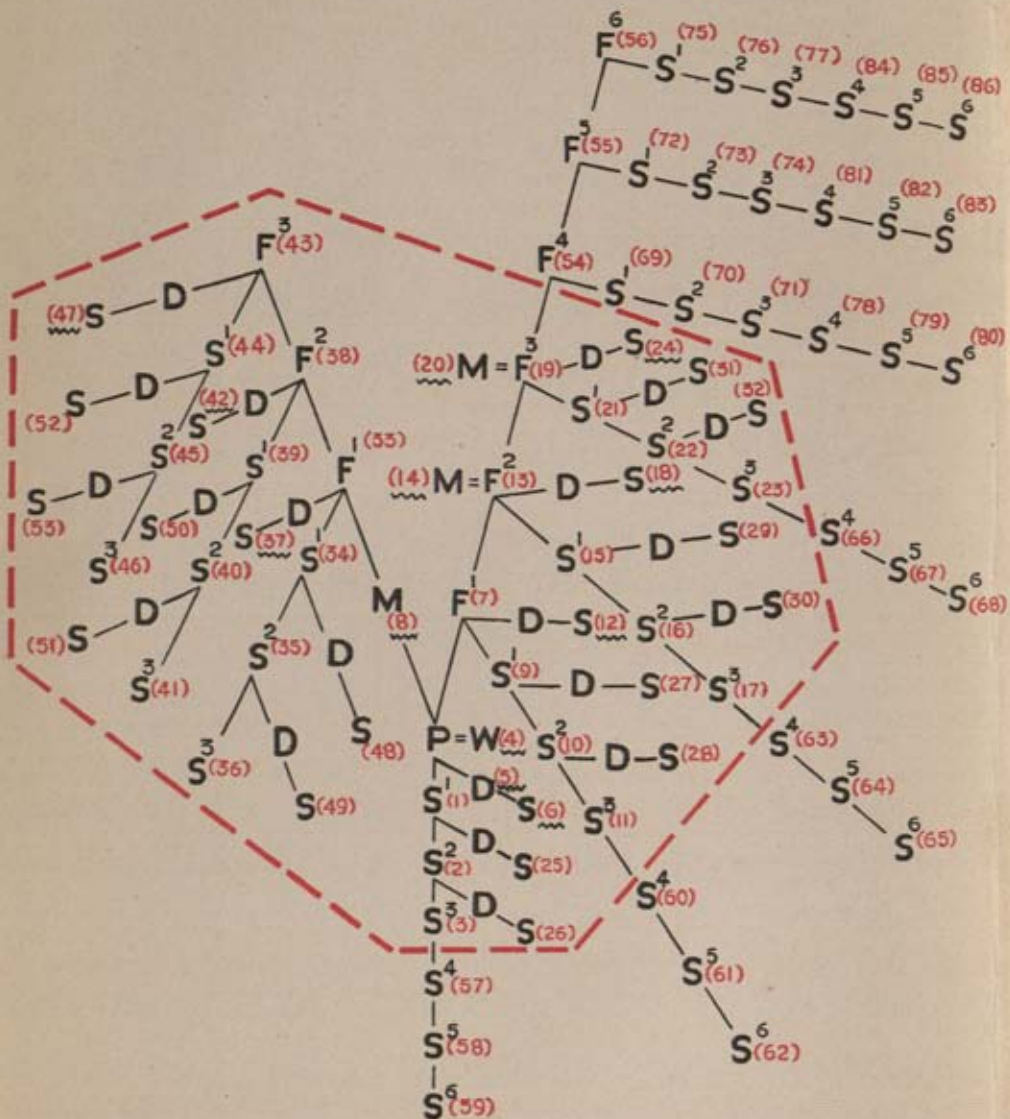
616. From this we see that *sapindas* at Dayabhaga law are the relations who are allowed to offer a *pinda* (i) to the deceased himself; or (ii) to the male lineal ancestors (father, father's father, or father's father's father) of the deceased; or (iii) to the male lineal ancestors of the deceased's mother. It is a matter of no consequence if an ancestor happens to survive the *propositus* at his death, for sooner or later the heir will carry out the duty vicariously for the deceased. In the first place the benefit is felt by the deceased directly; in the second he shares in *pindas* which are offered to the ancestors to whom he himself offered or could have offered *pindas*; and in the third he obtains benefit because a duty is done which he ought to have done although he cannot actually share in the *pindas* given. It will be seen at once that this order determines the choice of heir, for the order and the nearness of relationship were seen as different aspects of the same question.

617. *P* was survived by his brother's son's son, his father's sister's son, his son's daughter's son, and his mother's brother. The order in which they would inherit is as stated. The reasoning proceeds as follows: the brother's son's son gives one *pinda* to the deceased's father; the father's sister's son gives a *pinda* to the deceased's grandfather and one to the deceased's great-grandfather, but this extra *pinda* does not outweigh the single *pinda* of the brother's son's son because the father's sister's son is a cognate and the *pindas* are of a secondary quality from the point of view of capacity to convey spiritual benefit. The son's daughter's

¹ *Guru Gobind v. Anand* (1870) 5 B.L.R. 15 (FB); *Gobind v. Mohesh* (1875) 15 B.L.R. 35; *Huri v. Bama* (1888) 15 Cal. 780.

² *Gobind* (cited above).

DAYABHAGA SAPINDAS AND SAKULYAS



son does indeed give one *pinda* to the deceased himself, and another *pinda* to the deceased's father, but the same consideration applies as before — he is a cognate. The question has been raised why he does not come immediately after the daughter's son,¹ for his second-quality *pindas* are offered to the deceased himself and to a nearer, and certainly a more important, ancestor than was the case with the father's sister's son. The answer why he is not promoted on this very good ground seems to be this, that the daughter's son owes his special position to texts, and that these very similar relations (the son's daughter's son and son's son's daughter's son) cannot take advantage of analogy; and that the father's sister's son and the father's father's sister's son are so placed by virtue of the *Dayabhaga* itself, which inserts them in the groups of collateral *sapindas*, and we have no authority to break up that symmetry. Finally, the mother's brother comes last in this chosen group, because although he gives three *pindas* to maternal ancestors of *P*, and thus fully performs for *P* the duty that lay on *P* in that direction, he is postponed to (a) all the paternal relations of *P*, even the allowed cognates, such as the father's father's brother's son's daughter's son (the last paternal *sapinda*), and (b) the maternal grandfather who is the first maternal *sapinda* and holds his place because he would receive a *pinda* from *P* himself.

618. The pattern which emerges from an analysis of the *sapindas* is repeated, so far as may be possible, with the *sakulyas*. These were heirs (i) who received *pinda-lepa* (§ 607) from the deceased after he had given *pindas* in the *sraddha* ceremony; (ii) who give *pinda-lepa* to him; (iii) who give *pinda-lepa* to those to whom the deceased gave *pindas*; (iv) who give *pindas* to ancestors or an ancestor to whom the deceased gave *pinda-lepa*; and (v) who give *pinda-lepa* to those to whom the deceased gave *pinda-lepa*. It will be recollected that *pinda-lepa* is given to paternal ancestors only, and therefore all *sakulyas* are agnates. Because of its systematic arrangement the law of the Dayabhaga school can better be shown in a diagram than in a table. The intrusion of the seemingly anomalous five females is due to texts,² which operate in the Dayabhaga as in the Mitakshara school. In the following diagram *sapindas*, with their order of inheritance in brackets after them, are shown inside the line, *sakulyas* outside it. As elsewhere in this book F stands for 'father', S for 'son', D for 'daughter' and M for 'mother'.

After the last *sakulya* (no. 86 on the diagram) we pass directly to the spiritual heirs, that is to say the teacher,³ pupil, and fellow-student (as under the Mitakshara system).

¹ Sarvadhikari, 709.

² They, and the typical daughters' sons, are marked in the diagram with a wavy line. ³ *Sadananda v. Harinam* AIR 1950 Cal. 179.

The Dayabhaga provides that, failing these, persons bearing the same *gotra* name may take, and failing any such, the government took. The word *samanodaka* is found in some books with reference to Dayabhaga law, but as Jimutavahana tells us, they are nothing other than the *sakulyas*, and it does not seem that he understood *samanodaka* as in Mitakshara law, i.e. the agnates from eight to fourteen degrees from the eighth to fourteenth ancestors (counting inclusive of the deceased himself). It appears that heirs by blood according to Jimutavahana came to an end with those who give fragments of *pindas* at the *parvana-sraddha*.¹

Succession to males (Kerala system)

619. For those whose personal law is the *marumakkattayam* or *aliyasantana* system a system is supplied by HSA, s. 17 which differs from the general scheme. It is convenient for us, for our present purpose, to refer to it shortly as the 'Kerala system'. The differences are intended to provide that some part of the estate shall pass to the matrilineal heirs of the *propositus* who used, under the former statutes, to take not less than one-half of the estate on intestacy. The rule is that where the estate cannot devolve on the heirs mentioned in the Schedule, it shall pass to the nearest blood relation, whether agnate or cognate. Where agnates and cognates are equally near they shall share equally. For the tenure of female heirs see § 586.

The former systems of distribution prevailing in Malabar were based upon the conception of a compromise between the claims of the male's wife and children on the one hand, and his *marumakkattayam* or *aliyasantana* relations on the other: i.e. the widow would be in direct competition with the mother and with the brother and sister and the sister's children. The compromise was worked out either by giving the *tavazhi* half the estate in any event, or giving it an increasing share in the deceased's estate depending upon the survival of particular heirs; alternatively the widow was made to share with the mother. The schemes differed from statute to statute, and details are beyond the scope of an introductory book.²

¹ *Sambhu v. Kartick* (1926) 54 Cal. 171, AIR 1927 Cal. 11.

² Cf. § 391.

SUCCESSION TO FEMALES

620. This subject has not ceased to be complicated. The order of distribution depends to some extent upon the source from which the property came even today, when the general proposition is accepted that succession to a female depends upon the claim of the heir, and not the nature of the property. We shall deal first with the general (non-Kerala) system.

621. We must assume that the property does not come within the exceptions. In that case the order of distribution is as follows:

- (a) the *proposita's* children and husband equally, also the children (but not the grandchildren) of any predeceased children;
- (b) the heirs of the husband (as if the estate had been his and he had died immediately after the *proposita*);
- (c) the parents equally;
- (d) the heirs of the father (as above);
- (e) the heirs of the mother.

P died leaving *DDS*, the son of her predeceased daughter's predeceased daughter, *MFS*, her maternal uncle, and *HSDS*, the son of a predeceased daughter of a predeceased son of her husband by his earlier marriage. The property will be taken by *HSDS*, though he is no relation at all of *P*, for he comes in group (b), while *DDS* comes in group (d) and *MFS* in group (e). To the suggestion that this is absurd the answer here (as elsewhere) is that *P* should have made a will where no near relatives were likely to survive her, providing, *inter alia*, for charity.

622. The exceptions to the general rule are motivated by a clear (and traditional) desire that property shall not pass from family to family merely by a female's death intestate. Where property was *inherited* by her from her parent or parents, it shall not pass to her husband or to her husband's heirs where she dies without children or children of predeceased children. If such children or grandchildren survive her there is no objection to the husband taking a share even in such property; otherwise he is excluded, and so are his heirs, and the property goes to 'the heirs of the father'. The intelligent reader will at once exclaim, what will happen if the property was inherited by her from her mother, and her father survives her? Since the section provides that it

shall pass to the heirs of a person who turns out to be alive (and so has no heirs), should it go to the government under HSA, s. 29? The answer must be that here we have an example of the very rare phenomenon,¹ the legislative provision which is absurd unless words are added. We are justified in reading 'upon the heirs of the father' as 'upon the father and in default of the father upon the heirs of the father', under the maxim of construing *ut res magis valeat quam pereat*.²

623. Similarly with the above rule it is provided that if the *proposita* inherited from her husband or from her father-in-law, in similar circumstances it shall not pass to the husband ('in the absence of any son or daughter of the deceased . . . not upon the other heirs referred to in subsection (1) in the order specified therein') but to 'the heirs of the husband'. The difficulty appears to be greater in that the husband is expressly excluded, but we must apply the last resort in attempting to construe a badly drafted statutory provision, and read it as if it were 'in the absence of any son or daughter . . . upon the husband and in default of the husband upon the heirs of the husband'. It is essential to realize that by 'husband' is not meant necessarily the husband who survives the *proposita*. This is the reason why 'husband' apparently excludes the 'husband' who appears in s. 15 (1) (a). We are to understand that where the *proposita* inherits property from her first father-in-law and she dies leaving a second or subsequent husband neither that husband nor that husband's heirs are to have that property, but the heirs of the son of that very father-in-law (for the words 'husband' and 'father-in-law' seem to be correlated in this subsection). The surviving husband or his heirs in his default take only that property which was inherited from him, or from his father.

624. The Kerala system agrees with the general system except that (i) these exceptions regarding property inherited by the *proposita* from her parents do not apply, with the result that the husband can certainly share the property inherited from the father or mother of the *proposita*, whereas

¹ *Re Brockelbank* (1889) 23 Q.B.D. 461. Cf. *R. v. Oakes* [1959] 2 All E.R. 92, 95-6 (CCA). *H. K. Swaranavar v. State* AIR 1963 Mys. 49, 58.

² Maxwell, p. 237.

what she inherited from her husband or father-in-law will still pass exceptionally as indicated above; (ii) the mother is substituted for the husband in group (a), but — we note — the issue of *sons* are still permitted to inherit equally with the issue of *daughters*, a feature by no means agreeing with traditional *marumakkattayam* ideas; and (iii) in group (b) appear not the heirs of the husband, but the father and the husband, while the heirs of the husband are placed at the very end as group (e), and, in true *marumakkattayam* fashion, the heirs of the mother appear before the heirs of the father in groups (c) and (d) respectively.¹

625. Both under the general and under the Kerala system it is necessary to know what is meant by the undefined word 'inherited'. If the property is obtained from those exceptional quarters but not by inheritance the exceptions do not apply. One would naturally assume that intestate succession and also receipt of a legacy are included. The definition of 'heir' in s. 3 (1) (f) of the HSA confines the word to intestate succession, but this does not hinder us from taking the word 'inherited' in its wider meaning if that would be its natural meaning. The arguments against the wider meaning are that legacies are after all made by the testator with his eyes open, and in full knowledge that the *proposita* has no children and has a disagreeable husband, etc., and that if he intends nevertheless to leave the property to her absolutely there can be no harm in its passing to the husband amongst her normal heirs. A further argument is that if we include legacies within the scope of the subsection gifts ought logically to be included, and since they are obviously excluded by Parliament we should be entitled to exclude legacies as well. An authoritative settlement of this difficulty is awaited.

626. The former law regarding the descent of *stridhanam*, which corresponds to this chapter of the current law, was excessively complicated. The outline is all that concerns an introductory work, and indeed corresponds fairly accurately with as much as was known to Anglo-Hindu law when the HSA destroyed it in India. The possibility that recourse will be had in the future to the confused and contradictory provisions of the *sastrakaras* is happily very remote. We shall

¹ HSA, s. 17 (ii).

start with the Mitakshara law, proceed to the Mayukha sub-school with its marked peculiarities, and end with the Dayabhaga law.

627. There are two preliminary observations. What passed as *stridhanam* never so passed again,¹ except in Maharashtra and Gujarat and in respect of *propositae* governed by the 'Bombay school' of Hindu law.² Elsewhere, if a daughter or daughter's daughter inherited, it passed on the heiress's death to the next heir of the original *proposita*, for the property was held to have been inherited subject to the limited estate (§ 677). This extraordinary development of Anglo-Hindu law³ was rightly resisted by the Bombay High Court and was not applied there to the estates of heirs of *stridhanam*. The second observation is that most of the difficulties that arise stem from the fact that apart from the Mitakshara nearly all authorities confine the concept within close limits, and if there be any *de facto stridhanam* ('woman's wealth') which is not legally *stridhanam*, it will be taken by her husband or, if he is dead, distributed as if it were her husband's property and he had died when she died. This is a somewhat generalized explanation for the anomalies, but it serves to prepare the mind for the subject which the *sastrakaras* themselves unashamedly called 'unfathomable'.

628. The Mitakshara itself defines *stridhanam* in the widest of terms, but Anglo-Hindu law allowed all acquisitions of females to be their *stridhanam* except what they inherited (except in Maharashtra and Gujarat and under the 'Bombay school': § 627), and what they took at a partition at Hindu law (§ 677) or under a deed or will imposing upon them a limited estate. When a woman who was a limited owner acquired property by adverse possession she was presumed to acquire it as *stridhanam* unless it was shown that she intended or must have intended to acquire as a limited owner (§ 677).⁴ All the resulting *stridhanam* passed to the same heirs in order of distribution, except for a category of very small importance called *sulkam*. There is some doubt

¹ *P. Venkateswarlu v. D. China* [1955] An. W.R. 39.

² *Gandhi v. Bai* (1900) 24 Bom. 192.

³ *Sheo v. Debi* (1903) 30 I.A. 202, 25 All. 468.

⁴ In Mysore such property is *stridhanam* in all cases by statute: Mysore Act X of 1933, s. 10 (2) (d).

as to what the term originally meant, but it is now understood that it meant property paid to the parents of the bride to induce them to give her in marriage, and afterwards given by them to the bride herself.¹ It seems to have been believed that it belonged morally to her family and not to her husband or his heirs, nor even her children, and therefore it passed to her full brothers, in their default to her mother, and (it appears) after her to her father and in his default to the father's heirs.²

629. All property other than *sulkam* passed to the following :

- (a) unmarried daughter ;
- (b) ' unprovided ' married daughter ;³
- (c) ' provided ' married daughter ;
- (d) daughter's daughter ;
- (e) daughter's son ;
- (f) son ;
- (g) son's son ;
- (h) if the woman was married in an approved form (§ 222) her husband ; or her husband's nearest heir ;⁴
- (i) failing any husband's heir, then her own nearest blood relation, and thereafter the government ; but
- (j) if the woman was married in an unapproved form (§ 222), which was rarely the case (indeed the presumption was against it),⁵ her husband and his heirs were excluded by her mother, in her default her father, and then the father's heirs, after whom the husband and his heirs would claim, then at last the government.

630. As in the case of succession to males the distinction between provided and unprovided daughters lay in their relative poverty : a really poor daughter would exclude one

¹ *Surayya v. Balakrishnayya* AIR 1941 Mad. 618, [1941] 1 M.L.J. 496.

² *Surayya* (cited above) ; *Arunachalam v. Sivakami* AIR 1955 NUC (T.C.) 1659.

³ *U. Rajamma v. P. Padmavattamma* AIR 1951 Mad. 1047, [1951] 2 M.L.J. 487.

⁴ Even where she was estranged from her husband, consorting with an untouchable, and degraded : *B. Abdul v. Punyamurthy* (1942) 21 Mys. L.J. 166.

⁵ *Velayutha v. Suryamurthy* AIR 1942 Mad. 219, [1941] 2 M.L.J. 770. In certain castes the Asura form is (or was) usual : *Vijiarangam v. Lakshman* (1871) 8 B.H.C.R., O.C.J., 244 ; and see *Govind* (cited above : § 222).

who was not poor (§ 607).¹ When the inheritance came to the husband's heirs rules which were peculiar to succession to males did not necessarily apply. Thus male issue did not take as a single heir, and a (step-) son would exclude a (step-) son's son.² So also where an adopted son of her husband competed with an *aurasa* son of the same man, the two would share equally, for the text indicating the fourth share for the adopted son (§ 186) was held not to be capable of extension to succession to a female.³ Likewise the Act of 1929 (§ 613) did not apply to succession to females.⁴

631. If the *proposita* died unmarried her property went to her full brothers, her mother, her father, her father's heirs in order of propinquity, and finally her mother's heirs took the property.⁵ Thus a step-brother would, unfortunately, exclude an unmarried sister.⁶ The question how propinquity should be determined was far from being settled, and the controversy may never be set at rest. On balance it seems that he or she who would be the heir if the estate were that of the father, etc., should take (subject to the modifications mentioned in § 630 above).

632. In the Bombay school (under the influence of the Mayukha) a careful distinction developed between the *stridhanam* that was distinctly mentioned in the texts of Katyayana and other *smritikaras* on the one hand (*paribhashika-stridhanam*, 'technical *stridhanam*') and other property that might be under a woman's control at her death. The latter category is extremely important, in that it includes property inherited (§ 627), gifts and bequests from strangers except those actually given during the marriage festivities, what is given to her absolutely for her maintenance (§ 436), and what she earns or acquires by her own labour, investment, or enterprise.

¹ *Dewala v. Rupsir* AIR 1960 M.P. 35.

² *Krishnaswami v. S. Sankili* AIR 1955 Mad. 702, [1956] Mad. 324.

³ *Gungadhar v. Hira* AIR 1917 Cal. 575, 43 Cal. 944.

⁴ *Annagouda v. Court of Wards* [1952] 1 M.L.J. 414 (SC), AIR 1952 S.C. 60.

⁵ *Chhaterpati v. Lachmidhar* (1946) 73 I.A. 231, 25 Pat. 649, AIR 1946 P.C. 189. For Mayukha rules (variation in selection of 'father's heir' from Mitakshara pattern) see *Tukaram v. Narayan* (1911) 36 Bom. 339 (FB).

⁶ *Gopibai v. Chuhermal* AIR 1939 Sind 234, 237.

633. *Sulkam* (which was given a slightly different definition from that at Mitakshara law, though the difference need not detain us) passed as at Mitakshara law. Gifts or bequests from the husband (*bhartridatta-stridhanam*) and gifts from relations subsequent to the marriage (*anvadheya*) passed in the following order :

- (a) sons and unmarried daughters equally;¹
- (b) sons and married daughters ;
- (c) daughters' daughters and daughters' sons ;
- (d) sons' sons ;

(e) the husband or his heirs, and the father or his heirs, in order according to the distribution of *stridhanam* at Mitakshara law if the marriage was in an approved form, or the mother, father, or father's heir if the marriage was in an unapproved form (§ 629).

634. In *Vithal v. Balu*² the *proposita* had been married in an approved form, but left no issue nor any heir in her late husband's family. The estate did not contain *sulkam*. It was claimed by a brother, as the nearest heir to the *proposita* in her parents' family, who took in the absence of an heir in the husband's family. Divatia, J. who had already decided in *Rajeppa v. Gangappa*³ (a case which is no longer good law) that propinquity applies in distribution amongst *bandhus* claiming the estate of a male Hindu governed by Mitakshara law, irrespective of the possibility of distinction on the grounds of spiritual benefit (§ 608), was asked to consider the claims here of a sister as well as the brother. He held that the *proposita*'s brother and sister were her *sapindas*, and therefore heirs in her father's family; they were *sapindas* in another *gotra*, and therefore *bhinna-gotra-sapindas* (i.e. *bandhus*). It was consistent with justice, equity and good conscience that brother and sister, being equally near in point of propinquity, should share the estate between them. His Lordship said, 'That seems to me to be a legal as well as equitable view.'⁴ Notwithstanding the collapse of *Rajeppa* as an authority in the distribution of the estate of a male, this decision is still binding with regard to the distribution of the estate of a female. Its accord with justice, equity and good conscience is certain (for the principles of spiritual benefit cannot be called into play in determining the heirs to a female's separate property at Mitakshara law), and its principle having been followed by the legislature upon a larger scale in the HSA courts are likely to apply it by analogy in cases of successions opening before 17 July 1956, wherever possible.

635. The gifts made to a bride at the time of the marriage (*yautaka*) were destined for unmarried daughters. There was

¹ *Dayaldas v. Savitribai* (1910) 34 Bom. 385 (FB).

² (1936) 60 Bom. 671, AIR 1936 Bom. 283.

³ § 608

⁴ (1936) 60 Bom. 671, 678. See also dicta of Telang, J. in *Manilal v. Bai* (1893) 17 Bom. 758, 770.

no reason why the order of distribution of *yautaka* should differ from that of the remaining technical *stridhanam* other than *bhartridatta* and *anvadheya*, e.g. in particular presents from strangers prior to marriage and during the marriage festivities (other than *yautaka*) or at the time of the bride's procession to the husband's home. The order for such properties was as follows :

- (a) unmarried daughters ;
- (b) unprovided married daughters ;
- (c) provided married daughters ;
- (d) daughters' daughters and daughters' sons ;
- (e) sons ;
- (f) sons' sons ;
- (g) the residual heirs as in § 633 (e).

636. Remaining *stridhanam* of the so-called non-technical types (§ 632) passed to :

- (a) sons ;
- (b) sons' sons ;¹
- (c) sons' sons' sons ;
- (d) daughters ;
- (e) daughters' sons ;
- (f) daughters' daughters ;
- (g) the residual heirs as in § 633 (e).

637. The Dayabhaga law is complicated by the fact that spiritual benefit for the husband of the *proposita* becomes, where possible, a guide to the order of distribution. The Dayabhaga cuts through the tangle of authorities and defines *stridhanam* as property at a woman's sole disposition. It was a rule, now obsolete in India, and rapidly ceasing to be of significance in Anglo-Hindu law generally, that apart from the class of *stridhanam* called *saudayika* (a cross-classification indicating that it was property given to the woman from relatives — in the Mitakshara school relatives *other* than the husband — at any time whether before or after the wedding) no *stridhanam* could be alienated during the husband's lifetime, provided that the wife was in the eye of the law under his control, without his consent. We shall revert to this rule in connexion with testamentary dispositions, where it is of great practical importance. The Dayabhaga notion was that *stridhanam* and *saudayika* were

¹ *Bai v. Jagjivandas* (1917) 41 Bom. 618.

virtually synonymous. But provision was not made, as in the Mayukha, for devolution of women's wealth that was not within the term *stridhanam*. It was assumed that such property was the husband's property. The effective classifications of *stridhanam* were (i) *sulkam*, a present to induce the bride to go to her husband's house (practically obsolete, one may say); (ii) *yautaka*, presents from all and sundry during the wedding festivities; (iii) *pitridatta*, gifts and bequests from her father after the marriage; (iv) *ayautaka*, gifts and bequests (other than *pitridatta*), from relations before or after the marriage. *Sulkam* devolved as we have seen previously (§ 628). The three other classes were distributed in the orders shown below:

<i>Yautaka</i>	<i>Pitridatta</i>	<i>Ayautaka</i>
(a) unbetrothed daughters;	unbetrothed daughters;	sons and unbetrothed daughters;
(b) betrothed daughters;	betrothed daughters;	betrothed daughters; ¹
(c) married or widowed daughters having a son or capable of having a son (e.g. by adoption); ²	sons ²	married or widowed daughters having a son or capable of having a son, etc.;
(d) barren married daughters and childless widowed daughters unable to adopt;	married or widowed daughters (as in <i>yautaka</i> (c) above);	sons' sons;
(e) sons;	barren married daughters, etc. (as in <i>yautaka</i>);	daughters' sons;

¹ *Sreenath v. Surbo* (1868) 10 W.R. 488; *Renuka v. Aswini* AIR 1961 Pat. 498.

² *Prasanna Kumar v. Saratsasi* (1908) 36 Cal. 86.

³ *Uma v. Bedbati* [1942] 1 Cal. 299, AIR 1942 Cal. 265.

	<i>Yautaka</i>	<i>Pitridatta</i>	<i>Ayautaka</i>
(f)	daughters' sons ;	daughters' sons ;	barren married daughters, etc. (as in <i>yautaka</i>) ;
(g)	sons' sons ; ¹		
(h)	sons' sons' sons ;		
(i)	step-sons ; ²		
(j)	step-sons' sons ;		
(k)	step-sons' sons' sons ;		
	<i>Approved form</i>	<i>Unapproved form</i>	
(l)	husband ;	mother ;	brother ;
(m)	brother ;	father ;	mother ;
(n)	mother ;	brother ;	father ;
(o)	father ;	husband ;	husband ;
(p)	husband's younger brother ;		
(q)	husband's brother's son ;		
(r)	sister's son ; ³		
(s)	husband's sister's son ;		
(t)	daughter's husband ;		
(u)	husband's <i>sapindas</i> , ⁴ <i>sakulyas</i> (?) ;		
(v)	the government.		

638. It will have been noticed that there is some doubt about the *sapindas* and *sakulyas* or *samanodakas* of the husband, but there are adequate dicta (founded upon Srikrishna Tarkalankara's opinion) to support such a claim. One would naturally expect that after heirs of the husband would come heirs of the father and then heirs of the mother. Jagannatha, having in mind the residual heirs according to *smritis* which are acted upon in the Mitakshara school,⁵ said that the father's family and after them the mother's family took — a view with which so great an expert as

¹ *Prakash v. Nandorani* AIR 1955 NUC (Cal.) 819.

² *Kenaram v. Maniklal* AIR 1955 NUC (Cal.) 5589.

³ Including a half-sister's son : *Shashi v. Rajendra* (1913) 40 Cal. 82.

⁴ Apparently the step-son by a rival wife of higher caste may take as husband's *sapinda*, but if so he takes after the husband's (elder) brother (who is not included amongst the special heirs that precede the 'husband's *sapindas*' in the table above) : dicta in *Provashini v. Joggeswar* AIR 1951 Cal. 375.

⁵ *Colebrooke's Digest*, V, ix, 2, 2, comm. to text no. 513.

Sir Gurudas Banerji concurred. The Calcutta High Court held in *Sarnamoyee v. Sec. of State*¹ that a sister was no heir to her sister: the judgment was poor in quality and the issue hardly argued. Yet in subsequent cases a sister's daughter and a sister's son's son were held disentitled, and finally in *Charu v. Province of W. Bengal*² it was held that the married *proposita's* blood relations, other than those specifically enumerated in the *Dayabhaga*, could not be her heirs on intestacy.

639. The former law of Kerala relating to *marumakkattayam* and *aliyasantana* families gave the estate of a deceased intestate female to her children, and most usually thereafter to her mother (with the effect that it would become *tavazhi* or *kavaru* property), but in some systems the husband was allowed to share with the mother, while in others he shared with the grandmother in default of the mother or of the mother's *tavazhi*, or even at some later stage. Today that position is to some extent preserved by making him share on an intestacy with the *proposita's* father.

GENERAL CONDITIONS APPLICABLE TO INTESTATE SUCCESSION

Devolution of tenancy rights

640. 'For the removal of doubts' s. 4 (2) of the HSA introduces savings of any law for the time being preventing fragmentation of agricultural holdings,³ or fixing ceilings.⁴ These savings are straightforward. The law of inheritance operates normally, but the heirs are prevented from effective partition by metes and bounds in some cases, and from adding to their agricultural holdings if they would thereby offend against a State statute in that regard. But by a cryptic addition a further saving has been added over which commentators have disagreed. Nothing contained in the

¹ (1897) 25 Cal. 254, 2 C.W.N. 97. On the other issue this case was overruled by *Hirālāl v. Tripura* (1913) 40 Cal. 650.

² AIR 1950 Cal. 473; 54 C.W.N. 940.

³ e.g. Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

⁴ e.g. Kerala Agrarian Relations Act, 1960.

Act shall be deemed to affect provisions of any law in force providing for the 'devolution of tenancy rights in respect of [agricultural] holdings'. Does this mean that agricultural land and interests therein are totally exempt from the operation of the HSA?¹ Apparently not. The 'tenancy rights' are those regulated by the Land Revenue Codes of the various States, some of which refer to the 'personal law' when regulating the question how such rights, derived from the State, are to devolve on the tenant's death, while others² actually lay down detailed rules without reference to any particular law. These laws are saved by this subsection.

641. In *Sitabai v. Kothulal*³ the question was whether the widow of *H*, who died before the HSA was enacted, who had herself alienated parts of the estate without justification (§ 683) before that date, received retrospectively such an improvement in her tenure by virtue of s. 14 of that Act that the former reversioner, *H*'s brother *B*, would be unable to question those alienations after 17 June 1956. It was (wrongly : § 676) assumed for the purposes of argument that reversioners' rights had been totally abrogated by the Act, but it was observed that the property was an agricultural tenancy governed, as to devolution, by the Madhya Pradesh Land Revenue Code, 1954, s. 151 of which provided that, 'subject to his personal law, the interest of a tenure-holder shall on his death pass by inheritance, survivorship or bequest as the case may be'. Under HSA, s. 4 (2) this 'law' had to be observed. The presence of the word 'survivorship' showed that the Madhya Pradesh legislature had meant, by 'personal law', not 'personal law for the time being', but 'personal law as at the commencement of this Act (1954)', and accordingly the Mitakshara law was saved, and reversionary rights were unaffected in any case by the HSA. With respect, this decision is obviously correct, and this class of property is not affected by the HSA where reference is made in the relevant Code or Tenancy Act to a specific order of devolution, or to the personal law itself in any guise other than 'personal law for the time being'.⁴

¹ As was the view of R. N. Sarkar, *Hindu Code* (Calcutta, 1957), p. 19. But see *Laxmi v. Surendra* AIR 1957 Or. 1.

² e.g. Uttar Pradesh Act 1 of 1951.

³ AIR 1959 Bom. 78, 60 om. L.R. 408.

⁴ A different view was proposed by Sri L. P. Gargya in [1961] K.L.T. (J.) 45-50.

The last formula would, of course, let in the HSA itself, so that no contradiction would arise. Fortunately, many States' revenue legislation does not provide for devolution of tenancy rights at all, so that the HSA has unimpeded operation there.

Nasciturus pro iam nato

642. We have seen (§ 30) that a child in the womb who is born alive has the right to inherit as if he or she had been born at the death of the intestate, and there is a deemed vesting of the estate, or a share thereof, in him or her from the date of the death.¹ The former law was similar.

Half-blood and full-blood

643. Where heirs related by the full blood compete with heirs related by half-blood, that is to say heirs whose relationship to the *propositus* or *proposita* is not through both parents of the person who serves as a link, there is a statutory rule provided,² whereby the full-blood excludes the half-blood. We are told that 'half-blood' means 'consanguine half-blood' only,³ i.e. where, as is most usual in Hindu families, the father or ancestor is common, but the mother or ancestress is different.

P's estate was claimed by three brothers' sons. *A* was the son of *P's* full-brother, who was the son of *P's* mother and of *P's* father; *B* was the son of *P's* 'half-brother', who was the son of *P's* father but of a step-mother of *P* or another wife of *P's* father; *C* was the son of *P's* uterine half-brother, who was the son of *P's* mother by a previous marriage or a marriage later than that with *P's* father. Under HSA, s. 18, *A* excludes *B* and *C*.

644. Where there is a competition between a full-brother, or any other collateral of the full blood, and a relative of the same relationship but by uterine half-blood the question arises whether the claimant appears in the Schedule to the HSA. If he is, for example, the father's brother, or the sister's son, the *Explanation* to the Schedule clearly excludes him from the two Classes. He must therefore come in as a very near cognate in group (d) of s. 8 in relation to succession to a *male*. In succession to a *female* this exception

¹ HSA, s. 20.

² HSA, s. 18.

³ HSA, s. 3 (1)(e)(i).

does not apply, and the general position is the same as that which prevails otherwise with reference to succession to males, which is as follows:—since a collateral is none the less a collateral for being of the uterine half-blood (as a uterine half-sister is as much a ‘sister’ as a consanguine half-sister or a full-sister), the words denoting relatives *prima facie* include uterine half-blood. HSA, s. 18 lays down that the half-blood, that is to say, consanguine half-blood, are postponed to the full-blood. The result is that uterine half-blood share equally with the full-blood and exclude the consanguine half-blood.

In the illustration given above, if *P*’s estate were claimed by *B* and *C* only, *C* would exclude *B*.

645. Similarly where, in succession to a male, a mother’s full-sister’s son, a mother’s consanguine half-sister’s son, and a mother’s uterine half-sister’s son are in competition, the first and last would share equally and exclude the second.

646. Formerly the half-blood took immediately after the full-blood (except under the Bombay Mitakshara: § 612),¹ but uterine half-blood was not recognized for purposes of succession unless authorized by custom. Since the consanguine half-blood or their issue may give spiritual benefit in some cases equally with the full-blood, the Dayabhaga system showed unexpected favour to, for example, a half-sister’s son, who counted as a sister’s son for all purposes of succession (§ 617). Needless to say, at *marumakkattayam* and *aliyasantana* law the uterine relations were the only half-blood recognized unless exceptions were created by the relevant statute.

Per stirpes and per capita

647. All heirs sharing the estate share equally, unless there is a special rule to the contrary. They take the property *per capita*, and invariably as tenants in common. Under the current law the only instance of a succession which is governed by a joint tenancy (in fact as *tarwad* property) is that taken by a mother under the law as applied to persons governed by *marumakkattayam* and *aliyasantana*: there the

¹ Authorities are given in *Kalagouda v. Annagouda* AIR 1962 Mys. 65.

property is automatically *tarwad* or *tavazhi*, i.e. joint-family, property, if a child of the heiress is alive, and it becomes *tavazhi* property as soon as one is born to her (§ 578).

648. There are exceptions to the *per capita* rule. Naturally where heirs of a male claiming in Class I of the Schedule to the HSA compete their shares cannot be expected to be equal. The method of distribution is set out elaborately in the section concerned (s. 10), to which the reader is referred. Briefly the method is to conceive of the widow and issue of a son as forming a 'branch'. Between themselves they share the share which would have come to him had he lived. If there is a widow of a predeceased son's son the same principle is applied. Where a daughter is represented by her issue, they share the share that she would have taken. An illustration is given above (§ 601) in relation to partition. This is representation *per stirpes*. In succession to females their children and the predeceased children's children benefit from representation *per stirpes*.

Formerly representation *per stirpes* applied only to male issue at Mitakshara law (§ 607), and to brother's sons at pure Mayukha law (§ 612). It applied to male issue under the Dayabhaga law, but not to succession to *stridhanam* according to any school.

Preemption of certain shares

649. One obstacle to the general admission of females to shares along with males on intestacy was the fear that they would, by taking shares at their option, disrupt businesses and agricultural undertakings. Accordingly it is provided¹ that where *any* heirs, male or female, take together an interest in any immoveable property (a phrase which includes leases and mortgages), or an interest in any business which was carried on solely or jointly by the *propositus* or *proposita* (carried on up to the time of his or her death or substantially until such time), and one of these heirs proposes² to transfer his share (e.g. by gift, mortgage, exchange, or sale), the other heir or heirs shall have a preferential right to acquire the interest in question. Unless the parties

¹ HSA, s. 22.

² The use of this unexpected word must have been deliberate.

agree to a figure, the consideration shall be fixed by the court and if the applicant for such fixing does not acquire the share at that price he must pay the costs of the application. If heirs compete for the share the heir who offers the higher or highest price may acquire the interest in question.¹

650. This statutory right of preemption must be regulated by law, none of which is expressly declared by the statute. For such purposes as may require regulation it is suitable that the Muhammadan law of preemption (which applies by custom to many parts of India irrespective of community)² should be consulted. The statute gives the right, but does not tell us how it is to be asserted and vindicated: it merely tells us the procedure which may be resorted to when the preemptor and the owner cannot agree upon a price. The law looks very jealously at preemption even when the right is given by statute, and strict adherence to law is required.³

651. This statutory right arises under the HSA when a transfer (including a gift) is proposed (and not completed). In contrast with the position at Muhammadan law,⁴ if the owner sells, or gives the share, without allowing his co-sharers to offer to buy it from him, the right to preempt is defeated.⁵ But if it comes to their knowledge that he intends to part with the share they are entitled to preempt. Naturally there must be limits to this right. It seems, by analogy from the Muhammadan law, that the right is equally available whether the proposed transferee is a stranger or a co-sharer with the owner.⁶ Yet no particular formalities can be insisted upon as at Muhammadan law. The right exists by statute, and can be exercised by notice, or by suit. Where the owner proposes to give the share, the preemptor must still offer to buy it at an agreed or determined price. If he files a suit to preempt he must prove that the owner proposed to transfer, and the proper price at which the share ought to be

¹ HSA, s. 22 (2), (3).

² *Shri v. Gajadhar* [1955] 1 SCR 70, 85; *Narayana v. Karthiayani* [1961] K.L.T. 809.

³ *Bishan v. Khazan* AIR 1958 S.C. 838, 841 (point no. 6), [1958] SCJ 1234.

⁴ F. B. Tyabji, *Muhammadan Law*, 3rd edn, ss. 525, 526.

⁵ *Ram v. Domini* AIR 1961 S.C. 1747 is not applicable.

⁶ Tyabji, s. 527.

sold to the plaintiff. The preemptor cannot buy subject to conditions of his own choosing which were not contemplated by the owner when he was proposing to transfer.¹ The right to preempt is lost when the preempting co-sharer waives his right, or asserts it and does not follow up the assertion by offering the price, or delays unduly to assert his right, or waives a right to a part of the interest in question.² The statute does not give a right to acquire a part of the interest. The right to preempt is personal, and does not pass to heirs, nor to assignees. If the right is asserted and the preemptor dies without acquiring, the right to acquire does not pass to his heirs or representatives.³ On the other hand the right to preempt arises only when the owner proposes to transfer. His assignees' or transferees' proposals, or dealings with the undivided assets, are not within the section. And if the owner is adjudicated insolvent, the Official Receiver or Official Assignee cannot be compelled to sell to the co-sharer under this section.

Partition of dwelling-houses

652. If a daughter were to insist upon living in a house of which she had inherited a share, and she were married and not estranged from her husband, in no time the poor relations of the husband would be found in the family house as well as more welcome guests, and it would prove difficult or impossible in practice to evict them. Consequently it was necessary to provide that, while the daughter's right of residence could be preserved in cases where that result was not to be feared, she, and other females, could not demand separate possession of any part of a dwelling-house without the consent of male sharers. This being the policy of the section (s. 23) we are entitled to read the plural, 'heirs', as if it were inclusive of the singular, and the daughter cannot demand partition against the will of a single brother, or other male heir.

¹ Tyabji, s. 530A.

² Tyabji, s. 531. At Muhammadan law a conditional waiver is not a waiver (s. 534), and a waiver based upon a misapprehension of the facts is not a waiver (s. 535). It is very doubtful whether these rules apply to our preemption.

³ Tyabji, s. 532. In our case the preemptor has no 'interest' in the property whatever before preemption.

653. The rule is that where a male or female dies intestate leaving both male and female heirs or a male and a female heir from amongst those relations who appear in Class I of the Schedule, and the estate includes a dwelling *wholly* occupied by members of his or her family (an expression which will include a *gharjamai*: § 398), the right of the female heir to claim partition of the dwelling-house shall not arise until the male heir or heirs choose to divide their shares (whether from the female herself or otherwise), but the right of residence is not affected by this provision. The right of residence is however controlled by the peculiar proviso¹ that where the female in question is the deceased's *daughter* (i.e. not a son's daughter, or sister, etc.) she is entitled to reside in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow. A son's daughter, therefore, is under no such disability and she can, it seems, reside in the house of which she has inherited a share, and if this means that her husband resides with her *de facto*, her uncles must put up with it or partition. It seems likely that Parliament did not realize that this discrimination against the daughter might indirectly operate more to her disadvantage than to her brothers' comfort.

654. It is to be observed that when a female dies leaving a surviving spouse and a daughter, the spouse (the widower) cannot prevent the daughter's claiming partition of the dwelling-house which the deceased wife owned. For he is not in Class I of the Schedule (which of course refers to succession to males). But the daughter can in such circumstances insist upon residing in the house with her husband or any of his relations, since in practice where *A* has a right of residence it is not practicable to exclude or evict the spouse or dependants of *A*. It is fortunate that the Act does nothing to hinder a male heir's separating from a female heir.

It is further to be observed that where males and females are co-legatees of the house no such provision applies. Where a male or female dies intestate in respect of all other property but made valid legacies of the house the daughter can in all circumstances insist upon residing in the house, whether she is married or unmarried, separated or unseparated from her husband, and so on.

¹ HSA, s. 23, prov.

655. The former system knew nothing of such rules.

Dependance, and dependants' rights

656. The provisions of the Hindu Adoptions and Maintenance Act, 1956, relative to dependance are highly complex and differ in subtle ways from the previously operative system. These so extensively modify the actual rights of heirs and legatees that without a knowledge of which dependants are entitled to claim what extent of benefit from the net estate it is to little purpose to know the identity of the heirs.¹ Because the law relating to dependants may be resorted to more frequently in cases of intestacy than in cases where the deceased left a valid will the subject is discussed here rather than in connexion with testamentary disposition. But it is not to be assumed that dispositions by will cannot be upset as readily as the law of distribution on intestacy: the proposition that a man may dispose of his estate by will at his entire discretion has no foundation whatever amongst Hindus in India (§ 720).

657. To sum the matter up in a nutshell, those who can claim to be dependants, and who are not disqualified, may be entitled to be maintained for life or until forfeiture or until the limit specified in the statute, as the case may be,² out of the net estate, at the expense of the heirs or legatees, provided that the latter are not themselves dependants and provided that such claims would not reduce the incomes of the latter below the amount which the court would award them if the situations were reversed. We have already seen that to be an heir-dependant is the ideal position, and that legatees who are not dependants, and dependants who are neither legatees nor intestate heirs are much less favourably placed.

658. The exact amounts to be awarded to each applicant will depend upon many factors, and the court has a very wide discretion. Speculative suits for maintenance will certainly be discouraged. The Act indicates (s. 23 (3))

¹ That 'heir' in HAMA, s. 22 includes legatees was decided in *Gulzara v. Tej* AIR 1961 Pun. 288.

² HAMA, ss. 21, 24. See § 665.

considerations which the court must take into account. These are numerous, and not exhaustive.

*Who may claim to be dependants?*¹

- (i) the father;
- (ii) the mother;
- (iii) in the case of a male *propositus*, his widow (but *not* the widower in the case of a female);
- (iv) the minor son during his minority;
- (v) the minor son of a predeceased son or son of a predeceased son of a predeceased son subject to a special condition to be explained below;
- (vi) the unmarried daughter until her marriage;
- (vii) the unmarried daughter of a predeceased son or unmarried daughter of a predeceased son of a predeceased son subject to the condition referred to above;
- (viii) in the case of a male *propositus*, his widowed daughter subject to a special condition to be explained;
- (ix) in the case of a male *propositus* the widow of his son, or of a son of his predeceased son (but *not* the widow of a predeceased son of a predeceased son), subject to a special condition to be explained;
- (x) the illegitimate son during his minority;
- (xi) the illegitimate unmarried daughter until she marries.

659. No conditions are attached to the right, provided that it is not forfeited for reasons which are provided in the Act (§ 665), so that the parents, in order to be maintained out of the estate, do not have to be aged or infirm.² It is sufficient if they are poor and need help for their maintenance. But in the case of the dependants indicated above under (v), (vii), (viii), and (ix) special conditions are prefixed which may cause considerable difficulty in practice. The theory is that a dependant who may become in succession dependent upon several funds shall not claim from all simultaneously, but shall be obliged to approach each in turn in a prearranged order. Great care has been used to see that a claim on a remoter fund shall be made only

¹ HAMA, s. 21.

² Contrast the right under s. 20; *Samu v. Shahji* AIR 1961 Raj. 207.

when it can be shown that applications for help out of a nearer fund have been unsuccessful, and it will not satisfy the court if the applicant for maintenance out of the estate of her father-in-law, for example, states that the heirs of her husband, or her own son and daughter, refuse to maintain her while they are in fact able to do so. The court will adjourn the application to await the event of an application directed against the heirs, or the children in question. The order therefore must be closely observed. The special difficulties of the widowed daughter we must discuss last, since they are intricate.

660. The grandson (v) must apply in order to :

(a) his father's estate ; (b) his mother's estate ; (c) his grandfather's estate (the estate in question).

The greatgrandson (v) must apply in order to :

(a) his father's estate ; (b) his mother's estate ; (c) his father's father's estate ; (d) his father's mother's estate ; (e) his greatgrandfather's estate (the estate in question).

The granddaughter (vii) must apply in order to :

(a) her father's estate ; (b) her mother's estate ; (c) her grandfather's estate (the estate in question).

The greatgranddaughter (vii) must apply in order to :

(a) her father's estate ; (b) her mother's estate ; (c) her father's father's estate ; (d) her father's mother's estate ; (e) her greatgrandfather's estate (the estate in question).

The son's widow (ix) must apply in order to :

(a) her husband's estate ; (b) her son ; (c) her daughter ; (d) her son's estate ; (e) her daughter's estate ; (f) her father-in-law's estate (the estate in question).

The son's son's widow (ix) must apply in order to :

(a) her husband's estate ; (b) her son ; (c) her daughter ; (d) her son's estate ; (e) her daughter's estate ; (f) her father-in-law's estate ; (g) her father-in-law's father's estate (the estate in question).

The widowed daughter (viii) must apply in order to :

(a) her husband's estate ; (b) her son ; (c) her daughter ; (d) her son's estate ; (e) her daughter's estate ; (f) her father-in-law ; (g) her father-in-law's father ; (h) her father-in-law's estate ; (i) her father-in-law's father's estate ; (j) her father's estate (the estate in question). The spirit behind this extraordinary provision is simply that a widowed daughter belongs to her husband's family and that her father and his heirs

nearly always calculate without reference to her needs. However, if sources (a) to (e) prove of no help to her she is directed to proceed against source (f) 'her father-in-law'. HAMA, s. 19 (1) provides that a daughter-in-law may obtain maintenance from her father-in-law. The next subsection provides stringent conditions for this, which will apply during the transitional period while the property rights acquired under the old system are being worked out to their natural conclusion.

661. The living father-in-law is not obliged now and will never be obliged to maintain his widowed daughter-in-law except out of coparcenary property in his possession out of which the daughter-in-law did not obtain a share.¹ Thus where *F* was joint at Mitakshara law with his son *S*, who was married to *W*, and *S* separated from *F* in 1960 and died soon afterwards leaving practically no capital, *W* can claim against *F*, her rights being capable of attaching to *F*'s share. But if *F*2 was joint with *S*2 at Mitakshara law, and *S*2 was married to *W* and *S*2 died unseparated in 1962, a share in coparcenary property, however small it might be, would normally pass to *W* by succession from *S*2, and *W*'s rights to be maintained by *F*2 during his lifetime would be extinguished (she would do better after his death under s. 21 (vii), which attaches no conditions as to the source out of which maintenance is to be paid if it becomes payable). S. 19 (1) lays down another rule of priorities. The widowed daughter-in-law is directed to apply in order to (a) her husband's estate; (b) her father;² (c) her mother; (d) her son; (e) her daughter; (f) her son's estate; (g) her daughter's estate; and only then to her father-in-law.

662. *The liability of the estate.* Those who take the estate³ are liable to maintain dependants where the deceased died after the HAMA came into force. This applies to intestate heirs and legatees alike. The dependants cannot claim where they obtain a legacy which amounts to what the court would award them if they were dependants instead of legatee-dependants. The liability for the balance, where the legacy

¹ *Jal v. Pala* AIR 1961 Pun. 391.

² That is, not her father's estate, for, if s. 19 (1) (a) were so read, the unfortunate woman would get nothing from either her father's estate or her father-in-law.

³ HAMA, s. 22 (2).

is smaller, attaches to the estate in the hands of heirs and legatees, notwithstanding the words 'any share' in s. 22 (2) which, taken literally, would indicate that a legacy of Re. 1 would exonerate the estate from all claims by a dependant to whom the legacy is left. The expression 'where a dependant has not obtained, by testamentary or intestate cession, any share' must be taken to indicate that where the dependant disclaims a legacy he can take advantage of his rights as dependant as if the legacy had never been made to him. But if he takes this step he loses the protection of s. 22 (4) which provides that no heir or legatee, whose share or part would be diminished below what would be awarded to him as a dependant if he had to contribute to the maintenance of other dependants, will be forced to make any such contribution. The status of dependant-legatee is therefore worth preserving.

663. The claim for maintenance is not a charge, but it may be made a charge by the will, by decree of court, by agreement between the dependant and the heirs and legatees, or otherwise.¹ Since it is not a charge until so made the heirs and legatees may dispose of the estate, and the transferee for value and without notice of the rights of dependants is not affected by those claims.² A gratuitous transferee, like the legatee's legatee, or the transferee for value with notice of the rights, is liable to find the maintenance out of the property so transferred.³ It might be argued that the heirs and legatees could, by a swift transfer of the estate to parties who could not possibly have notice of the rights of dependants (as for example by acts of insolvency) totally defeat the rights of dependants. It cannot be asserted with certainty that the dependants can never be entirely defeated. Since the heirs and legatees are not trustees for the dependants, and indeed even executors are trustees only for beneficiaries under the will and not for the statutory dependants, it follows that the funds which come into the hands of the heirs and legatees as a result of their dealings with the estate do not become impressed with any trust in favour of dependants, cannot be followed by dependants, and cannot be turned to in substitution for the original assets which have been made away with. Fortunately for the dependants some reliance may be placed in the rule

¹ HAMA, s. 27.

² HAMA, s. 28.

³ HAMA, s. 28.

in *Chunilal v. Bai Saraswati*.¹ This rule, we have seen (§ 402), entitled a widow to demand maintenance from the surviving members of the family even though they asserted that no family property was left out of which she might be maintained. They can therefore discharge themselves of a liability to maintain dependants when they show that the estate was applied to purposes binding upon it, as for example the maintenance of one or more other dependants. It is open to the court to develop this rule, and to discharge the heirs and legatees only when they can show that they have distributed the estate amongst dependants in a manner substantially agreeing with the order that the court itself would have made in the circumstances.

664. Yet all claims of dependants are postponed to 'debts of every description contracted or payable by the deceased'. Indian law is as yet barely acquainted with testamentary contracts, but this provision allows the testator to make a contract with a person whom he favours agreeing that he will make a legacy in his favour, which agreement, if not actually carried out, is binding upon the executor, whom the promisee can sue for the amount as a debt.² If the legacy had been made in the will the legatee might have lost much of his legacy to provide for maintenance for dependants; as a creditor he can ignore the claims of dependants, to whom he is preferred by virtue of the provisions of HAMA, s. 26.

665. All decrees for maintenance, and all agreements, whether entered into before the HAMA came into force or afterwards, may be subject to a revision of the amount decreed if there is a material change in the circumstances justifying such alteration.³ No one may claim maintenance if he or she had been converted to another religion; it is doubtful whether a conversion after maintenance has been decreed could forfeit the right; though in view of certain dicta in the case of *Sundarambal v. Suppiah*⁴ on appeal the right to file a suit would cease, together with the liability to maintain, from the moment of conversion. The accession of wealth from any quarter will be a ground for reduction

¹ AIR 1943 Bom. 393, 45 Bom. L.R. 747.

² § 730.

³ HAMA, s. 25. *Narayanan v. Krishnan* [1961] K.L.T. 455.

⁴ [1963] 1 M.L.J. 106. See Derrett at [1963] 1 M.L.J. (Jour.) 18-20.

or termination of the maintenance provision, since maintenance is awarded only upon the basis of need. If any widow dependant remarries her rights cease.¹

666. In determining the amount of maintenance, if any, to be awarded to a dependant regard must be had to the value of the estate; the provision which the *propositus* or *proposita* meant to make in a will which could not take effect or the provision which was validly made in a will for the support of the dependant; the degree of relationship between applicant and *propositus*; the past relations between them; the value of any property of the applicant, and the income derived from it, and his or her earnings or income from any source; finally the number of applicants likely to be successful.² In fact a complicated balance of needs and merits has to be held, and the amount decreed will reflect many aspects of the competition of claims.

The net estate is worth Rs. 1,00,000. The deceased left a valid will whereby all this is bequeathed to a society for the protection of aged cows. The dependants are *W*, his widow, whom he had not seen for 15 years; *S*, his son, who is insane; *D*, his daughter who is widowed and nursed him through his last illness; and *SS*, the son of a predeceased son, who is a minor and is undergoing education. *W* has ample *stridhanam* for her maintenance but claims that she needs more servants; *S* is maintained out of a settled fund which produces more than his needs; *D*'s husband died comparatively poor and she has an income of Rs. 15 per month; while *SS*'s income is Rs. 30 per month, though this is not sufficient to take care of his further education. If the monthly income from the estate is Rs. x it is submitted that *W* will be awarded Rs. $\frac{1}{7}x$, *D* will be awarded Rs. $\frac{2}{7}x$, and *SS* Rs. $\frac{4}{7}x$. No provision need be made for *S*, whose needs are already met. He can apply again if the income from his own fund no longer maintains him. The court will have constituted the total claims for maintenance into a charge upon the estate in the hands of the legatee, and it is open to the court at any time to reallocate the awards of maintenance-amounts.³

¹ The widow and son's widow, etc., are expressly bound to forfeit for remarriage under s. 21 (iii), (vii); the other widows must forfeit because after their remarriage they are no longer 'widows'. In s. 21 (vi) (a) 'estate of her husband' means 'estate of her deceased husband'.

² HAMA, s. 23 (3).

³ Though s. 25 provides (declaring the previous law) that the amount of maintenance may be varied if there is a material change, etc., it is likely that a dependant who is awarded nothing may apply to reopen the allotments under the Act if he becomes entitled to an award on the ground of need. *Sed quare?*

667. Although the court *may* take into consideration factors (e.g. cost of living indices) other than those which it must regard, there seems to be no ground for supposing that it will discriminate between dependants on the ground of their relative responsibilities. In *Chamava v. Iraya*¹ an illegitimate son by an adulterous union sued for maintenance at the rate of Rs. 2,000 per annum. He had a wife, a son, and seven daughters of whom four were unmarried. Notwithstanding these burdens the court did not hesitate to award a mere Rs. 500 per annum. Upon the same principle, where there is a competition between two widowed daughters, one of whom has many children and the other few, the awards will be similar.

668. Where the deceased died before the HAMA came into effect the Act applies only so far as the provisions of s. 22 (1) and s. 23 (1), (3), virtually codify the existing law by reference. The former law was in effect, and it was continued without modification. The Act is not retrospective² and relatives who would not have been dependants before 21 December 1956 did not become dependants of the estate of a person dying before that date merely because their position would have been different if the deceased had died after that date.³

669. Formerly maintenance out of the estate of a deceased male fell into two categories; firstly came those who were maintained by him during his lifetime as a matter of obligation, such as his parents,⁴ his unmarried daughter, and his illegitimate son while he was a minor (§ 36); and also those who were dependants of an estate which he had inherited, such as the widow of an uncle whose only heir he was. Secondly came those whom he was morally but not legally obliged to maintain during his lifetime, but whose maintenance became a legal obligation upon his estate after his death, that is to say his widowed daughter, his widowed daughter-in-law and the unmarried daughter of his predeceased son. The heirs could not, under the old system, evade the moral duties which the *propositus* himself

¹ 33 Bom. L.R. 1082, 1088, AIR 1931 Bom. 492.

² *A. Ramamoorthy v. A. Sitharamamma* AIR 1961 An.P. 131 (FB).

³ *Mukta v. Kamalaksha* AIR 1960 Mys. 182.

⁴ *Subbarayana v. Subbaka* (1884) 8 Mad. 236.

might evade. Under that system the widowed daughter and widowed daughter-in-law were in general better placed than they have subsequently become. We have seen the restrictions within which the rights of the latter dependant have been confined since 21 December 1956 (§ 661). Formerly she could obtain maintenance until her marriage or remarriage out of any property of the father-in-law, whether it were separate property or an interest in joint-family property.¹ Previously, too, the illegitimate daughter had no rights at Hindu law (§ 36).

670. On the other hand the illegitimate son's rights against joint-family property were more extensive (§ 36) and these have not been cut off, so far as that class of property is involved.² Similarly, in those rare cases where a father governed by Mitakshara law dies after the coming into force of the HAMA leaving no close relation but a legitimate son and an illegitimate son the latter will have a right to be maintained for life out of the joint-family property including the interest of his father which has passed by survivorship under HSA, s. 6. The HAMA, s. 22, enables dependants as defined by that statute to seek maintenance from surviving coparceners who take under HSA, s. 6, but does not pretend to affect, still less diminish, rights at Mitakshara law attaching to coparcenary property. Thus if *F*, governed by Mitakshara law and joint with his son *S*, died in 1957 leaving *S*, an illegitimate son, *IS*, and a separated father, *SF*, *IS* will be entitled to be maintained for life out of the coparcenary property in the hands of *S* under the old law, while *SF* will be entitled to maintenance out of *F*'s interest (which comes within the meaning of the word 'estate' in HAMA, s. 22) under the HAMA. The claims of such a relative as *SF* belong to the very narrow class of claims which counts as an exception to the otherwise neat scheme whereby dependants' existence at the time the succession opens usually prevents the operation of survivorship. The illegitimate son cannot take the *dasiputra*'s 'half share' (§ 526) after the HSA came into force, because, as we have seen,

¹ *Ambu v. Soni* [1941] Mad. 13, AIR 1940 Mad. 804 (FB) (daughter); *Appavu v. Nallammal* [1948] 1 M.L.J. 110, AIR 1949 Mad. 24 (daughter-in-law); *Provash v. Prokash* (1946) 50 C.W.N. 559 (son's daughter).

² The adult illegitimate son has no right against property passing under the HSA since 21 Dec. 1956 (*Tikaram v. Narayansingh* AIR 1958 M.P. 231), but rights accruing earlier are unaffected.

his right to that share after his putative father's death depended upon his being able to demand partition from an *aurasa* son with whom he was a coparcener with limited rights. The HSA, by s. 6, restricted the right of survivorship to the 'surviving members of the coparcenary', which of course excludes the *dasiputra* of a Sudra, who is never a coparcener with his father.

671. Similarly the concubine, faithful to her deceased paramour, could obtain maintenance out of his interest in joint-family property for her life, so long as she remained faithful. When the paramour died after 21 December 1956¹ she had no rights whatever against *any* part of the deceased's estate. In view of the rights of the large number of persons who can legitimately claim to be dependants, claims by concubines would *prima facie* be a waste of time, unless they can show that they are legatees, or creditors of the estate (§ 664). But if the heirs and legatees show, as against the claims of dependants, that there is a concubine of the deceased who must somehow be maintained unless the whole family is to lose face, it would not be inequitable that a sympathetic judge should allocate some property to her as a creditor of the estate even in the absence of proof of any legacy or testamentary contract. A man does not normally undertake to keep a permanent concubine without envisaging a legacy for her support in case of his death, and if he fails to leave such a legacy there is normally no remedy. But a concubine taken into the family and living there subject to implied undertakings to be maintained so long as she remains faithful, ought to be better placed.

672. A development of English law can be availed of in the rare cases where the widow turns out not to be a widow at all. In these days, when Hindus are for the most part, compulsorily, monogamous, it will happen from time to time that a man married in childhood will desert his wife and after many years, when her whereabouts are unknown, marry again. The second 'wife', when it comes to the distribution of his estate, discovers that she was never legally married to him, that she is not his widow, and that she is neither entitled to an intestate share, nor to claim as a dependant. But there is a way out of her difficulty, though

¹ A. Ramamoorthy (cited above).

it is not known to whom we owe this piece of ingenuity. In *Shaw v. Shaw*¹ S, a married man, representing himself as being a widower, went through a form of marriage with the plaintiff. In 1950 his legal wife died and in 1952 he himself died intestate. It was only at his death that the plaintiff became aware that she was not legally married to S, and she brought an action against the administrators, a son and daughter of the deceased, claiming damages for breach of promise of marriage by S. It was held that the damages would be assessed having regard to what the plaintiff would have been entitled to receive as a widow on intestacy. Denning, L.J. (as he then was), said :

‘ Every man who proposes marriage to a woman impliedly warrants that he is in a position to marry her, and that he is not himself a married man ; and he reaffirms that warranty when he afterwards goes through a form of marriage with her . . . On the faith of it . . . she lived with him as his wife for 14 years, she put money into the farm . . . and when he died she followed his coffin to the grave as his widow. His estate was worth [Rs. 1,500] or more, which she had helped to make, and yet the administrators now turn round and say that she was never his wife because . . . his real wife did not die until 1950. In my judgment S broke his warranty at every point . . . The most important breach of all was at the moment of his death, because when he died she was not his widow as she thought she was . . . That is the breach for which, in my judgment, damages can be recovered.’

The direct damages were the rights of which she was deprived by the discovery that he had broken this warranty, and those she was held entitled to recover. Adapting this decision to Indian conditions it appears that where a married Hindu male marries again after 18 May 1955 and fails to make the second ‘ wife ’ his true wife by another ceremony after the death of the first and lawful wife (if the latter dies in the interval), or dies leaving both women surviving him, the rights of the lawful widow, if any, are not directly affected by the circumstance that she had not lived with her husband for long, but the amount available for distribution amongst heirs, legatees and dependants will be reduced by claims brought by the second ‘ wife ’ for damages for breach of warranty by the ‘ husband ’. The suit for damages can be brought against the heirs and legatees as legal representatives of the deceased in default of executors or administrators, and the amount of damages will equal the amount that would have been awarded to her had she been a true widow of

¹ [1954] 3 W.L.R. 265 (CA).

the deceased and had she been applying for maintenance as a dependant under the HAMA, s. 22.

673. The chief difference between the former and the current system lies, however, in the obligations now lying upon heirs of females to maintain dependants. Previously the net assets of a female passed without (so far as is known) any obligation to maintain any relative of the *proposita*. The liability to maintain illegitimate children, or a mother, has not (so far as is known) been the subject of judicial decision. The growth in the liability of the estates of females, as of the liability of living females themselves, is an outcome of more general absolute estates for women, and the great increase in participation by women in the succession to men, and to some extent even in the succession to women.

The former limited estate of female heirs

674. We are justified in calling the limited estate 'former', as it no longer applies at law, but only by agreement;¹ by legacy or as a condition attached to a power of appointment, that the appointee shall take a limited estate; by award or compromise to the same effect;² or by order or final decree.³ Today a limited estate can be created by will, or when the court incorporates in a decree a settlement between parties arrived at by arbitrators who will for a long time to come utilize the well-known method of giving property to females for a limited estate. But apart from these marginal cases the limited estate is dead.

It is important to note that when a grantor or testator wishes to limit the estate he gives to a female he is by no

¹ In *Sampato v. Dulhin* AIR 1960 Pat. 360 the widow gave property to daughters (presumably the next reversioners: § 685) and they executed a deed of maintenance in her favour, so that she might possess properties for life, without right of alienation. These properties were within HSA, s. 14 (2). But where a mother settled inherited property on her granddaughters, reserving a life interest for herself, it was held, in *A. Venkatasubba v. Penchalamma* [1962] 2 An. W.R. 156, that the life estate was within s. 14 (1).

² *Mali v. Dadhi* AIR 1960 Or. 81.

³ A declaratory decree, a preliminary decree, and a decree against which an appeal was pending on 17 July 1956 are not within HSA. s. 14 (2): *Janak v. D. J.*, Kanpur AIR 1961 All. 294; *Krishna v. Akhil* AIR 1958 Cal. 671; *V. Annapurnamma v. V. Bhima* AIR 1960 An. P. 359.

means confined to the Hindu woman's limited estate. Nowadays it is becoming increasingly common for estates of very different characters to be created. We shall see that testators leave to female heirs estates for their lives, that is to say the characteristic 'life-estate' of English law, under which alienation of the corpus for any purpose is impossible. Examples occur at §§ 754, 755. On the other hand in *Marthandan v. Ramasubramania*¹ a woman was given an estate for her life without any restraint upon alienation other than the direction that she should have no power to dispose of the property by her will. It was held that she could mortgage the estate for value (at her pleasure) and so validly charge the estate so as to bind the remainderman. In all cases it is desirable to discover whether the limited estate in question is that known to the old Hindu law, or one of the newer variations employed by modern testators.

675. It is essential that the main incidents of the institution should be understood. Numerous transactions in practically every family are only intelligible in view of the fact that property inherited or taken at a partition by females was nearly always held subject to the limited estate until 17 June 1956, when that estate was abolished with respect to any property 'possessed' lawfully, whether in fact or in law, by a woman subject to the HSA.² The exceptions to the general rule, that women took a limited estate, were in the Bombay school, i.e. generally in Maharashtra and Gujarat, according to which school of Hindu law women who enter a *gotra* by marriage cannot take an absolute estate from deceased relatives belonging to that *gotra*, but

¹ [1961] 2 M.L.J. 372, AIR 1962 Mad. 256.

² Constructive possession is contemplated: *Kotturuswami v. Setra* AIR 1959 S.C. 577, [1959] S.C.J. 437, [1959] 1 M.L.J. (SC) 158; *Jamuna v. Ramanup* AIR 1960 Pat. 182; *Yamunabai v. Ram* AIR 1960 Bom. 463, 61 Bom. L.R. 1316; and where the widow had forfeited for re-marriage she was not 'possessed': *Bisarti v. Sukarti* AIR 1960 M.P. 156. If she owned the equity of redemption she was 'possessed': *Arumuga v. Nachimuthu* AIR 1958 Mad. 459, [1958] 2 M.L.J. 154; so also where her assets had vested in the Receiver in insolvency: *Krishna* (cited above); and when they were invested in her name in Government securities under the provisions of a statute: *Saila v. Saila* AIR 1961 Cal. 26; and when she had granted a permanent lease: *Ram v. Jago* AIR 1962 Pat. 131.

that all other female heirs, including heirs to the estates of females, took an absolute estate.¹ It is important to realize that when a female entitled to a share at a partition between coparceners (§ 528) dies before the share is actually divided by metes and bounds it will pass to her heirs under the HSA, since she is 'possessed' of it, and the old rule of Hindu law postponing her right until division by metes and bounds is abrogated.² For further, minor, exceptions see § 682.

676. The exceptions to the general abolition of the limited estate lie in the cases where the limited owner had alienated the estate or part of it improperly, so as not to bind the reversion, prior to 17 June 1956: in those cases the property was not 'possessed' by her,³ the rights of the reversioners to recover the property after the cessation of her interest survive notwithstanding the HSA,⁴ and when that cessation happens the nearest reversioner, sought out according to the old law,⁵ will be able to recover the estate in question from the alienees or their successors in title. To this extent and in the marginal cases mentioned in § 674 the limited estate is still current, even in India.

677. *How was the limited estate acquired?* Formerly a woman might own property subject to the limited estate by inheriting from a male or from a female, by taking a share at a

¹ *Gandhi v. Bai Jadb* (1899) 24 Bom. 192 (FB); *Dhondappa v. Kasabai* AIR 1949 Nag. 206, [1948] Nag. 936.

² *Munnalal v. Rajkumar* AIR 1962 S.C. 1493, 1499-1500. Since in that case the preliminary decree had been passed we ought not, strictly, to extend the Supreme Court's ruling to cases where the coparceners themselves survived and had not exercised their right to initiate a severance. In such cases, one would suppose, the Privy Council's ruling in *Pratapmull v. Dhanbati* (cited at § 526) continued to apply, notwithstanding the Supreme Court's dictum to the contrary. Since it cannot be the law that all females are 'possessed' of shares in undivided coparcenary property prior to a severance of status, the *ratio* of this case must not be supposed to cover cases in which status is not severed. It is remarkable that it applies to cases where, at Anglo-Hindu law, not even an interest had arisen in her favour.

³ *Kotturuswami v. Setra* [1959] 1 M.L.J. (SC) 158, [1959] S.C.J. 437, AIR 1959 S.C. 577. § 675.

⁴ *Amar v. Sewa* AIR 1960 Pun. 530 (FB); *Harak v. Kailash* AIR 1958 Pat. 581 (FB). A different view was taken in *B. Hanuman v. Indratwati* AIR 1958 All. 304.

⁵ *Bapurao v. Neroji* (1960) 63 Bom. L.R. 576. A different view in *Lateshwar v. Uma* AIR 1958 Pat. 502 was disapproved: see § 589 n. 3.

partition of joint-family property, by receiving a legacy from a male expressed in such terms that a presumption was excluded that she took an absolute estate like a man, by compromises or awards of arbitrators, by gift from a manager of the joint-family in lieu of payments of maintenance, by deed from her husband at the time of separation from him, or by her own acquisition of property in such circumstances that it was evident that she acquired with the intention of having in the property the estate of a female heir.¹

W, a widow, acquired by adverse possession two plots of land. The first she had originally taken as heir to her deceased husband, but she had forfeited it by marrying a second husband, *H*. Upon attempts being made to recover it she refused to part with it and had held it adversely to the reversioners for more than 12 years. On the death of her second husband *W* seized a portion of the property of his joint family and was claiming that she inherited it from *H* as his heir during the 12 years since his death. In respect of the first plot she had prescribed for an absolute estate for herself, and it would descend as *stridhanam*.² In respect of the second she prescribed for her deceased husband's estate, and on her death, surrender, or forfeiture the next reversioner of *H* would be entitled to it.³

678. *The powers of the owner of the limited estate.* The female owner fully represented the estate⁴ and as we shall see (§ 686) normally was alone entitled to sue and be sued in respect of the inheritance. She was alone entitled to possession and control of the estate, the practice of appointing a receiver to receive its income and control her expenditure was confined to unusual circumstances (§ 698); and the court discouraged trifling interferences with her management. She was in many ways comparable with the manager of a joint Hindu family. But she was subject to legal limitation in her enjoyment of corpus and income alike, and in respect of her right to create title in others. Her estate endured (§ 695) until forfeiture by adoption or by remarriage,

¹ *Sampat v. Surajmal* AIR 1959 Bom. 504, 59 Bom. L.R. 1112; *Chattar v. Roshan* [1946] Nag. 159.

² *Kirpal v. Bachan* (1957) 21 S.C.J. 438; *Satgur v. Kishore* (1919) 46 I.A. 197, 42 All. 152; *M. Satyanarayana v. J. Veeraj* AIR 1959 An. P. 79 (FB), [1958] 2 An. W.R. 497. § 628.

³ *M. Satyanarayana* (cited above); *Singhai v. Ujjay* AIR 1961 S.C. 1334, [1961] 2 S.C.J. 680; *Thailambal v. Kesavan* AIR 1957 Ker. 86, 90, [1957] Ker. 287.

⁴ *Radharani v. Brindarani* AIR 1936 Cal. 392, 63 C.L.J. 263; *Viraraju v. Venkataratnam* AIR 1939 Mad. 98, 48 L.W. 692.

surrender (§ 696), or death. In the meanwhile she might apply its profits to her maintenance at her discretion. To meet her necessary requirements and commitments¹ she could consume or alienate the corpus as well as the income.² She was by no means obliged to starve herself to keep the estate for the reversion,³ but to sell it in order to provide herself with maintenance for her life, where the consideration would be more than sufficient to keep her if well invested, would be unjustified and would not bind the reversion.⁴

679. In addition to her power of alienation for maintenance of herself and the dependants of the last male holder she had circumscribed powers of alienation for other necessary or beneficial purposes. It was believed until 1956 that women's general inexperience in financial matters left them a prey to dishonest dealings, and the limits which the law set to their powers were devised as much for their own protection as for that of the reversion. The position after 1956, as we have seen, is that testators or intending testators or donors are saddled with the responsibility of determining whether their female legatees, donees, or heirs are, or would be, competent to manage and enjoy the property in question without the restrictions which could, if the answer were negative, be imposed by the appropriate instrument (§ 674).

680. Before we proceed to examine the restrictions which formerly existed by operation of law it is necessary to observe a distinction between classes of property which, though acquired by a limited owner from the limited estate, would not in every case be subject to the restrictions. The income from the estate was, unless it was attached to pay the debts of the last male holder,⁵ at her absolute disposal.⁶ If she accumulated it, or any of it, in a fund distinct from the

¹ For example the maintenance, to take an extreme case, of the last male holder's indigent married daughter: *Kotrabasavva v. Veerabhadrappa* AIR 1942 Mad. 313, [1942] 1 M.L.J. 235.

² *Ramsumram v. Shyam* AIR 1922 P.C. 356, 49 I.A. 342, 44 M.L.J. 751.

³ *Neelambal v. Rajarathnam* AIR 1956 Mad. 336, [1956] 1 M.L.J. 245.

⁴ *Gyanu v. Sarubai* AIR 1943 Bom. 266, 45 Bom. L.R. 477.

⁵ *Phool v. Rikhi* (1935) 57 All. 714; AIR 1935 All. 261.

⁶ *Hurrydoss v. Uppoornah* (1856) 6 M.I.A. 433.

estate itself it passed on her death as *stridhanam*. A doubt arose, when, instead of investing or otherwise dealing with it and instead of manifesting an intention separately to enjoy it, she allowed it to accumulate with the estate. The dominant view is that the presumption must be that it will devolve as *stridhanam*, and that therefore the reversion has no interest in it at any time. The reason is that she had at all times complete control over it, and the burden of showing that she had merged or blended it with the estate (which she might do at any time at her option¹) lay on the one who asserted it.² This position was established in South India and Calcutta,³ but an unfortunate decision in the Privy Council⁴ led some Northern Indian courts to hold that the contrary presumption existed, namely that the *stridhanam* heirs must prove that she did not intend to merge the accumulations or to allow them to accrue to the parent estate.⁵ The southern view is more logical, and dicta in the most recent Supreme Court case on the topic of purchases out of income⁶ point in the same direction. If the other view were to be correct reversioners could question a widow's alienation of accumulations of income from the estate if the alienee were unable to show that she had formed an intention to sever them from the estate *prior* to the disputed alienation — which can hardly be correct. Quite otherwise is the position regarding the accumulated or unrealized income from property in which the woman had a life estate. Even if she evinces no distinct intention to appropriate the income to herself or to separate it from the corpus, it is at her absolute disposal, and the

¹ *Rajah v. Sundara* AIR 1918 P.C. 156, 46 I.A. 64, 42 Mad. 581; *Sitaji v. Bijendra* AIR 1954 S.C. 601, 605.

² *Parthasarathy v. Venkatadri* AIR 1922 Mad. 457 (FB), 46 Mad. 190, 220. On appeal, *Venkatadri v. Parthasarathi* AIR 1925 P.C. 105, 108-9, 52 I.A. 214, 48 Mad. 312; *Ayiswaryanandaji v. Sivaji* AIR 1926 Mad. 84, 49 Mad. 116, 119-51; *Harihar Singh v. Deonarayan* [1954] Nag. 692, 704-7.

³ *Ayiswaryanandaji* (cited above); *Ganu v. Shriram* AIR 1954 Nag. 353; *Keshav v. Maruti* AIR 1922 Bom. 144, 23 Bom. L.R. 803; *Tustu v. Kali* AIR 1957 Cal. 122. See also *Balasubramanya v. Subbaya* AIR 1938 P.C. 34, 65 I.A. 93, [1938] Mad. 551.

⁴ *Nabakishore v. Upendrakishore* AIR 1922 P.C. 39, 42 M.L.J. 253, 256, 24 Bom. L.R. 346 (PC).

⁵ *Bhagwan v. Bitton* AIR 1945 All. 227, [1945] All. 148; *Ram v. Krishna* AIR 1939 Pat. 364, 182 I.C. 982.

⁶ *Sitaji v. Bijendra* AIR 1954 S.C. 601, 605 col. i.

remainderman has no interest in it at her death (unless he happens also to be her heir).¹

681. While property bought out of income would belong to the limited owner, purchases financed by a sale or mortgage of the estate were impressed with the character of the estate. There had been merely a change of identity of the objects constituting the estate.² The limited owner might by her conduct or declaration indicate an intention to treat her self-acquisitions as an accretion to the estate,³ and the doctrine of blending applies as in the case of the manager of a coparcenary (§ 549).

682. On the other hand two small, but not unimportant, exceptions to the general rules of the limited estate must be noticed. According to the Mithila school moveable property belonging to the estate could freely be alienated as if it were in all respects *stridhanam*.⁴ According to the *Vyavahara-Mayukha* the moveables inherited by a female from her husband, son, etc. (§ 675) might be alienated freely *inter vivos*. This convenient rule applied in Gujarat and the so-called Mayukha areas of Maharashtra (§ 24).⁵

683. To revert to the general rules, so long as her estate endured the female owner could give a good and absolute title to a purchaser for value for a purpose coming within one of the following classes of justification :—(i) for necessity, i.e. her own needs;⁶ (ii) for the benefit of the estate, i.e. to prevent its loss, destruction, diminution in value (though she was under no positive obligation to save it from ruin);⁷ (iii) for the fulfilment of obligations which lay upon the last male holder, for example the duty to give his daughter in marriage,⁸ or to pay the deceased husband's untainted

¹ *Mohinee v. Rash* [1937] 2 Cal. 97.

² *Tod v. Begum* AIR 1960 M.P. 64.

³ As in *Ajit v. Nagendra*, AIR 1960 Cal. 484, 488.

⁴ *Sureshwar v. Maheshwari* (1921) 47 I.A. 233, 238, 48 Cal. 100; *Jagannath v. Suraj* AIR 1937 Pat. 483, 170 I.C. 777.

⁵ *Chamanlal v. Bai* (1934) 58 Bom. 246, 36 Bom. L.R. 152. Bombay Mitakshara cases followed the general law: *Pandharinath v. Govind* (1908) 32 Bom. 59, 9 Bom. L.R. 1305.

⁶ *Rajagopalachariar v. Sami* AIR 1926 Mad. 517, 50 M.L.J. 221.

⁷ *Hunoomanpersaud v. Babooee* (1856) 6 M.I.A. 393.

⁸ See § 689.

debts, even if these had in fact become time-barred.¹ She might not alienate for a speculative, wasteful, unnecessary or unbeneficial purpose, nor to carry out schemes which, though masquerading as needful in the spiritual interests of the last male holder (such as her deceased husband, in the case of a widow) were in reality directed to private objects. In general modern cases tend to make very little distinction between the powers of a female limited owner to alienate for valuable consideration and those of a manager of a joint family (§ 437). It has been held that there is a difference between the authority of a manager to continue a joint-family business and to bind the family for debts incurred for this purpose and the power of a widow to run a business inherited from her husband.² It seems that the wide, but none the less controversial, powers of the manager (§ 457) depend upon the intention of the separating coparceners as evidenced by their agreement or conduct; while the widow inheriting a business in which she had not participated was not necessarily authorized by law to incur debts which were not evidently for the benefit of the estate, and could not come within the description of 'necessity'. In all such cases the widow's position must be seen in the light of its own facts. Similarly it depended upon the state of the facts whether a limited owner intended to bind the limited estate or herself personally when she incurred an unsecured debt. There was no presumption that any debt she incurred must bind the estate, even if it was for a purpose which would come within the authorized classes of binding purpose. At any rate, if it could be shown that she intended or must have intended to bind the estate rather than her *stridhanam* (if any) there was no distinction between a simple debt and a debt charged upon that estate.³

684. What a prudent man would approve of could hardly fail to be justified as 'beneficial'.⁴ But many cases would be on the borderline. Examples come readily to mind. Could she borrow to turn a hotel into a motel with the hope of obtaining a greater income from it? Could she mortgage

¹ *Chandrika v. Bhagwan* (1940) 15 Luck. 167, AIR 1940 Oudh 93, 95; § 503.

² *Ramaji v. Manohar* AIR 1961 Bom. 169, 180-1.

³ *Dhondo v. Mishrilal* AIR 1936 Bom. 59, 38 Bom. L.R. 6 (FB).

⁴ *Jagannadham v. Vighneswarudu* AIR 1932 Mad. 177, 55 Mad. 216.

an estate to buy a vehicle with which she might more quickly and regularly see the state of the farms for herself? The test is not whether the reversioners might stand to lose then, or ultimately. The restrictions upon her power of alienation were an incident of the estate, not for their benefit.¹ If the purpose could be questioned the purchaser took at his own risk, and might buy or lend at a disadvantageous rate. Therefore here, as well as in the case of the manager and the *shebait* (§§ 441, 795), the rule in *Hunoomanpersaud's case*² figured, and the purchaser who made sufficient *bona fide* inquiry³ into the existence of justification was fully protected. The protection could be strengthened by what appears at first sight a curious rule of law. One might suppose that if the purchaser did *not* make sufficient *bona fide* inquiry that alone would disqualify him from retaining any interest in the estate after the limited owner's interest dropped. But the courts had to find some place in the scheme for the ancient customary practice whereby the alienations by females were authorized and consented to by near male relations: it was evident that third parties relied in some sense upon these authorizations or consents, and this fact had to be harmonized with the equitable principle enunciated in the case of *Hunoomanpersaud*. The result was that if the presumptive reversioner (§§ 685, 696) gave his consent the latter was held to raise a presumption that the alienation was justified,⁴ and the burden of proof would then be placed on the actual reversioner, when he came into his inheritance, to show that the alienee had not acted *bona fide* and that the alienation had in fact been for an improper purpose. In practice it is nearly impossible to disturb an alienation which was made with the consent of the presumptive reversioner, and it made little, if any, difference whether the latter had taken some benefit or consideration for the giving of his consent.⁵ The consent if properly given is evidence that the alienee made sufficient *bona fide* inquiry as to the presence of justifying circumstances. Where the presumptive reversioner gives his consent, and even

¹ *Jaisri v. Rajdewan* [1962] S.C.J. 578, [1962] 1 An. W.R. 258 (SC).

² See above, § 93. ³ *Karuppu v. Sellammal* [1959] 1 M.L.J. 173.

⁴ *Rangasami v. Nachiappa* AIR 1918 P.C. 196, 46 I.A. 72, 42 Mad. 523 (PC); *Kalishanker v. Dhirendra* AIR 1954 S.C. 505, [1954] S.C.J. 670, [1955] SCR 467.

⁵ *Sahu v. Mukand* [1955] S.C.J. 417, AIR 1955 S.C. 481.

participates in the negotiations and their outcome, without a full knowledge of what is intended or of its probable consequences to himself and others, he himself, or the actual reversioner when the limited estate comes to an end, may upset the transaction.¹ *A fortiori*, where the consenting reversioner was in collusion with the widow or her alienee to the prejudice of the reversion as a whole.

685. The rights of reversioners to protect the reversion will be considered below (§ 698). It is desirable at this stage to see who they are. We have mentioned the 'presumptive reversioner'. He or she is (unless a statute, such as the Baroda Hindu Nibandha, provides otherwise) the person who would be the next heir of the last male holder if the latter died when the limited owner's estate ceased. So long as that estate endures there is no reversioner. But there is always a presumptive reversioner, wherever a limited estate exists, who has an interest in the estate's being free, when it falls into possession in the hands of the eventual actual reversioner, from improper encumbrances and waste. It will already be clear that the widow has a far more comprehensive right in the property than a life tenant. The reversioners are also not remaindermen of a life estate. During the subsistence of the limited estate any reversioner, even the presumptive reversioner, has only a *spes successionis*;² he has no transferable interest in the estate — for he may die before the estate falls to the reversion.

686. A limited owner might bind the reversion by a compromise entered into *bona fide* to settle an existing dispute³ provided that the compromise was in the interest of the estate.⁴ A decree, even an *ex parte* decree, fairly and properly obtained against her in respect of the estate will likewise bind the reversioners, though they have no right to be represented in the proceedings, and do not claim under or

¹ *T. V. R. Subbu v. M. Raghava* AIR 1961 S.C. 797, 801 col. i, [1961] 2 S.C.J. 9, [1961] 2 M.L.J. 1 (SC). In that case the reversioner was actually a party to the arrangement, but his conduct showed an ignorance of the legal position and an approval of the transactions for the limited owners' lives only.

² *Kalipada v. Palani* AIR 1953 S.C. 125, 130, [1953] S.C.J. 208, [1953] SCR 503.

³ *Pullayya v. Appanna* AIR 1957 An. P. 846, [1956] An. W.R. 1125.

⁴ *Phool v. Prem* [1953] 2 All. 195, 209 (SC), AIR 1952 S.C. 207.

through her.¹ The general rule of *res judicata* has been extended so that an issue settled for or against the widow as limited owner binds all the reversioners when her estate ceases.

687. Courts of equity look favourably on *bona fide* family arrangements which compose or avert actual or impending disputes which would otherwise waste the estate in litigation. A family composition entered into fairly to prevent litigation and put an end to a genuine claim against the estate, and thus in the interests of the estate as a whole (§ 75), will bind reversioners even though none of them may be parties to it.²

688. If a limited owner allows the estate or part of it to be acquired by adverse possession by a trespasser that trespasser may make good title against her for the rest of her tenure. But he cannot acquire rights against the reversion, and time runs against the actual reversioner from the moment when the limited owner's estate ceases, subject to one reservation, namely that in the case of a female reversioner prescription against her did not operate to the detriment of the eventual male reversioner and full owner.³

689. It is convenient to treat together the limited owner's powers of making *gifts*. Here too the presumptive reversioner's consent, if given, would make it hard for the eventual reversioner to have the transaction set aside. Alienation by testament was out of the question. Gifts were valid only if they were for *dharma*, but not *dharma* generally — merely the *dharmic* interests of the deceased male owner. Alienations for purposes conducive to the female's own spiritual benefit will not bind the estate, any more than alienations to pay her personal debts other than those for her maintenance. The Anglo-Hindu law achieved an ingenious division

¹ *Vaithialinga v. Srirangath* AIR 1925 P.C. 249, 52 I.A. 322, 28 Bom. L.R. 173; *Risal v. Balwant* AIR 1918 P.C. 87, 45 I.A. 168, 21 Bom. L.R. 511.

² *Binda v. Lalita* AIR 1936 P.C. 304, 41 C.W.N. 161, 38 Bom. L.R. 1256; *M. Ramayya v. U. Lakshmayya* AIR 1942 P.C. 54, 46 C.W.N. 1008, [1942] 2 M.L.J. 249; *Subramaniya v. Dhanabhagayathammal* [1959] 2 M.L.J. 148; *Purnananda v. Purnanandam* AIR 1961 An. P. 435, 443.

³ *Natvarlal v. Dadubhai* AIR 1954 S.C. 61, 56 Bom. L.R. 447. Derrett at (1959) 61 Bom. L.R. (Jour.) 87-90.

between allowable gifts for *dharma*. She had wider powers of alienation for purposes which were regarded as essential, such as the deceased's funeral, *sraddha* and gifts to Brahmans and cows customarily associated with the spiritual welfare of a deceased owner of property, than she had for purposes which, though undoubtedly classifiable as 'pious purposes' or 'pious observances' were in a sense luxuries and were not essential.¹ Besides the objects already mentioned purposes which were obligatory included the marriage of the deceased's daughter.² For all these purposes as much of the estate as might be necessary for them could validly be alienated even by gift.

690. Examples of pious observances were the expenses of and gifts attendant upon or associated with the marriage of a son's daughter of the deceased owner, or even (for the Anglo-Hindu law was not ungenerous in this context) that of a daughter's son or daughter's daughter,³ and gifts by a widow, for example, to her son-in-law in connexion with the marriage were by custom recognized as valid.⁴ Apart from this custom such expenses were binding if they were to a reasonable extent relative to the size of the estate and the calls upon its income. A widow, as surviving half of her husband, was entitled to spend a reasonable portion of the estate (and not more) on acts conferring spiritual benefit upon her husband. These fell into two classes, namely gifts to temples, for the erection of temples or dedicating of tanks, the furthering of charities, whether strictly religious or charitable in the wider sense, including educational charities, and in particular charities in which the deceased himself had an interest or favoured;⁵ and secondly pilgrimages,

¹ *Sardar v. Kunj* AIR 1922 P.C. 261, 264, 49 I.A. 383, 44 All. 503; *Maniruddin v. Aminuddin* AIR 1956 Pat. 142.

² *Kamla v. Bachulal* AIR 1957 S.C. 434, [1957] S.C.J. 321, [1957] SCR 452.

³ *Y. Venkatasubba v. L. Ananda* (1934) 57 Mad. 772; *Srinivasa v. A. Seshacharlu* [1942] Mad. 42, AIR 1942 Mad. 106; *Krishnamachariar v. Ramabadrin* AIR 1952 Mad. 706, [1952] Mad. 318; *Parisa v. Nataraja* AIR 1950 Mad. 337, [1950] 1 M.L.J. 90. Her daughter's daughter has been denied a right to this in *Lacchan v. Fulkunwar* AIR 1961 M.P. 239, which represents a less generous line of authority.

⁴ *Kamla* (cited above).

⁵ *C. Mahalakshamma v. B. Machamma* AIR 1961 An. P. 263, [1961] 1 An. W.R. 231; *C. Parthasarathi v. Gurulinga* AIR 1955 NUC (Mad.) 3894; *Prithipal v. Sikh* AIR 1951 Sim. 175.

and the expenses attendant upon making pilgrimages and making moderate gifts on the way and at the *tirtha* selected to recognized charitable objects as understood in Hindu custom. On the question of pilgrimages, which are often an excuse for mulcting the estate without any intention to benefit the former owner spiritually, the court has devised two safeguards. Firstly the pilgrimage must be intended to be made to Gaya or to any other *tirtha* where such spiritual benefit may traditionally be conferred upon the soul of the deceased that the journey there and compliance with the customary ritual there may be said to be virtually a necessity for those whose estates will bear the expense.¹ On the other hand numerous popular places of pilgrimage, visits to which will give some merit to the performer and her deceased spouse through her, have been denied such outstanding efficacy as will serve to enable the widow to bind the estate without proof of custom or the consent of the next reversioner. Apart from this somewhat useful distinction it is clear that disproportionately lengthy or unreasonably expensive pilgrimages will not be recognized, for the expenses incurred cannot be said to be obligatory in any sense.² A widow who chooses to go to Hardwar from Trivandrum, when she might equally effectively visit Rameshwaram, and a widow resident in Bombay who visits Prayag when she might equally well visit Pandharpur, risks the difficulties attendant upon the court's declaring her charges upon the estate invalid beyond her own tenure of the estate.

691. In all cases where the money raised for the 'pious observance' has been excessive, or the gift has been unreasonably large, the court cannot substitute its own judgment for that of the widow, and the transaction will be set aside in its entirety.³ It depends upon the facts of each case what proportion will be allowable.⁴

¹ See Raghavachariar, p. 535.

² *Bai v. Chimanlal* (1928) 30 Bom. L.R. 685, AIR 1928 Bom. 238 is the happy medium between the lax *Khub v. Ajodhya* (1915) 43 Cal. 574 and the strict *Hari v. Bajrang* (1909) 13 C.W.N. 544. *Shripati v. Vishwanath* AIR 1955 Bom. 457, 57 Bom. L.R. 840, 842. Raghavachariar's comments, p. 535, n. 203, are of interest.

³ *Thakurji v. Parmeshwar* AIR 1960 All. 339, 346-7.

⁴ *E. Galb v. B. Veeranarayana* AIR 1957 An. P. 257, [1956] An. W.R. 919; *Chandradip v. Mahip* AIR 1960 Pat. 112.

692. Another category of allowable expenditure of the estate which cannot fairly be placed in the class of 'essential' *dharmaic* payment, or in the class of 'pious observance', is the widow's peculiar power to spend for the payment of the private untainted debts of her deceased husband, whether the estate that is used is that of the husband himself or that of his son who died with the Pious Obligation (§ 503) unfulfilled.¹ She is entitled to encumber the estate in order to pay these even if they have become time-barred.² She does not enjoy the same right in the case of her son's time-barred debts, nor, needless to say, her own.³

693. We have seen that the reversion is not bound by an improper alienation. A curious and embarrassing hindrance to a widow's or daughter's transactions was the rule that co-widows and daughters inheriting an estate jointly were bound to seek each other's consent before alienating even for necessity.⁴ Though widows or daughters might split the estate between them for convenience of management and enjoyment, neither might validly bind the whole without the concurrence of the other. This difficulty could be removed by agreement between them, whereby each renounced the right of survivorship from the other,⁵ but whether this is correct, in view of the fraud which this may inflict upon the reversion at large, remains to be settled.

694. Though an alienation might not be binding upon the reversion, because it was excessive or improper or the presumptive reversioner's consent was improperly obtained or did not, in the actual case, preclude the transaction's being impeached by the actual reversioner, there was never any doubt but that it would bind the limited owner herself. For she could not derogate from her own grant, and no

¹ *Bhau v. Gopala* (1887) 11 Bom. 325; *Chinta v. L. Papayya* [1955] 1 An. W.R. 44, AIR 1955 An. 97. A different view was taken by Mukherjea, p. 96; *Sheo v. Sheo* (1921) 43 All. 604.

² *Raja v. Chiranjeevulu* AIR 1955 Or. 17.

³ *Raja* (cited above); *Shankar v. Rudra* AIR 1946 Oudh 110, 116, 222 I.C. 549.

⁴ *Appalasuri v. Kannamma* AIR 1926 Mad. 6, 49 M.L.J. 479; *Gauri v. Gaya* AIR 1928 P.C. 251, 55 I.A. 399, 31 Bom. L.R. 1; *Telumalai v. Natesachari* AIR 1944 Mad. 310, [1944] 1 M.L.J. 201; *Beni v. Ram* AIR 1954 Pat. 451.

⁵ *B. Venkata v. Janaki* AIR 1959 An. P. 171, [1958] 2 An. W.R. 350.

reversioner had the right to have an alienation set aside until the estate devolved upon him as actual reversioner. Thus it was true to say that a limited owner could always alienate for the duration of her own estate.¹ When her rights ceased, for whatever reason, the alienee's dropped with them.² In *Nagarathinathachi v. Karpagathachi*³ the two widows, instead of making a simple partition under which each might take a share for her own life, entered into a transaction which was held to have conveyed to each the interest of the other in the items comprising the shares. Each then had an interest *pur autre vie* (for the duration of the other's life), so that when the first widow to die died leaving an heir the latter took the share for so long as the other widow lived, and the surviving widow took nothing by survivorship.

695. Termination of the estate and rights of reversioners. The birth of a posthumous son divested a widow or daughter; so also the adoption by a widow of a predeceased coparcener divested the widow of a sole surviving coparcener (§ 188). When a widow adopted she forfeited half or the whole of her estate, depending upon whether or not she had taken it under the Act of 1937 (§ 606). A widow forfeited when she remarried. This was so whether she remarried according to caste custom,⁴ or in reliance upon the Hindu Widows' Remarriage Act, 1856 (§ 216).⁵ A mother who remarried forfeited the estate of her son if he had inherited the property from her husband and died leaving his mother his heir; but she did not forfeit any property the son had acquired himself.⁶ Nor did a woman forfeit for a second remarriage the property of her son obtained from his father if the remarriage took place after the death of that son in the interval between the two remarriages. For when she remarried for

¹ *Kalishanker v. Dhirendra* AIR 1954 S.C. 505, [1954] S.C.J. 670, [1955] SCR 467.

² *Bebea v. Roy* (1881) 8 I.A. 210, 8 Cal. 224; per Mukherjea, J., in AIR 1954 S.C. 61, 68, [1954] SCR 339, 356.

³ AIR 1962 Mad. 482, [1962] 2 M.L.J. 312.

⁴ *Hira v. Bodhi* AIR 1954 Or. 172; *Rama v. Sakhu* AIR 1954 Bom. 315, 56 Bom. L.R. 227. The opposite view expressed in *Ram v. Occha* AIR 1951 M.B. 97 must be taken to have been overruled by *Kishan v. Arjun* AIR 1959 M.P. 429.

⁵ *Thangavelu v. Lakshmi* [1957] 2 M.L.J. 132, AIR 1957 Mad. 534.

⁶ *Thayamma v. Giriyanma* AIR 1960 Mys. 176.

the second time she was not the widow of the man whose son's estate was in question.¹

696. We know already that the limited estate terminates at the latest with the limited owner's death. Since the HSA came into force there remains, generally, no other way in which the tenure can cease, even in respect of interests subsisting before the Act (§ 675), i.e. a widow cannot surrender in 1963 in order to enable a reversioner to obtain possession of property she improperly alienated in 1955: the reversioners must wait until she dies. But in respect of estates within HSA, s. 14 (2) the other methods of termination may well survive. In particular surrender has caused difficulty and must be described at length. Surrender was the self-effacement of the widow, by which she worked her own 'death'.² Surrender was *not* in a legal sense a transfer,³ whatever it might be from a practical point of view. She could surrender only the whole estate and not parts of it.⁴ She could not surrender to an individual as such, still less to two individuals as such,⁵ but only into the hands of whoever happened to be the presumptive reversioner. She accelerated, independently of any volition of the next reversioner,⁶ the opening of the succession to that next heir. A conditional surrender was impossible. A surrender arranged upon terms that parts of the estate were to pass to nominees of the limited owner were invalid as mere devices to divide the estate between the limited owner and the presumptive reversioner, to defraud the reversion as a whole.⁷ Such arrangements were voidable, and a remoter reversioner could impeach them.⁸ On the other hand, a gift by the widow of the entire estate to the presumptive reversioner, followed by a gift by him to a nominee of the widow, would be valid, for he would be master of the estate

¹ *Faguniswari v. Dhum* AIR 1951 Cal. 269.

² *Kamlabai v. Sheo* AIR 1958 S.C. 914. Cf. §§ 537-8.

³ *Thiruvankidaswami v. Palani* [1962] 1 M.L.J. 224.

⁴ *Kamlabai* (cited above).

⁵ *Mummareddi v. P. Durairaja* [1951] SCR 655, AIR 1952 S.C. 109.

⁶ Dicta in *C. Venkateswarlu v. Kanyadhara* AIR 1953 Mad. 551 are no longer good law where they conflict with *Natvarlal* (cited above) and *Mummareddi* (cited above); see *A. Rami v. A. Rosamma* AIR 1955 Andh. 232 (FB).

⁷ *Mummareddi* (cited above); *Kuppanna v. Peruma* AIR 1960 Mad. 154.

⁸ *Mangilal v. Barkatulla* AIR 1956 All. 118.

after a valid surrender;¹ and the transactions might well be recorded in one document. A surrender by a widow to, say, her nephew, with the consent of the presumptive reversioner, say, her father-in-law, would be invalid: it would be tantamount to a gift unauthorized by law in which the consent of the presumptive reversioner would not preclude the impeaching of the transaction by the actual reversioner.

697. It was not, however, inconsistent with the validity of a surrender that the limited owner should stipulate for her maintenance and that of any female reversioner who intervened between her and the next male reversioner.² Where she stipulates for maintenance this is valid and a slice of the estate may be transferred to her by the reversioner to provide it, but if she does not stipulate at the time she surrenders she cannot demand maintenance from him thereafter.³ An adopted son, adopted after her surrender, is entitled to divest the surrenderee and his transferees (§ 189), since the doctrine of 'relation back' which operated until 21 December 1956 removed retrospectively her title, wholly or in part, and hence her power to surrender the estate.⁴

698. The rights of reversioners to protect the interest of the reversion are threefold. Firstly they may sue for an injunction to restrain waste,⁵ that is to say violent mishandling of the estate which would lead to its ceasing to have the value which it might reasonably be expected to have when the next reversioner succeeds to it. Waste does not include imprudent alienations as such; nor may the limited owner be restrained under this head from normal enjoyment of the property, for example felling fully-grown trees in an inherited forest.⁶ An analogous, though rarely-granted, remedy is to ask for the appointment of a receiver, which

¹ *Mummareddi* (cited above).

² *Venkateswarlu v. Kanyadhara* AIR 1953 Mad. 551, [1953] 1 M.L.J. 167.

³ *V. Kondamma v. V. Seshamma* AIR 1957 An. P. 156, [1956] An. W.R. 415 (FB).

⁴ *Bahubali v. Gundappa* (1954) 56 Bom. L.R. 501, AIR 1954 Bom. 451 (FB).

⁵ *Kailash v. Kanchani* AIR 1934 Cal. 136, 149 I.C. 616; *Arunachalam v. Krishnaveni* AIR 1941 Mad. 724, [1941] 1 M.L.J. 697.

⁶ *P. Seshamma v. N. Appalamma* [1955] An. W.R. 633.

is especially suitable where the limited owner is under the influence of a stranger who is systematically wasting the estate. Secondly the next reversioner in a representative capacity may sue for a declaration that an alienation, or the adverse possession of a trespasser, will not bind the reversion beyond the limited owner's own tenure. Thirdly the next reversioner when succession opens to him may sue for possession of improperly alienated property. Alternatively he may ignore the transaction, treating it as void (provided he has never approved of it), and his alienee may raise against the possessor the same pleas that he himself could have raised.¹ The actual reversioner's right to sue is terminated 12 years after his cause of action arises (the cessation of the limited estate). If he dies while his suit is pending his heir may step into his shoes.²

699. The suit for a declaration is appropriate to a situation where the limited owner's estate is still subsisting. The suit for possession is appropriate when the limited estate comes to an end. When suing for possession the actual reversioner places upon the alienee, or the alienee's alienee,³ the burden of proving that the alienation was made for justified cause, that is for necessity or benefit of the estate or for one of the special causes referred to above. It may happen that the alienee is able to prove that he made sufficient *bona fide* inquiry (§ 684), in which case the reversioner's remedy is excluded. In any case it may transpire that the alienation was supported by some necessity, but not sufficient to justify the whole transaction. In such cases, as with analogous cases of alienations by managers of joint families (§ 483), if the amount not covered by necessity is small the court may uphold the entire transaction,⁴ but if it is large the transaction will be set aside on terms, namely that the reversioner repays to the alienee who is dispossessed the value of that portion of the consideration which was covered by necessity,

¹ The reversioner's alternatives are set out in *Bijoy v. Krishna* (1907) 34 I.A. 87, 34 Cal. 329, 333 (PC), 4 All. L.J. 329, 331 (PC). The alienee's position is explained in *Mahibub v. Vithal* AIR 1954 Bom. 311, 56 Bom. L.R. 221.

² *Thakur v. Dipa* (1930) 10 Pat. 352, AIR 1931 Pat. 442.

³ *Kalishanker v. Dhirendra* AIR 1954 S.C. 505, [1954] S.C.J. 670, [1955] SCR 467.

⁴ *Sushila v. Bibhuti* AIR 1961 Cal. 180.

etc.¹ If the reversioner in such circumstances exercises his option of ignoring the transaction and disaffirming it by alienation to a third party, the latter is saddled with the task of obtaining possession under conditions resembling those which would have obtained had the reversioner himself brought the action against the possessor of the estate. It is not the practice to award mesne profits for the period of the limited owner's estate. If she alienated her alienee was not, as we have seen (§ 694), a trespasser during her tenure; he became an unauthorized possessor from the moment when it dropped.

FURTHER READING

Modern Hindu Law

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- J. D. Mayne, *Treatise on Hindu Law and Usage*, ed. N. Chandra-sekhara Aiyar, 11th edn, chh. xii-xviii.
 N. R. Raghavachariar, op. cit., chh. xii-xvi.
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 R. Sarvadhikari, *Principles of the Hindu Law of Inheritance*, 2nd edn, Madras, 1922.
 G. D. Banerjee, *Hindu Law of Marriage and Stridhan*, 5th edn, Calcutta, 1923.
 The best treatment of *stridhanam* is the thesis by P. W. Rege (Ph.D., London University, 1960), a part of which has appeared in the Magazine of the Government Law College, Bombay, vol. 30 (1961-2), pp. 46-62.

The Historical Background

- P. V. Kane, *History of Dharmasastra*, III, pp. 543-802.

¹ *Sumantrabai v. Batti* AIR 1955 Nag. 299, [1956] Nag. 48. The rule in *Krishan v. Nathu* AIR 1927 P.C. 37 (§ 483 above) applies to such alienations as to alienations of joint-family property.

CHAPTER EIGHT

Testamentary Succession

THE ORIGIN OF THE HINDU WILL

700. 'Hindu wills' differ from other wills subject to the laws of India and Pakistan in a few respects. These can be traced to the history of the introduction and development of testamentary disposition in India and in particular amongst Hindus. The details of this history are beyond the scope of this book, but the outlines are needed in order that some of the peculiarities can be understood. There was at one time some dispute as to whether the British introduced wills to Hindus, or whether the latter borrowed them from their Muslim compatriots. The English law of wills has been applied to the Hindu will, so far as may be practicable, under the heading of justice, equity and good conscience. However it is certain that although Hindus utilized the facility of leaving property by will, and testamentary disposition grew slowly in the Presidency, Supreme and later High Courts, the will in some form was known to and utilized by Hindus well before the British period. A document that looks very much like a will has survived from the Maratha period in the Deccan, and the Hindus around Negapatam were familiar with wills about 1730-40. The Hindu will before the British undertook to grant probate and to construe the document consisted principally in an order to sons or other close heirs in the position of dependants of the testator to carry out some bequests which deviated from the intestate law, for example, gifts to charity. Quite apart from gifts not completed by delivery *inter vivos*, the *smritis* certainly knew of these *post obit* gifts, and the customary law undoubtedly obliged the sons, for example, to execute them. A late medieval work contains a (? spurious) *smriti* text which refuses to recognize disposition by gift to operate after death.¹ Naturally an unrighteous or harmful disposition would not have been given effect to. The queer notion, that

¹ 'Brihaspati' cited in the *Vyavahara-nirnaya* of Varadaraja (pp. 298-9) proves a usage to the contrary.

a man could make a gift after his death, i.e. after he had lost all interest in the property, was founded securely in a doctrine of the *Mimamsa* that gifts promised, payments undertaken, and merit anticipated from instituting sacrifices, would all continue and operate for the benefit of the sacrificer even though he should die before the sacrifice could be completed.¹ The upshot of the matter was that a Hindu could in general dispose by will of that over which he had a power of gift *inter vivos*, and the legatee must be in existence in fact or in law in order to accept the 'gift' or to have acceptance made validly on his behalf. These rules have been considerably attenuated in the passage of time, as they have been found to be impractical restrictions.

THE FORM OF THE WILL AND OF ITS REVOCATION; TESTAMENTARY CAPACITY AND PROBATE

701. A will is a solemn declaration as to the ultimate intention of the owner of property concerning the disposition of that property after his death. It is ambulatory in that the words, unless unapt for that purpose, apply to the property he owns (including any that is not in his possession) at the moment of his death. It is revocable in that up to the last moment of life the testator may revoke it by substituting for it another will, or otherwise nullifying his expressed intention. Whatever existed in the nature of a will before the British period probably lacked both the ambulatory and the revocable characteristics of the modern Anglo-Hindu will, but we are not concerned with questions of purely academic interest.

702. The nominal form is not conclusive against a document's being a will. Even if it purports to be a surrender,² assignment,³ or petition,⁴ or any other type of document, but it appoints (or may be construed to appoint) an executor or executors and disposes revocably of the testator's property from the moment of his death, it will be held to be a will.

¹ Sabara-svami commenting on Jaimini's *Mimamsa-sutra*, x. 2, 58.

² *Anna Saktharam v. Basgouda* (1955) 58 Bom. L.R. 177.

³ *Ishri v. Baldeo* (1884) 11 I.A. 135, 10 Cal. 792.

⁴ *Mahomed v. Shewukram* (1874) 2 I.A. 7, 14 B.L.R. 226.

Form and Registration

703. A will need not follow any particular form, nor be in any particular language or style. It must however be in writing (unless it is privileged, see below § 705) and must be signed (or marked if the testator cannot sign his name) by the testator or signed by some other person in his presence and under his direction.¹ The signature or mark or the signature of the person signing for the testator must be placed so that it appears that it was intended to give effect to the writing as a will.² Thus if it appears in the middle of the propounded will so that documents unsigned or unmarked follow the signature it is possible that they will not be admitted to probate.³ The will must be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark or has seen some other person sign the will in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator.⁴ It is not necessary that more than one witness be present at the same time, and no particular form of attestation is necessary.⁵ An attestation of a will by a witness who is a legatee or appointee under the will is sufficient in law, though the legacy or appointment itself is void,⁶ but may not be effective in the event of the execution itself being disputed, for the executor is bound to prove execution by the evidence of attesting witnesses, if they are alive,⁷ and they may not be believed if they expect (no doubt vainly) to take a benefit under the will which they would not otherwise have: thus for two reasons attesting witnesses ought, if possible, not to be chosen from amongst legatees.

704. Formerly wills made prior to 1 September 1870 outside the Presidency of Bengal or the local limits of the ordinary original civil jurisdictions of the Bombay or Madras High Courts (i.e. those two Presidency towns), provided and to the extent that they did not relate to immoveable property

¹ Indian Succession Act, 1925, (hereafter referred to as ISA) s. 63 (a).

² ISA, s. 63 (b).

³ *Re Little* [1960] 1 All E.R. 387.

⁴ ISA, s. 63 (c).

⁵ ISA, s. 63 (c).

⁶ ISA, s. 67.

⁷ *Ram v. Aipna* [1922] 49 I.A. 413, 27 C.W.N. 485, 44 All. 495.

within those limits, and otherwise before 1 January 1927 in British India,¹ and wills made outside British India, or relating, if made in British India, to immoveable property situated outside British India until 1 April 1951² in the former Part B States or until various dates³ in the case of former Part C States,³ need not be in writing. To such wills the provisions of the Hindu Wills Act, 1870, never applied, and to their declaration or execution and attestation as well as revocation the old law of England applied as unmodified by the Wills Act of 1837, upon which the Indian statute law was to some extent modelled. In particular oral wills proved by those who heard them, and holograph wills unattested by witnesses, were normally admitted to probate. Their revocation might be oral or in any form which enabled an *animus revocandi* (intention to revoke) to be made out.⁴

705. All the foregoing relates to unprivileged wills, that is to say those executed by others than seamen at sea, or soldiers or airmen on active service. The latter, in order that their intentions shall not be frustrated for want of formalities, can execute privileged wills, which do not require all the formalities of the unprivileged will. The will can in such cases be declared orally before two witnesses present at the same time,⁵ or the testator may give instructions for the preparation of a written will which are reduced to writing in his lifetime but he dies before the instrument could be executed.⁶ The testator may write out his will with his own hand and it need not be signed or attested,⁷ or another may write it and the testator may sign it, in which case no attestation is needed.⁸ These unusual forms of will-making are explained in elaborate detail in ISA, s. 66, to which the student is referred for further particulars.

706. The revocation of a will, other than a will made before 1 September 1870 and other wills referred to in § 705 above, may be by another valid will, privileged or unprivileged. A writing declaring an intention to revoke, and executed

¹ ISA, s. 57.

² Part B States (Laws) Act, 1951.

³ Part C States (Laws) Act, 1950. See also Merged States (Laws) Act, 1949.

⁴ *Sridevi v. Venkitaparasurama* AIR 1960 Ker. 1, [1959] K.L.T. 528 (FB).

⁵ ISA, s. 66 (2) (g). ⁶ ISA, s. 66 (2) (f). ⁷ ISA, s. 66 (2) (a).

⁸ ISA, s. 66 (2) (b).

in the same way as an unprivileged will, will validly revoke a will or codicil (which is a testamentary writing used as adjunct or supplement to a will, or an amendment to it). Revocation may also be done by burning, tearing, or otherwise destroying the same by the testator himself or by some person in his presence and by his direction with the intention of revoking it.¹ A Hindu's will is not, and never has been, revoked by his marriage.² A revocation by a subsequent will may be conditional upon the efficacy of the new dispositions, and if these fail the revocation itself will then fail.³

707. When it is known that the testator kept his last will with him in a place to which he alone had access, and it was missing when that place was properly searched after his death, it is permissible to presume that he revoked it by destroying it,⁴ unless the circumstances leave room for suspicion that interested parties had access to the place of its deposit about or after the time of his death.⁵

708. Wills may be registered under the Registration Act, 1908, upon which they become documents of which copies may be obtained after the death. The step of registering the will is often taken by the testator in order to prevent the objections which disappointed relatives over-frequently raise to a will after its author's death, namely that it is a forgery. But nonregistration in no way affects the validity of the will, and the testator's failure to apply for its registration raises in itself no presumption against his testamentary capacity, the finality of his expressed intentions, or the validity of the will's dispositions.⁶ On the other hand registration alone will not dispel suspicions as to the authenticity of the dispositions and its due execution and attestation unless the

¹ ISA, s. 70. Sri P. N. Ramaswami at AIR 1960 Journal 26-8.

² ISA, Sch. III, s. 4.

³ *Antony v. Mathew* [1961] K.L.T. 500; Jarman on Wills, 8th edn, 165 ('dependent relative revocation').

⁴ *Brundaban v. Ananta* AIR 1956 Or. 151 following *Allan v. Morrison* [1900] A.C. 604; *Welch v. Phillips* (1836) 1 Moo. P.C. 299 = 12 E.R. 828.

⁵ Caution must be employed in admitting the presumption: *Padman v. Hanwanta* AIR 1915 P.C. 111, 17 Bom. L.R. 609, 29 M.L.J. 307. The presumption was not applied in *Rangrao v. Gopal* (1957) 60 Bom. L.R. 675.

⁶ *Celestine v. Josephine* AIR 1956 Mad. 566.

registering officer brought home to the testator that what was being registered was his testament.¹

Testamentary capacity

709. We must distinguish 'testamentary capacity' from 'power of disposition'. A man or woman may have the capacity to be a testator and may execute a will which will be admitted to probate; and yet it may emerge upon examination of his or her power of disposition that the will, valid as a will, cannot take effect, or can take effect only with regard to some items, or to the extent of certain dispositions. We shall consider the various classes of void dispositions in the following section. No one may hinder the course of the law of intestate succession otherwise than by a valid *positive* disposition: that is to say, if *A* writes in his will, 'I desire that none of my property shall go to my wife,' and he makes no disposition to others, and his wife is his only relative within class I of the Schedule to the HSA, the widow will take all his property. There is no testamentary capacity merely to *prevent* heirs from inheriting.

Nevertheless an evident desire that *X* shall not take may influence the court's construction of an ill-phrased bequest. *A* evinced in his will the desire that his brother, *B*, should not take his estate. *A* bequeathed property 'to my son and wife'. As the will was executed before 1927 (after which date s. 106 of the Indian Succession Act would have applied: § 704) it was urged that, since the son predeceased the testator, half the bequest passed to *B* as on an intestacy while the other half went to the widow. But it was held that as the testator desired that *B* should not take, and as there was no impossibility at Hindu law of the creation of a bequest to two legatees or the survivor of them (a kind of joint bequest), the widow was entitled to the whole bequest.²

710. No one may make a will unless he has reached the age of majority under the personal law. One attains majority at midnight before the day before the relevant anniversary of the birth. In the majority of cases (§ 44) a Hindu born at 3 p.m., 10 June 1950, will attain majority at 12 p.m., midnight, on the night 8 – 9 June 1968. A will executed by him at 7 a.m. on 9 June of that year will not be invalid for nonage. By contrast one attains one's '18th

¹ *Purnima v. Khagendra* AIR 1962 S.C. 567.

² *K. Surareddy v. K. Venkata* AIR 1960 An. P. 368, [1960] 1 An. W.R. 102.

year' at the moment he completes his 17th year, i.e. becomes 17 years old. Most Hindus attain majority, therefore, when they attain their '19th year'. Testators will notice that the permissible variant of 'completes the age of 21 years' is not 'attains his 21st year', but 'attains the age of 21 years'. Wards of Court require the sanction of the prescribed authority before their wills can be operative.

711. The testator must have at the moment of executing the will a sound and disposing mind and memory.¹ He must be aware of his duties and of the extent and nature of the property which is to be distributed amongst claimants.² If he can discriminate between the claims of a wife and a concubine, or between those of a legitimate and an illegitimate son, it is likely that he has testamentary capacity.³ A shabby provision for near and dear ones does not necessarily negate the required capacity.⁴ But if he was so weakened by sickness or otherwise that his power of discrimination had left him at the relevant time, he lacked capacity to execute a will. Except in cases where mental unsoundness is evident on the face of the document, we should not infer from the provisions of the will itself whether the testator was of sound and disposing mind. Very inconvenient and unexpected dispositions are at times made by perfectly sane people.⁵ The evidence of the testator's condition at the time of execution carries more weight than the evidence of those, even medical attendants, who guess what his condition may have been from their observation of him at other times.⁶ Eccentricity, blindness or dumbness, or other abnormalities not amounting to unsoundness of mind cannot affect the testamentary capacity; but a person who is, for example, perfectly capable of discussing business and even of contracting a marriage

¹ *Banks v. Goodfellow* 5 Q.B. 549, 567; *Battan v. Amirchand* [1948] A.C. 161 (PC), [1948] 1 M.L.J. 232 (PC).

² *Saradindu* (cited below). *Harwood v. Baker* (1840) 3 Moo. P.C. 282, 13 E.R. 117, 290/120; *Shunmugaroya v. Manikka* (1909) 36 I.A. 185, 32 Mad. 400, 11 Bom. L.R. 1206.

³ *Saradindu v. Sudhir* AIR 1923 Cal. 116, 50 Cal. 100.

⁴ *Gomtibai v. Kanchhedilal* (1949) 52 Bom. L.R. 5 (PC), [1949] 2 M.L.J. 469 (PC).

⁵ Whose mistakes do not invalidate their dispositions: *Kamala v. Kishori* AIR 1962 Pun. 196, where *Venkatachala v. Thimmajamma* AIR 1959 S.C. 443 (§ 714) is cited to illustrate the court's suspicion.

⁶ *Saradindu* (cited above).

may be unfit to incur the onerous responsibility of making his will.¹ If it is proved that he executed the will in a lucid interval even a lunatic may have testamentary capacity.

712. The testator who gives capable instructions for his will, but who is not capable of critically considering them when they are rehearsed to him afterwards, raises a problem. Strictly one might suppose that if the testator is incapable of understanding the will when it is read to him he is not capable of executing it. But this would be harsh in practice.² Therefore a testator is competent to execute a will, the provisions of which have been settled by him while of sound mind and memory, and which he generally understands and approves while they are read to him prior to execution, even though at that moment he could not spontaneously have given the necessary directions. If his mind is clear enough to *intend* what is read over to him in draft form, he has the capacity to make such an intention his will.³

713. It follows that the testator must *approve* the will read or submitted to him in draft. Quite independently of the state of his mental or physical powers at the time, it is useless for his legal adviser to proffer as a draft will something which does not correspond to the instructions, in spirit as well as the letter, and if the testator signs a document in ignorance of a material discrepancy from his instructions, the legatees under the propounded will cannot be heard to say that because the testator signed whilst of sound mind the will must of necessity be admitted to probate, whether or not it can be shown that it is inconsistent with the testator's probable intentions. The presumption is that the testator approved what he signed, whether or not previous drafts or instructions differ from the final will: and the burden of proof lies heavily on one who asserts that the properly-executed document was not approved by the testator. But in a proper case, where evidence is forthcoming that the legal adviser failed to proffer a document corresponding to the testator's instructions, and the discrepancy could easily escape the notice of a testator placed as he in fact was placed,

¹ *In the estate of Park (deceased)*. *Park v. Park* [1954] P. 89, 97.

² *Jarman on Wills*, 8th edn, 51.

³ *Ganpatrao v. Vasantrao* AIR 1932 Bom. 588, 34 Bom. L.R. 1371; *Ramesh v. Lakhan* AIR 1961 Cal. 518.

it is open to the court to reject the executed will, even if the result would be that the *propositus* dies intestate.¹ *Pardanashin* ladies' dispositions are naturally scrutinized to determine whether they correspond with their true and free wishes; ladies who, though not *pardanashin*, are customarily confined to the house, may need equal protection;² and it goes without saying that the wills of females who are not used to business must be open to closer scrutiny, to avoid all suspicion of defective *approval*, than the wills of educated persons used to complicated transactions with property.

714. A will may be refused probate if it is shown that its dispositions were obtained by undue influence.³ The burden of proof lies heavily on one who asserts that the testator was unduly influenced and that his will was overborne by that of another. But if the document contains a disposition in favour of a person who in fact was so related to the testator or was so connected with him that he would naturally exert influence over him, or where there is a legacy to a nominee of such a person, the burden is somewhat lightened, and a presumption against the legacy is raised. Where a testatrix lived for years with her *guru*, and in her will the bulk of her property was left to a temple in which the *guru* functioned as manager, an objection to the will on the ground of undue influence might prove successful. Medical attendants as well as spiritual advisers readily come under suspicion, and parents (particularly the father) or relations by marriage (particularly the husband and parents-in-law) naturally exert influence which a person who is not of independent character may find it difficult to resist. Where a will is made as part of a bargain or is executed in pursuance of, or in reliance upon, an agreement, it may be refused probate if the testator was entitled to be treated with candour, and if he was not enabled to act after full, free, and informed thought by a person standing towards him in

¹ *Wintle v. Nye* [1959] 1 All E.R. 552 (HL).

² *Hodges v. Delhi and London Bank* (1901) 27 I.A. 168, 175, 23 All. 137; *Bank of Khulna v. Jyoti* AIR 1940 P.C. 147, 150, 67 I.A. 377, 42 Bom. L.R. 1139 (PC).

³ *Gomtibai v. Kanchhedilal* (1949) 52 Bom. L.R. 5 (PC), [1949] 2 M.L.J. 469 (PC); *Nareesh v. Pareesh* AIR 1955 S.C. 363, [1955] S.C.J. 293, [1955] SCR 1035.

a fiduciary relationship and now seeking to benefit under the will.¹

A, a young woman, contemplating marriage with *B*, is induced by *B* to execute a will whereby *A* bequeathed all her property to *B*, or in default of *B* to *B*'s 'lawful issue'. *B*, who was already a married man with children by his wife, went through a ceremony of marriage with *A*. The court will pronounce against the will on the ground of *B*'s undue influence.

If it is shown that the one who propounds the will for probate has taken a prominent part in the execution of it and has received substantial benefit under it, that is generally treated as a suspicious circumstance attending the execution, and the propounder is required to remove the said suspicion by clear and satisfactory evidence.² Registration as such by no means proves due execution and attestation, and the propounder may be unable to dispel suspicious circumstances.³ This is a difficulty which beneficiaries under a will have to face quite independently of any positive assertion that a legacy was given under undue influence. Two questions may be asked: (i) was the will as propounded duly executed and attested; and (ii) if duly executed and attested, did it contain dispositions vitiated by undue influence?

To prove undue influence it is essential to show not only that the beneficiary or other person who it is claimed exerted that influence was in a position, or might have been tempted, to exert it, but also that he actually did so.⁴ It must be shown that without that influence a similar disposition could hardly have been made. In practice it is advisable for any proposed legatee whose legacy may be impugned in this fashion to protect himself, and the will, by providing against such a contingency. This is easily done. The suspicion or, as the case may be, presumption of undue influence can be rebutted by showing that the testator availed himself of independent advice when framing and executing his will. Advice is independent for this purpose if the person offering it would not stand to gain from the disposition objected to,

¹ *Wintle v. Nye* [1959] 1 All E.R. 552 (HL). For the jurisdiction of a court of equity see *Zamet v. Hyman* [1961] 3 All E.R. 933, 938 (CA). § 725.

² *H. Venkatachala v. B. N. Thimmajamma* [1959] S.C.J. 507, AIR 1959 S.C. 443.

³ *Purnima v. Khagendra* cited at § 708 above.

⁴ See *Gomtibai*, cited above, also *Bur v. Uttam* (1910) 38 I.A. 13, 38 Cal. 355.

whether or not he is a legatee under the will. If the testator's intention can be shown to have been free and unconstrained (this is the best method of showing it) the charge that he was unduly influenced is removed. Where individual bequests were obtained by undue influence it is possible for them alone to be struck out.

Probate

715. It is the duty of an executor to propound the will for probate. Even without probate, however, the property of the deceased vests in the executor as such.¹ Probate confirms the executor's title and authorizes him to carry out the directions of the will in accordance with law. The subject of grant of probate, letters of administration, and the qualifications and duties of legal representatives are beyond the scope of this work, but it should be noted that Hindu wills which were required to be in writing and attested by two witnesses prior to the commencement of the Indian Succession (Amendment) Act, 1926 (§ 704) must be admitted to probate, or letters of administration must be issued with the will annexed, before the executor or legatee or anyone else, such as a legatee's legatee or heir, can obtain a decree at law.² Debts owed to the deceased in such cases cannot be collected by suit or in execution without this formality. After the grant of probate (or until it is recalled or revoked) only the executor to whom it is granted may sue or act as representative of the deceased.³ Thus while it is true that probate is not essential for the validity of the executor's authority in India, an unprobated will does not everywhere give the executor a full right to collect the entire estate, and except where the debts owed to the estate present no problems of collection it is hardly advisable to neglect probate. All wills executed after 1 September 1870 within Bengal or the original civil jurisdictions of the Madras and Bombay High Courts, or relating to immoveable property situated within those limits (§ 704), must be admitted to probate, or letters of administration with the

¹ *Venkatasubbamma v. Ramayya* (1932) 55 Mad. 443, 59 I.A. 112, AIR 1932 P.C. 92.

² ISA, s. 213. *Chandra v. Prasanna* (1911) 38 Cal. 327, 38 I.A. 7, 9 I.C. 22 (PC); *Hem v. Isolyne* AIR 1962 S.C. 1471.

³ ISA, s. 216.

will annexed must be issued, before the interested parties are fully entitled to protect their interests at law. On the other hand heirs, as such, may sue for the benefit of the estate, whether or not probate has been obtained, provided no other claimant establishes his right under the will.¹ This anomalous position persists because it is expedient to allow small estates to be distributed without the expense of proceedings to obtain probate; but further regularization of the position is inevitable before long.

716. An executor or legatee under a will which is not within s. 213 of the Indian Succession Act (§ 704) may prosecute his rights by suit irrespective of probate.

THE POWER OF DISPOSITION

Generally

717. The Hindu Succession Act provides :²

Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

718. We have already discussed (§ 599) the effect of the *Explanation*, whereby the interest in Mitakshara coparcenary property is placed within the coparcener's power of disposition (subject to the requirement that the interest shall not pass by survivorship under s. 6), and the interest of members of matrilineal joint families of Kerala are unconditionally subject to the power of testamentary disposition of their 'owners'.³

719. A Hindu may dispose by will of property over which he has a right of gift *inter vivos* or of property over which he has a power of appointment by will (§ 752). Property of which he is a manager (such as a *shebaiti* (§ 790)⁴), or in

¹ *Gopal v. Amulyakumar* AIR 1933 Cal. 234, 59 Cal. 911.

² S. 30.

³ *Sundara v. Girija* AIR 1962 Mys. 72 (FB) (Aliyasantana kutumba : nissanthathi kavaru, divided, has no power of disposition of his share under s. 36 (3) of Act 9 of 1949).

⁴ *Rajeshwar v. Gopeshwar* (1908) 35 Cal. 226, 12 C.W.N. 323. § 593.

which he has an interest ceasing at his death, or property given to him on condition (express or implied from conduct or custom)¹ that it shall revert on death to the source whence it came, cannot be disposed of by will. It goes without saying that he cannot dispose of a specific object which is not part of his estate at the time of his death;² thus a residuary bequest (§ 750) to *X* does not entitle *X* to an object which the deceased himself gave by registered deed. Nor does it entitle him to property, of which he constituted himself trustee for another³ in a *donatio mortis causa* (or 'gift in contemplation of death'), which was inchoate for want of transfer of possession by the donor to the donee,⁴ which is required for a regular *donatio mortis causa*.

A promised lands to his daughter, *D*, but never executed a deed of transfer. On his deathbed he asked his son, *S*, to give the lands to *D* and *S* agreed. After his death *A*'s will was found to contain a bequest of all his property to *S* and *C*. *D* can compel *S* to transfer the lands to her, notwithstanding the will, since *A* constituted himself a trustee for *D* in respect of them, and had constituted *S* his trustee to transfer the lands to *D*. *C* has no interest in the lands under the will.⁵

720. No one has a power of disposition which would deprive a dependant of maintenance out of the estate to which the court, after considering the extent of the estate and the demands to be satisfied from it and other relevant matters, finds him to be entitled (§ 656). The will disposes of so much of the property or such interests in it as remain free of the charge created or other arrangements approved by the court for the maintenance of dependants. For the former law on this subject see § 669.

¹ In this sense *N. Venkata v. T. Bhujangayya* AIR 1960 An. P. 412 is an illustration (Kamma custom: proved to apply, here, on intestacies also).

² Except, of course, where he exercises a power of appointment by will.

³ *Bhaskar v. Sarasvatibai* (1892) 17 Bom. 486.

⁴ *Bhaskar* (cited above). ISA, s. 191 (2).

⁵ Based on *Bhaskar* (cited above). The aid which equity brings to defective *donationes mortis causa* (as distinguished from almost all other inchoate transfers) is shown in *Richards v. Delbridge* (1874) L.R. 18 Eq. 11, 14; and *Duffield v. Elwes* (1827) 1 Bligh, N.S., 497, 530f = 4 E.R. 959, 971f.

Specially with regard to males

721. It is to be noted that *maths* (§ 811) cannot be disposed of by will of their *mahants*, though the *mahant* may indicate in his will which of his *chelas* he would suggest as his successor, and it depends upon the custom governing the question whether this nominee is actually to be appointed the next *mahant* by the patrons of the *math*. Likewise a *shebait* cannot dispose of a deity or its property by will, nor can he dispose of the *shebaiti* itself beyond any powers he may have, in default of sufficient appointment by the founder, to indicate the further succession (§ 792). A founder who is the first *shebait* has certain powers of appointment of the next and succeeding *shebait*s which are noted in the appropriate place (§ 791).

722. We have seen that a Mitakshara coparcener, who has no female heirs in class I of the Schedule to the HSA and no daughter's son capable of inheriting, and likewise any member of a joint family governed by Punjab customary law, cannot dispose of his interest, respectively, by will (§ 599).

723. Formerly a Mitakshara coparcener had no testamentary power of disposition over his undivided interest as such.¹ A series of cases assuming that the very act of bequest worked a partition of status enabling such a disposition to take effect² is almost certainly no longer authority for the proposition stated. Nevertheless where a bequest is made to one who turns out to be the sole surviving coparcener of the deceased his consent is presumed and the bequest is valid. Likewise where the bequest has, at the time of the execution of the will, the consent of all coparceners competent to consent and there is no coparcener in the womb and no minor coparcener, it will be valid, for want of a power to dispute it. Again, a rule of equity will sometimes validate an otherwise invalid bequest, as where the testator bequeaths his self-acquired property to his coparceners and his undivided interest to a stranger, whereupon the coparceners are put to their election, and cannot both take

¹ *Lakshmi v. Anandi* (1926) 53 I.A. 123, 48 All. 313.

² *Jumma v. Munsab* AIR 1922 Lah. 473, supported by *Sri S. V. Chari* at AIR 1934 Jour. 215-18. The correct position is asserted in *Mulam v. Kanchhendi* AIR 1958 M.P. 304.

the self-acquired property (i.e. approbate the will) and insist on taking the interest by survivorship (i.e. reprobate).¹ Apart from these rare cases it is a rule that a bequest of an undivided interest made before 17 June 1956 will be inoperative as a bequest and can only operate with the approval of the surviving coparceners (if they estop themselves from disputing it) or by a family arrangement,² which the law may infer from conduct, whereby the deceased's instructions are incorporated voluntarily in an agreement for the benefit of the entire family and thus binding upon minors (§ 75).

724. Formerly, according to the better view,³ a dependant whose claims during the *propositus's* lifetime were merely moral claims, for example the widowed daughter, could claim maintenance out of his property as much in the hands of his legatees as in those of his intestate heirs. *A fortiori* those who were legally entitled to maintenance, for example his widowed step-mother, were entitled to be maintained *pro rata* by legatees and heirs to the extent of the property which reached their hands after payment of debts, etc. (§§ 399ff), unless the *propositus* had made separate provision for them which operated so as to exonerate the estate.

725. It must be borne in mind that all agreements, intended to exonerate the estate of a *propositus*, whether made in his lifetime or after his death, from the claims of a dependant, must be yielded up to be cancelled if they have been obtained, by those who rely upon them, without a full and frank disclosure of the size of the assets against which the claim operates or is likely to operate, and the true state of liabilities which that estate must, or is likely to be obliged to, meet.⁴

¹ *Kishan v. Narinjan* AIR 1928 Lah. 967, 10 Lah. 389. See ISA, ss. 180-90.

² *Lakshmi* (cited above); *Venkoba v. Ranganayaki* AIR 1936 Mad. 967, 71 M.L.J. 454. Consent is instanced in *Babu v. Lal* AIR 1933 All. 830, [1933] All. L.J. 1547.

³ *Jeot v. Lauji* AIR 1929 All. 751, 119 I.C. 253, is to be preferred to *Bai Parvati v. Tarwadi* (1901) 25 Bom. 263. Bombay stands (with Gujarat) alone against Allahabad, Calcutta, and Madras. Trevelyan and others prefer the Bombay view on the ground that the moral claims affect only an heir: but the testator has no power of disposition over property that will be impressed with legal claims at his death.

⁴ The principle is set out in *Zamet v. Hyman* [1961] 3 All E.R. 933 (CA).

In view of the intention of Parliament to give better rights to women, as expressed in the HSA and the HAMA, the court will not be slow to cancel any agreement whereby a woman agrees to forgo, for a present consideration, the right, which may be enhanced from time to time (§ 665) to participate as dependant or as sharer in a valuable estate, if there is the slightest suspicion that deception has been practised upon her. For their own sakes the heirs, or prospective heirs, must secure that the true state of the family's finances is placed before her, if possible in writing, and that she has an opportunity to discuss its implications with an independent person used to business and capable of understanding the implications of the agreement put before her for signature. In *Gajavalli Ammal v. Narayanaswami*¹ it was made clear that where a woman elected to take a settlement for her maintenance instead of working out her rights under the statute (there the Act of 1937) she must be deemed to have released those rights and cannot retract from her bargain — but this was upon the supposition that she was fully aware of her real rights and that no concealment had been practised upon her.

Specially with regard to females

726. The former law regarding disposition of a female's property by will differed from the current law of India in that *stridhanam* was seldom liable to maintain the woman's own dependants except for her natural obligation to maintain her minor issue, legitimate and illegitimate, about which, fortunately, there seems to have been little litigation. That apparent discrimination in favour of females is easily explained by the fact that females succeeding to property usually took a limited estate, which carried with it the obligation to maintain dependants of the last male holder. The exceptions in Bombay (§ 675) provide the only exceptions to the general rule. When a male *propositus* governed by Mitakshara law as administered in the Bombay school died leaving a disqualified son and a daughter, the daughter took subject to the rights of maintenance of the son, her brother. On the death of the daughter her *stridhanam*, burdened with this liability, passed to her daughter, still as

¹ AIR 1962 Mad. 187.

stridhanam; whence it was possible for *stridhanam* to be liable for maintenance of a dependant other than issue of the former owner.

727. Since 17 June 1956 all Hindu females may dispose of all property by will without the consent of any person, provided that it is within the terms of s. 14 (1) of the Hindu Succession Act: 'Any property possessed by a female Hindu . . . shall be held by her as full owner thereof and not as a limited owner.' Property falling within s. 14 (2) and subject to the limited estate or some other estate less than absolute is still not capable of being disposed of by will unless the instrument which conveyed it allows. This disability applies equally to bequests for purposes which, had they been gifts *inter vivos*, would have been binding upon the reversion (§ 689).

728. Though the point is not beyond doubt, it seems better to take the view that s. 14 (1) abolishes the ancient rule that *asaudayika stridhanam* cannot be disposed of by gift or will without the consent of the husband if he is alive and of sound mind (even if he and his wife are estranged). True, the words of the subsection cited above are designed to abolish *pro tanto* the limited estate, but the words of the explanation in the order in which they appear:

... 'property' includes both moveable and immovable property acquired by a female Hindu by inheritance or devise . . . or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription . . . and also any such property held by her as *stridhana* immediately before the commencement of this Act. . . .

read together with the words of s. 30 (where 'him' must be interpreted according to the context¹ to include 'her') authorizing disposition by will of 'any property', strongly suggest that all property of a female other than that coming outside the Act altogether (§ 676), or within the exception in s. 14 (2), must be treated alike for purposes of succession, testamentary or intestate.

729. Formerly *asaudayika stridhanam* could not be disposed of by gift or will unless the husband, being alive and of sound mind at the time of the execution of the will, then

¹ HSA, s. 3 (2).

consented to it. If, however, he did not survive the testatrix, the want of his consent was immaterial. The rule was inconvenient, for whatever is not included within *saudayika* is *asaudayika*.¹ The shortest *sastric* definition of *saudayika* is that which is *obtained* by a married woman or by a virgin in the house of her husband or of her father from her brother or parents or other relations.² In the Bengal school the text is read differently, so that gifts from the husband (or his relations) can be *saudayika*.³ The sources being so limited, much property might come within the character of *asaudayika*.⁴ The case-law reveals two movements towards mitigating the harshness of the ancient rule. Firstly the scope of *saudayika* was declared to be inclusive of bequests from relations such as the maternal grandfather,⁵ and shares in an inheritance passing by intestacy.⁶ The most recent case on the subject, *Hanmant v. Rango*,⁷ is of interest as the property in question was arrears of maintenance decreed to the woman against the husband himself, who, not unnaturally, declined to assent to the transfer. It was held that *all* acquisitions other than the gains by mechanical arts and affectionate gifts from strangers (items excluded specifically by Katyayana in *sloka* 904) must be *saudayika*. It is submitted that this went beyond the requirements of the case (for amounts payable in respect of maintenance are *eiusdem generis* with anything 'obtained' in the husband's house), and departed improperly from the *sastric* definition of *saudayika*. The word 'obtained' is not all-embracing. Secondly it was settled that the husband's right to prevent disposition was lost if his wife was 'thrown out' by him,⁸

¹ A dictum to a different effect in *Dhondappa v. Kasabai* AIR 1949 Nag. 206, 210, [1948] Nag. 936, 944-6 seems to be unsound.

² *Katyayana-smriti*, ed. Kane, *sloka* 901. Colebrooke's *Digest*, V, ix, 1, text 475.

³ *Dayabhaga*, IV, 1, 21.

⁴ *Muthukaruppa v. Sellathammal* (1916) 39 Mad. 298, AIR 1915 Mad. 475.

⁵ *Venkaraddi v. Hanmantgowda* AIR 1932 Bom. 559, 57 Bom. 85.

⁶ *Gajanan v. Pandurang* AIR 1950 Bom. 178 (FB), 52 Bom. L.R. 238 (FB), overruling the narrow (but historically accurate) *Bhau v. Raghunath* (1906) 30 Bom. 229.

⁷ AIR 1961 Mys. 206. It is not clear on the facts whether the wife was separated from her husband. If she was, the question whether the debt was *saudayika* was superfluous (see below).

⁸ *S. P. Madaswami v. S. P. Madhavan* [1947] Tr.L.R. 822 (see AIR 1955 NUC (T.C.) 1105).

or if they had lived apart for a long period (in *Bhagvanlal's case*¹ it was 30-40 years and in *Shantabai v. Ramchandra*² it was about 35 years). Though the original law contemplated the husband's prohibition of disposition by his wife even if she was separated from him, so long as the marriage-bond endured, present-day Hindu society cannot be subjected to such a rule when the wife separates on account of incompatibility of temperament or other cause and the marital home is broken up.³ The perpetual tutelage of women was a thing of the past even before the passing of the HSA.

LIMITATION OF THE POWER OF DISPOSITION

Voluntary limitation

730. A person may limit his right to dispose of his estate wholly or in part by two methods, namely by a simple testamentary contract or by a joint and mutual or mutual will which imports an agreement in favour of a common object that the surviving party shall not revoke the will. The common legatees take a vested interest (§ 762) in the property in the hands of such a survivor. If *A* validly contracts⁴ to leave or not to revoke a will leaving 'all my estate' or 'Rs. 1,00,000 out of my estate' to *B*, the legal representative is bound to ignore a will made in defiance of this contract, or to pay the sum concerned, for the obligor will be entitled to sue the executor for the legacy contracted for as if it were a simple debt.⁵ We have seen that even the rights of dependants are postponed to such 'creditors' of the deceased.⁶ If *B* agrees to perform something (for example to make a payment) for *A* in consideration of *A*'s making a will in his favour, and *A* makes the will otherwise and dies before *B* has performed his promise, it seems that *B* may rely upon the agreement and insist upon payment of

¹ *Bhagvanlal v. Bai* AIR 1925 Bom. 445, 27 Bom. L.R. 633.

² AIR 1960 Bom. 408, 61 Bom. L.R. 627.

³ *Shantabai* (cited above).

⁴ In India this need not be in writing.

⁵ *Hammersley v. De Biel* (1845) 12 Cl. & F. 45 (HL) = 12 E.R. 1312; *Eyre v. Munro* (1857) 3 K. & J. 305 = 69 E.R. 1124; *Synge v. Synge* [1894] 1 Q.B. 466 (CA).

⁶ § 664.

the legacy promised by *A*, provided that before *A*'s death *B* had not actually repudiated the agreement.¹

731. Joint wills and mutual wills are known to India.² *A* and *B* make a single (joint) will in which each bequeaths property to the other, that is the executants 'fill the roles of both testator and legatee towards each other', or *A* and *B* together make separate wills which are in fact identical in content save that the legacies are in part reciprocal: apart from the legacy to each other they both bequeath the residue to a common object or objects. It is a rule that where the first dies and the second takes the benefit the latter becomes a trustee to perform his part of the arrangement and cannot revoke his first will, on the faith of which the will of the other was executed, and so frustrate the scheme to which both were parties.³ An exception exists where the scheme was uncertain or unfair to the survivor, as where the parties were totally disparate in age and the survivor's obligations could not have been clearly foreseen, and the agreement could not stand in equity.⁴ But where the survivor cannot revoke his original will he cannot make a fresh will, and his power of testamentary disposition is deprived of its normal freedom until the common object of *A* and *B* is independently frustrated, if ever.

A and *B* made a joint and mutual will in respect of their joint and separate properties whereby each took a life estate in the whole, remainder to a particular school. *A* died first. *B* sought to revoke his will and make a new will disposing of his own estate to a relation in 1950. This will was invalid. In 1960 the school ceased to exist. In 1961 *B* executed another will confirming his second (invalid) will. This last will is valid.

A and *B* made a joint will in which both bequeathed their joint estate to *D* the child of *C*. *A* died in 1899. *B* gave the property to *C* in 1904. The gift 'revoked' the will of *B*, because the joint will gave

¹ The problem is glanced at in *Thakurani v. Dwarkanath* AIR 1953 S.C. 205, [1953] SCR 913, [1953] 2 All. 716 (where *A* did make the agreed will).

² *Kochu v. Thayankoot* [1959] S.C.J. 63, AIR 1959 S.C. 71, [1959] K.L.T. (SC) 9; a joint will must be admitted to probate on the death of each executant.

³ *Dufour v. Pereira* (1769) 1 Dick. 419 = 21 E.R. 332; *Stone v. Hoskins* [1905] P. 194 (referred to in *Minakshi*, below); *In re Hagger* [1930] 2 Ch. 190.

⁴ Discretion will not readily be exercised against the compact: *Walpole (Lord) v. Oxford (Lord)* (1797) 3 Ves. Jun. 403 = 30 E.R. 1076.

no benefit to the survivor and there was no agreement express or implied between the testators that each should stand by the other.¹

A and *B* made identical mutual wills, leaving the survivor of them an absolute estate with the same alternative provisions in case of lapse. After the death of *A*, *B* took the legacy, married again, and made a new will ignoring the alternative provisions of the mutual will. It was held that in the absence of proof of an agreement to benefit a common object, *B* was free to revoke the mutual will.² The same would have been the case if the legacy to the survivor had been a life estate, but no agreement not to revoke could be made out.³

A and *B* made identical mutual wills of their joint property in 1940. An agreement not to revoke was clearly made out. *A* died in 1942; *B* succeeded. In 1943 *B* became wealthy, and remarried in 1945; and made a second will revoking the first in 1946, dying soon afterwards. It was held that the half of the joint estate belonging to *A* was in *B*'s hands impressed with a trust binding on *B*, so that he could not dispose of it otherwise than according to the terms of the first will. His other properties might, of course, be disposed of freely, irrespective of the first will.⁴

Legal limitations: void bequests

732. Bequests may be void for impossibility,⁵ repugnancy, or contrariety to public policy. Void legacies are simply struck out of the will, even if the result is a partial or complete intestacy, whereas legacies which lapse for failure of the legatee to survive the testator go as undisposed-of property to the residuary legatee (§ 750), if any.

733. An impossible bequest is naturally void and legacies that turn out to be impossible naturally lapse, but the intention of the testator is saved in a case where a bequest is made to a person described as kindred of a specified person but his possession is deferred until after the death of the testator and he dies between the death of the testator and the date when possession is to come to him. One might expect that no legacy would take effect in such a case, but in fact his legal representatives may take the legacy;⁶ and there is a similar exception in favour of bequests to the descendants of the testator (§ 760).

¹ *Minakshi v. Viswanatha* (1909) 33 Mad. 406.

² *In re Oldham* [1925] 1 Ch. 75.

³ *Gray v. Perpetual Trustee* [1928] A.C. 391 (PC).

⁴ *In re Green* [1951] 1 Ch. 148, [1950] 2 All E.R. 913.

⁵ ISA, s. 126.

⁶ ISA, s. 112, exception.

734. Immoral conditions and conditions contrary to public policy are void, though the legacy itself may be good.¹ A bequest of property on condition that it shall be rendered useless will be void.² Bequests on condition that the legatee shall not perform his public duty, or that he shall seek to prevent others from doing theirs, and likewise attempts to create invalid charities or to support movements which are against law and public order, are all void.³ The same difficulty affects conditions suspending or divesting legacies. In present-day India it is perhaps too soon to expect a condition to be struck out which deprives a legatee of property if he becomes a Christian or a Muslim or joins the Communist Party; but a condition that he shall be deprived of the property if he ceases to be a practising Hindu is void for uncertainty.⁴

735. A Hindu may bequeath property to a person not in existence at the time of his death, provided that if there is a prior bequest (as for example to a living person for his life) the ultimate bequest must vest in the legatee the entire remaining interest which the testator had in the thing bequeathed.⁵ Naturally this ultimate bequest must be unconditional and absolute.

A bequeathed a house to *B* for life and after *B*'s death to his eldest son for life and after the death of the latter to his eldest son. The bequest to *B*'s eldest son is to an unborn person, if *B* has no son at the time of *A*'s death, and it is not a bequest of the entire remaining interest of the testator. It is void.⁶

736. Formerly (that is to say until the passing of statutes of 1914, 1916, 1921 and more recently⁷) all bequests were void which purported to carry property to a person not born in fact or in law at the moment of the testator's death,

¹ *Ram v. Bela* (1884) 6 All. 313, 11 I.A. 44.

² *Brown v. Burdett* (1882) 21 Ch. D. 667; *McCraig's Trustees v. Lismore* [1915] Sess. C. 426.

³ ISA, s. 127. *Re Edgar* [1939] 1 All E.R. 635.

⁴ Jarman, p. 1453. §§ 17, 18 above.

⁵ ISA, s. 113. *Edulji v. Cowasji* (1951) 57 Bom. L.R. 763.

⁶ Ill. (i) to ISA, s. 113. *Bibhabathi v. Mahendra* AIR 1938 Cal. 34, [1937] 1 Cal. 400; *Malraju v. Rajyalakshmi* AIR 1960 An. P. 509, [1960] 1 An. W.R. 318.

⁷ Madras Act I of 1914 (now repealed); Hindu Disposition of Property Act, 1916; Act VIII of 1921 (now repealed); Act 48 of 1959, s. 3 (Sched. I).

for as the will operated as if it were a gift acceptance was essential for its effectiveness.¹ This did not prevent the testator from giving property by remainder to someone who was alive at the date of his death, the bequest to vest in interest only on the death of a prior legatee also alive at the date of the death.

A died leaving by his will property to the male issue of R, his son, and on failure of male issue to a Trust. When R died without leaving a son the Trust claimed. It was urged that the legacy did not vest in the interval and that consequently the bequest was void, but it was held that as an absolute estate could be created in favour of a person living at the death of the testator on the close of a life in being,² whether or not a prior gift could be made out,³ immediacy of effect of the bequest was not essential. It was said in *Gadadhar v. Off. Trustee*⁴ that 'if an estate in remainder can be limited to take effect on the natural determination of a life estate and may be so limited upon a condition which may never be fulfilled; if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu law to be saved by refusing to recognize a limitation to take effect upon condition in the future because it lacks "support" from a particular estate'.

737. A bequest may be void for contravening the rule against perpetuity or that against excessive accumulation. Property is not to be kept out of active and free dealing for too long a period. No bequest is valid if it might vest the thing bequeathed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be alive at the end of that period and to whom, if he reaches majority, the thing bequeathed is to belong.⁵

A bequeathed a fund to B for life and after his death to C for life and after C's death to such of C's sons as should first attain the age of 25. C died in A's lifetime leaving sons, all of whom are in this case living at A's death and one will reach 25 within the lifetime of persons so living. The bequest is valid.⁶

A bequeathed a fund to B for life and after his death to C for life and after C's death to such son of C as shall first attain the age of 25. Both B and C survive the testator. The bequest is void, because the son of C

¹ *Tagore v. Tagore* I.A. Sup. Vol. 47, 9 B.L.R. 377, 18 W.R. 359.

² *Ram v. Sec. of State* (1881) 8 I.A. 46, 7 Cal. 304.

³ *Bhupendra v. Amarendra* (1913) 43 I.A. 12, 41 Cal. 432, 18 C.W.N. 360.

⁴ (1940) 67 I.A. 129, AIR 1940 P.C. 45, [1940] 1 Cal. 415.

⁵ ISA, s. 114 (a rule differing considerably from the corresponding English rule).

⁶ Ill. (ii) of ISA, s. 114.

who shall first attain the age of 25 *may* be a son born after the death of *A*, and may therefore attain the age of 25 more than 18 years after the death of whoever of *B* and *C* lives longer, and the vesting of the fund may be delayed beyond the lifetime of *B* and *C* and the minority of the sons of *C*.¹

738. A vesting subject to a 'condition subsequent' (§ 768) does not violate the 'perpetuity rule', even if the last taker would not be qualified to take under s. 114 of the ISA. Thus it is valid to bequeath 'my house to my daughter until she marries, and thereafter to my youngest brother's eldest son', even if at the testator's death one of his parents is still alive so that any son of his *youngest* brother might well be born after the close of the 'life in being' (namely that of the brothers who survive the testator).² The daughter's marriage, too, might be postponed later than the majority of any son of any brother of the testator. But the object of the perpetuity rule is to prevent an indefinitely-postponed vesting, and here the vesting is complete, notwithstanding the possibility of a subsequent defeasance or divesting.

739. The rule against excessive accumulations is complicated only by its exceptions. Fundamentally directions for accumulating the income arising from any property are inoperative to the extent that accumulation is ordered for longer than 18 years from the death of the testator, and the disposal at the end of the 18 years follows the directions set out in the will as if the (invalid) excessive period had elapsed.³ Exceptions exist in favour of directions to accumulate income for (i) paying the debts of the testator or any other person taking an interest under the will; (ii) providing portions (for example, advancements at the time of marriage) for children or other descendants of the testator or any other person taking an interest under the will; or (iii) preservation or maintenance of any property bequeathed.

740. A Hindu may not bequeath, or provide by testamentary contract or family arrangement,⁴ so that the property disposed of or to be disposed of shall pass by a rule of

¹ Ill. (i) of ISA, s. 114.

² In Indian speech 'youngest brother' may well include a posthumous brother, unless the context requires otherwise. ³ ISA, s. 117.

⁴ *Purna v. Kalidhan* (1911) 38 Cal. 603 (PC), 38 I.A. 112.

succession differing from the current Hindu law of succession. This rule applies to every class of property¹ and is not strictly a peculiarity of Hindu law. In the *Tagore case*² an attempt to create an estate in tail male, an estate known only to English law, was properly frustrated. Similarly all bequests providing that the property shall pass to males only, or to the descendants of a particular branch and not other branches, or that females shall invariably be excluded, or that a son's estate should pass only to his issue by wives other than those who have been divorced, or any provision which would prevent an estate which is intended to vest absolutely from passing by the ordinary law of devolution, are void. The testator cannot pretend to legislate and derogate from the law of the land. Where he attempts to control the manner in which his legatee must bequeath the property, and thus attempts to create an estate unknown to Hindu law, his attempt fails, and the legatee takes an absolute estate.³ Yet a bequest of an estate subject to unusual restrictions on alienation and a gift over of the residue is not void.⁴

741. It might be claimed, upon a conservative interpretation of this rule of the *Tagore case*, that all provisions inconsistent with the *pre-1956* Hindu law are void, but that those which are consistent with it are good, and that therefore an attempt to prevent the estate from passing under the HSA, for example, would be valid. But the *ratio* of that case is more important than the rule. Once the vesting of the property has been achieved, what is prevented is an attempt by the testator to control its future devolution: the operative law is therefore the current law and not that operative when the rule was first laid down. Where the testator selects his first takers he is quite free, and the rule does not apply. Similarly in a family arrangement the parties may provide conditions for the devolution of their shares on the deaths of any of themselves. These conditions bind the parties by contract and do not purport to alter

¹ *Raikishori v. Off. Trustee* AIR 1960 Cal. 235; the decision in *Sri Kishan v. Jagannathji* AIR 1953 All. 289 that the office of *manager* (as distinct from *shebait*) may be bequeathed to the seniormost must be distinguished.

² § 736.

³ *Ramu v. Kashi* [1944] All. 9, AIR 1944 All. 5.

⁴ *Bishun v. Shri Thakurji* AIR 1945 P.C. 30, 72 I.A. 27, [1945] All. 231.

the law of succession to the shares as such : once the property has vested on the fulfilment of the conditions no agreement can alter the law of succession to it.¹

742. The word 'repugnant' can, as we have seen, mean a repugnancy to the law of the land; a more frequent use of the term relates to an inherent inconsistency or repugnancy in the will itself. The court is assisted to determine the intention of the testator by an elaborate set of rules of construction, some of which are referred to below. Where the court construes the will in such fashion that an absolute interest must be conveyed to a legatee all directions that the property should be kept and not alienated, or enjoyed in a particular manner or exempted from partition, and the like, are to be disregarded as 'repugnant'.² This is by no means an infrequent occurrence. The testator may mean that something less than an absolute estate is to pass to the legatee, in which case the directions are not struck out: but once it is clear that his directions are merely requests, hopefully suggested, rather than mandatorily insisted upon, they are ignored for purposes of administration of the estate. The conviction that the construction has not dealt fairly with the testator cannot always be avoided, but in India, as in England, what is to be followed is not what the testator may have thought he was recording as his intention, but what he has actually expressed as his intention. In his effort to communicate the testator is presumed to know that canons of construction will be applied and that attempts will be made to understand his intention starting from the actual words he uses. True, if the context requires it, a more extended or restricted meaning may have to be given to particular words than their exact literal meaning permits,³ but even so (as we shall see: § 754) it is from his mode of expression that we must draw the often fine distinction between a repugnant restriction and one importing, e.g., a defeasance (§§ 768, 770).

¹ *Bageshar v. Mahadei* AIR 1924 All. 461, 46 All. 525; *Shrinivas v. Chandrabhagabai* (1957) 60 Bom. L.R. 570, AIR 1958 Bom. 420.

² ISA, s. 138; *Rameshwar v. Balraj* AIR 1935 P.C. 187, 40 C.W.N. 8, 37 Bom. L.R. 862; *Vajja v. Kambhampati* [1956] An. W.R. 582; *B. Ramamurty v. K. Vajram* AIR 1961 Or. 49.

³ *Rajendra v. Gopal* (1930) 57 I.A. 296, 302 (power of adoption).

A wrote, 'My wife and son will take possession . . . After them in case the son's wife bears a son, she and her children should enjoy the property . . . If she has no sons, the sons by my son's first wife will enjoy the property absolutely.' It was held¹ that the absolute grant to the widow and son was cut down by the defeasance clause, as the condition had matured before the death of the survivor of them.

743. Where a bequest is void any bequest which is dependent from it and is to take effect after it must also be void.² An executory bequest, limited to take effect upon the failure of a void bequest, has no independence, and must be void. Although it would be rational to expect that a bequest, conditioned to take effect on the failure of a bequest which turned out to be void, would vest, and would be accelerated by the voidness of the intermediate bequest, the Indian law provides that any bequest intended to take effect after or upon the failure of a void bequest is also void.

A bequeathed his house to the last son of S to attain the age of 19 until the youngest son of SS born in A's lifetime reaches the age of 18, and then to the last-named. The intermediate bequest is void (for perpetuity) and therefore the ultimate bequest cannot take effect.

A bequeathed his house to W for her life, with remainder to S's youngest-born son to reach the age of 18 upon condition that by that age he shall have matriculated in the university, but if he shall not have matriculated then to X, or to X if S die without leaving a son surviving him. A son is born to S after A's death. The bequest to X could not take effect upon failure of the first prior bequest, for it was void, not giving the entire remaining interest to the unborn person; but if the fact is that S dies in W's lifetime leaving no son the bequest to X takes effect; for the alternative arm is sound, and the bequest took effect neither *after* nor *upon the failure* of the bequest to S's youngest-born son.³

Where property is bequeathed to a class, and some cannot take because the legacy to them is void by reason of perpetuity or breach of the condition whereby unborn persons may take, etc., the bequest is not void *in toto* but only in regard to those persons.⁴

RULES OF CONSTRUCTION

744. Wills executed by Hindus are very seldom drafted with technical skill: on the contrary they are often faulty in

¹ *P. Krishna v. Narayana* AIR 1962 Ker. 322.

² ISA, s. 116.

³ 1 Jarman 368.

⁴ ISA, s. 115.

vocabulary, grammar, and style. They often take the form of open letters detailing the testator's property *seriatim* and its sources, and then explaining which members of the family or strangers are to enjoy which items and under what conditions. They often ramble inconsequentially, contain apparently contradictory provisions, and seem vaguely to attempt to please everyone, in the hope that whatever construction is eventually placed on the will the blame will not be laid at the testator's door. Naturally the whole technical apparatus of the English rules of construction is quite unfit for application to the average Hindu will: but where there is reason to suppose that the testator, as a man of business, employed a legal adviser in full anticipation of his using appropriate technical terms, those terms will be construed so as to give them the normal legal force.¹ On the other hand even to the most amateurish will certain rules of construction of English origin are to be applied by statute. The court utilizes to the full its jurisdiction to 'place itself in the testator's armchair',² and the results are sometimes rather unexpected; but when the literal meaning of the provisions is made out certain rules *must* be applied in all cases, and in others will be applied if no contrary intention can be made out. The beginner must know the general purport of the more fundamental of these rules, otherwise he will fail to grasp what difficulties lie before a court of construction, and what hazards lie before the optimistic property-owner who drafts his own will or employs anyone but a specialist to draft it for him.

745. At the outset we must recognize certain basic points:

(1) rules of construction do not make a will for the testator — they merely help to clarify what his intention was;

(2) the court when construing a will never mends or improves upon a defective, void, or merely inept will³ — it was the testator's business to make effective dispositions;

(3) the testator's intention will always be effectuated as far as possible,⁴ and the result will often be that all bequests

¹ *Edulji v. Cowasji* (1951) 57 Bom. L.R. 763, 767-8. ² § 742, n. 3.

³ *Tarokessuar v. Soshi* (1883) 9 Cal. 952, 10 I.A. 51; *Narasimha v. Parthasarathy* (1913) 41 I.A. 51, 37 Mad. 199, 16 Bom. L.R. 328.

⁴ ISA, s. 87.

are validated to the extent that they are not affected by invalidity;

(4) where alternative possible¹ constructions are before the court so that one would cause the testator to die intestate, the presumption is in favour of an intention not to die intestate and the other construction will be followed — similarly where of two possible constructions one will effectuate the testator's declared purpose better than another, or one will avoid the postponement of vesting after the death of the testator, that one is to be preferred;²

(5) the intention of the testator is at all events to be collected from the entire will, and all parts of it must be so read together that a harmonious whole is obtained — even if the result is that some portions will actually be discarded as repugnant — a construction which relies more heavily on some paragraphs than others is almost certainly bad;³

(6) a will is primarily construed from its words, but the court is entitled to bear in mind surrounding circumstances and prevailing habits of mind such as will give full meaning to ambiguous or unclear expressions;

(7) where the will is unclear or ambiguous the uncertainty is not to be resolved by reference to external evidence, unless (a) the evidence is actually referred to or incorporated by the testator himself, providing that he does not delegate his power of testamentary disposition (which is not open to him),⁴ or (b) the ambiguity itself is latent and not patent on the face of the will. For the court cannot cure defects which are apparent on the face of the will, and uncertain dispositions are always void.⁵

A bequeaths 'Rs. 1,000 to my dear pupil Krishna' and it appears that *A* had two pupils each called Krishna; evidence may be admitted to show that one of them was closely associated at the time of execution of the will and that the other cannot have been intended.

A bequeaths '3 acres in the village of _____'. No evidence can be admitted to show which village *A* had in mind if *A* owned lands in more than one village at his death.

¹ *N. Kasturi v. D. Ponnammal* AIR 1961 S.C. 1302, [1962] 1 An. W.R. 174 (SC).

² *Sarajini v. Gnanendranath* AIR 1916 Cal. 70, 23 C.L.J. 241; *Bickerteth v. Shanu* [1936] A.C. 290; *Gnambal v. T. Raju* AIR 1951 S.C. 103, [1950] 1 SCR 949.

³ ISA, s. 82.

⁴ *Chichester D. F. v. Simpson* [1944] A.C. 341.

⁵ ISA, ss. 80, 81, 89.

746. Among provisions which are expressly provided by the ISA, but which by no means curtail the court's jurisdiction to ascertain the testator's intention, the following are prominent.

747. In perusing the detailed rules of construction that appear in the following pages it must be remembered that early wills, to which the provisions of the ISA did not apply, may be construed with the aid of rules contained therein under justice, equity and good conscience.¹

748. All facts may be inquired into which are conducive to the correct application of the words the testator chose.² Misdescriptions or misnomers do not prevent the legacy from taking effect if the legatee can be identified with certainty;³ words which have been omitted but are essential to complete the full expression of the meaning may be supplied from the context;⁴ and erroneous particulars, the rejection of which would save the bequest but not affect the intention of the testator, may be rejected.⁵

A bequeaths Rs. 100 to 'Krishna, second son of my brother Ram'. A has only one relative Ram, his cousin, and Krishna is Ram's third son, the second having died long before. Krishna will take the legacy.

A bequeaths 'my shop in Bombay bought from Thakurji'. His shop in Bombay was not bought from Thakurji but leased from him. The bequest of the shop takes effect.

A bequeaths 'my shares in B.K. & Co. transferred to me by my wife worth now about Rs. 50,000'. Some of the shares were not transferred from A's wife and neither these, nor the whole, were worth Rs. 50,000 at the execution of the will. The 'Rs. 50,000' is disregarded, and the bequest operates to pass so much of the shares as had been transferred by A's wife to A.

749. Since a will is revocable until death and speaks from the moment of death it is construed, unless a different intention appears, with reference to the state of affairs prevailing at that moment and not at the moment of execution, at least so far as identification of property is concerned.⁶ Unless a different intention can be made out the time by which conditions are to operate is the moment of death. It is impossible to exaggerate the importance of this rule.

¹ See Phillips and Trevelyan, *Law relating to Hindu Wills*, 2nd edn, p. 6.

² s. 75. ³ s. 76. On descriptions importing a condition see § 756.

⁴ s. 77.

⁵ ss. 78, 79.

⁶ ISA, s. 90.

A bequeaths 'my large farm in Rampur' to *X* and 'my small farm in Krishnapatam' to *Y*. At the date of execution of the will *A* owned farms in both villages. Afterwards he sold the Rampur farm and banked the proceeds; then he sold the farm in Krishnapatam and with the proceeds bought a small farm at Rampur. The bequest of the small farm at Rampur takes effect, but the bequest to *Y* fails.

A bequeaths his farm 'to *B* or to his eldest son'. *B* and his son survive. *A. B* takes the farm.¹

For illustrations of the rule that the death is the time by which conditions must be fulfilled see § 764.

750. Residuary bequests carry all the estate in regard to which no other testamentary disposition is capable of taking effect.² The words constituting a legatee the residuary legatee need not be formal, provided that it is clear that the residue, surplus, or bulk of the estate, as the case may be, is to go to the designated person.³

A bequeaths all his property to *B*, but his cash at the bank to *C*. *C* takes the cash, but *B* is the residuary legatee.

A bequeaths items to *B* and *C* and adds 'any other property that remains after payment of my debts shall go to *D*'. *D* is the residuary legatee.

751. The residuary legatee is the person who is most interested in bequests failing, or in the ceasing of a bequest because of the coming into operation of a 'condition subsequent', or condition working a defeasance or divesting of a legacy (including a legacy of his own!).

752. Powers of appointment, which are really bequests at second hand, have long been admitted into the Hindu law of wills.⁴ But the appointment, when eventually made by the holder of the power, is a bequest from the creator of the power and it is a valid exercise of his power if the appointment would have been valid as a bequest from the testator. It is a useful rule of construction that, where the will does not provide otherwise, a bequest of the estate, or a residuary bequest, carries with it the property over which the testator himself had a general power of appointment and of which he has not made an express appointment to anyone.⁵ Similarly if a testator creates a testamentary power of

¹ ISA, s. 96.

² ISA, s. 103.

³ ISA, s. 102.

⁴ *Bai Motivahoo v. Bai* (1897) 24 I.A. 93, 21 Bom. 709, 1 C.W.N. 366.

⁵ ISA, s. 91.

appointment over a fund in favour of special objects but in the proportions or in the manner to be determined by the holder of the power, and the power is not exercised, the property is deemed to pass, on the non-execution of the power, to the objects in equal shares.¹

A bequeaths a farm to *B* for life, remainder to the son of *C* to whom *B* shall appoint it by will. *B*'s will does not refer to this farm but contains a residuary bequest to *D*, son of *C*. The farm passes to *D*.

A bequeaths a fund to *B* for life and directs that at his death it shall be divided amongst the children of *A* in such proportions as *B* shall appoint. *B* dies without making an appointment. The children of *A* alive at *B*'s death are entitled to the fund in equal shares.

753. Certain rules of construction are of peculiar interest to Hindu testators and deserve separate mention before rules which affect Hindu wills no more than wills of non-Hindus.

(1) There is no presumption that a bequest to a female is intended to be held by her subject to the former limited estate (§ 677), and unless the terms of the will as a whole suggest that she shall not have an absolute right of disposal over the property a bequest to a female imports as absolute an estate as a bequest to a male.² The presence of the word *malik* or *tamlik* or cognate expressions which ordinarily imply full ownership³ may assist the court in arriving at a view that an absolute estate was intended, and such a construction will enable words to be disregarded as repugnant (§ 742) which subsequently direct that the female legatee shall abstain from waste or shall hand over the property to designated persons, or which otherwise inhibit her management.⁴ The word *uttaradhihari*⁵ is indecisive.

754. The crux in each case is to determine whether the words purporting to cut down the woman's freedom are precatory, and so capable of being disregarded. Or are they

¹ ISA, s. 92.

² *Ram v. Nand* AIR 1951 S.C. 139, [1950] S.C.J. 575, [1950] SCR 766; *Nathoo Lal v. Durgaprasad* AIR 1954 S.C. 355, [1954] S.C.J. 552, [1955] SCR 51; *G. Sriramulu v. Anasuyamma* AIR 1957 An. P. 21, [1956] An. W.R. 115.

³ *Ram* (above); *Bishunath v. Chandika* AIR 1933 P.C. 67, 60 I.A. 56, 35 Bom. L.R. 341.

⁴ *Partap v. Makhni* AIR 1933 Lah. 365, 14 Lah. 485; *Subbamma v. Rama* [1937] 1 M.L.J. 268, AIR 1937 Mad. 476; *Krishnaswami v. Srinivasan* [1945] 1 M.L.J. 220, AIR 1945 Mad. 362; *Kamla v. Murli* AIR 1934 Pat. 398, 13 Pat. 550. ⁵ 'Heir': *Monoranjana* (§ 771).

used merely to convey what in English law is known as an 'estate of inheritance or an absolute estate',¹ and after the death of *X* any part of the property to remain will pass to his heirs by testamentary or intestate succession as if such words had not been used. Other terms customarily implying that the legatee has the property as her separate property (free from the husband's supervision) will convey to her an absolute estate, notwithstanding references to 'male issue', unless the intention is to convey a limited estate, when the words must be appropriately chosen to avoid being construed as 'repugnant'.²

A bequeaths his farm to *B* and his *dayadas*. *B* takes an absolute estate.

A bequeaths his farm to *B* and his brothers. *B* shares the farm equally with such of his brothers as survive *A*.

A bequeaths his farm to *B* and after *B*'s death to his issue. *B* takes a life interest in the farm, remainder to such of *B*'s issue³ as survive *B*.

A bequest read 'after my death all the three widows of my son shall be the owners and possessors like me in equal shares, but they shall not have any power to alienate the property. If any of the said widows dies or contracts a second marriage, the other widows shall remain the owners and possessors and enjoy the produce. When all the three widows die the daughter's sons of my son shall be the owners and possessors in equal shares generation after generation.' It was held⁴ that the three widows, who survived the testator, took a life estate, with remainder to the granddaughter's sons.

A, a male belonging to a Kerala matrilineal community, bequeaths his property to *W*, his wife, and her children. *W* and her children take the bequest as *tavazhi* property. This exception is discussed at § 578 above.

756. (3) A bequest to a relation by name and description of his relationship will normally carry the property to him even if he is not in fact related as supposed, but if the relationship amounts to a condition whereby the legatee deserves the legacy and he is not so related at the time of distribution of the estate he is not entitled to the legacy.

¹ Phillips and Trevelyan, *Hindu Wills*, 2nd edn, pp. 87-8.

² *Malraju v. Rajyalakshmi* AIR 1960 An. P. 509, [1960] 1 An. W.R. 318.

³ 'Issue' is not a technical term in the Hindu law of wills. Unless the context otherwise requires it will mean 'children'. *Santana* has normally the same meaning: *Santi v. Sudhang Subala* AIR 1955 NUC 570 (Cal. 1948). So *nissantana* will mean 'without issue of either sex': *Indramani v. Raghunath* AIR 1961 Or. 9.

⁴ *Mehtab v. Amrik* AIR 1957 Pun. 146, [1957] Pun. 418.

A bequeaths property to 'Krishna, my adopted son'. Krishna lived with A for 20 years as his adopted son, but the adoption was invalid. Krishna is entitled to the legacy.¹

A bequeaths property to 'Raman because he is my *illatom* son-in-law having married my daughter'. A died shortly before the marriage was due to take place. Raman is not entitled to the legacy until he marries the daughter.²

757. (4) The rule that 'children' (as a class) must be construed as inclusive only of legitimate or reputedly legitimate children³ does not apply to Hindu wills, but we must note that no presumption operates that 'children of X' will necessarily include all X's issue, legitimate or illegitimate. If the parent is a female we can take some light from the HSA (§ 31) in support of the view that even an illegitimate child should *prima facie* count as her child: but such indications are far from conclusive. Just as 'brother' will more naturally mean 'brother' than 'cousin', so 'child' will more naturally mean the issue of a regular marriage than the issue of concubinage, and still more so than the issue of casual intercourse. *Prima facie* references to the 'children' of a person should be confined to their legitimate or reputedly legitimate issue, unless an indication can be found which would show either an inability to distinguish (which has been the case in a very old precedent⁴) or a positive intention to group legitimate and other children together.⁵

758. (5) In Hindu wills, on the other hand, 'child', unless context otherwise requires, includes the adopted child, a rule which is recognized in the ISA with regard to certain sections of that Act, and in statutory provisions generally.⁶

¹ *Ranganathan v. Periakaruppan* [1958] S.C.J. 58, AIR 1957 S.C. 815, [1958] SCR 214.

² *K. Ramanna v. P. Venkatalakshamma* AIR 1941 Mad. 375, [1941] 1 M.L.J. 286.

³ *per* Lord Eldon in *Wilkinson v. Adam* (1812-13) 1 V. & B. 422, 462 = 35 E.R. 163, 179. Jarman, p. 1751. ISA, s. 100. *Sher v. Ganga* (1913) 41 I.A. 1, 33 All. 101, 26 M.L.J. 291 (PC).

⁴ *Barlow v. Orde* (1870) 13 M.L.A. 310, 312.

⁵ *Kumara v. Rajeswara* AIR 1942 P.C. 3, [1942] 1 M.L.J. 132, 68 I.A. 181.

⁶ ISA, Sched. III, s. 5. § 122.

rather dispositive attempts to show an intention on the testator's part inconsistent with the legatee's taking an absolute estate (§ 674)? In *Kshetra v. Syama*¹ a *nirupanapatra* in favour of a female which was in fact construed as a deed and not a will (the distinction is immaterial for our present purpose) did not contain the word *malik* or a phrase contemplating the passing of the property to her descendants, and when it was construed in the light of surrounding circumstances it was held to convey a life estate only. *Ram v. Nand*² was distinguished, in which the Supreme Court had settled the principle that a bequest to a female by no means implies that she must take the limited estate once taken by the majority of female heirs on intestacy.

A bequeathed his farm to his widow in these words, 'she shall be the *malik* and perform *vahivat* and she shall have it for her enjoyment and she shall always respect the advice of my father in managing it'. The widow took an absolute estate.

A bequeathed a farm to his widow 'to be enjoyed by her at her discretion, and not to be sold or mortgaged without my father's consent and after her death or if she marries again it is to go to my nearest sapinda'. The widow took a limited estate equivalent to the old Hindu woman's estate.

A bequeathed his estate to W, his wife, without giving her, by express terms or necessary implication, power of alienation for necessary purposes. He wrote, 'After my lifetime my wife shall enjoy the properties for her lifetime, after which my daughter and her heirs shall enjoy them with absolute rights'. After A's death W took possession, but during her lifetime both the daughter and her children died. It was held that an ordinary life-estate was conferred on W, and not the Hindu woman's estate. The daughter obtained a vested interest as remainderman, which passed to her heirs.³

755. (2) There is no presumption that a bequest to 'X and his *santana*'⁴ or to 'X to be enjoyed by him (or her), his (or her) sons and grandsons'⁵ imports any other estate than an absolute estate to X. References to *santana* or *putra-pautra-krama* and the like are antiquated terms of art now

¹ AIR 1958 Or. 254.

² AIR 1951 S.C. 139, [1950] S.C.J. 575, [1950] SCR 766.

³ *Lakshmana v. R. Ramier* [1953] SCR 848, 853. Similarly in *Lakshmi v. Allauddin* [1962] 2 An. W.R. 187 the legacy to the wife was construed as a limited (or 'life') estate. *Ramadasa v. Kalliani* AIR 1960 Ker. 183.

⁴ *K. Pullaiah v. A. Veeraghavamma* [1954] 2 M.L.J. (And.) 30 (*santati*, literally 'issue' = 'heirs').

⁵ *P. Lakshmayya v. G. Tirupathamma* AIR 1958 An. P. 720. In *Bibabati v. Mahendra* AIR 1938 Cal. 34, [1937] 1 Cal. 400 a different construction was used which would now not recommend itself to the court.

759. (6) A bequest to the 'heirs' of *X*, or some equivalent term, will be paid as if *X* had died intestate leaving such property when the testator himself died, and the word 'heirs' must be construed according to the law of succession operative at that date in respect of that property.¹

760. (7) A bequest to a child or other descendant of the testator does not lapse if the legatee dies in the lifetime of the testator leaving a descendant of his or hers surviving the testator, but the bequest takes effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears.² This very useful provision which would obviate many over-complicated and sometimes ineffectual directions is subject to a drawback. If the child or descendant who does not survive to take the legacy has left a will disposing of the property away from his own descendants the testator's intention to benefit that child, etc., or his issue, or that branch of the family, may be frustrated.

A, dying in 1962, bequeaths his estate to his³ children. At his death three sons survive him and grandchildren by *D*₁, a daughter who died in 1955, and by *D*₂, a daughter who died in 1957. One-fifth will be taken by the heirs of *D*₁ and one-fifth by the heirs of *D*₂ according to the law of succession operating in India in 1962.

A bequeaths a fund to his son *B*. *B* predeceases *A* leaving a son *C*, who survives *A*, but also leaving a will whereby *B* leaves all the estate to his wife, *D*. The fund goes to *D*, and not to *C*.

761. Rules of construction which are of general importance include the fundamental aids to construction which tell us when a legacy vests, or when, on the contrary, it is merely contingent and not vested; and the different types of conditional bequests, those which are conditions precedent, or those which are conditions subsequent and work a divesting, and the relative strictness with which these conditions must be complied with. The word 'contingent' does indeed mean 'conditional' but by convention the latter word

¹ ISA, s. 93.

² ISA, s. 109.

³ It must be noted that if they had been children of another person only the children would have taken. If the distribution had been deferred until a period after the death of *A* his representatives would have taken the share of any child who died between *A*'s death and the time of distribution—for the legacy would have vested: ISA, s. 111.

refers to doing or forbearing, while the former refers to the happening of an event.

These rules provide keys to wills, or rather categories into which amorphous wills may be fitted for their better comprehension. If one ignored these distinctions one could not make good sense of any will, however competently it may have been drafted. In this connexion it is essential to realize that no one will can be used to construe another. Judicially-construed precedents are of less use here than in almost any other context. No two wills are identical, and it is most unwise to import into the will in front of you the construction a court has placed upon another will, however superficially similarly drawn.¹

762. The importance of the distinction between a vested and a contingent interest is that if the legatee dies before he is entitled to possession the vested interest passes to his heirs, for it is part of his property, while the contingent interest drops. A 'vested' interest should not vest conditionally, though that which vests in interest frequently vests in possession only upon the maturing of a condition. But a contingent interest is one which does not come into existence unless something happens which may never happen. The student will observe that though possession may be deferred it by no means follows that vesting is deferred.²

763. An interest vests if it is given in general terms, without specifying the time when it is to be paid, from the day of the death of the testator.³ Where a bequest is made simply to a described class (for example, 'children', 'sons' sons'), only such as are alive at the testator's death take an interest; where, however, the class are described as related as kindred of a specified individual, but possession is deferred until a time later than the death, the members of the class who have died in the interval have a vested interest which passes to their representatives, who take the legacy along with the surviving members at the specified time.⁴ A legacy bequeathed in case a thing shall happen vests when that thing

¹ *Sasiman v. Shib* AIR 1922 P.C. 63, 49 I.A. 25, 24 Bom. L.R. 576; *N. Kasturi v. D. Ponnammal* AIR 1961 S.C. 1302, 1307, col. i.

² *C. Chinna v. G. Chinna* [1961] 2 An. W.R. 162; *Kapuri v. Sham* AIR 1962 Pat. 149.

³ ISA, s. 104.

⁴ ISA, s. 111.

happens; a legacy bequeathed in case a thing shall not happen does not vest until that thing becomes impossible; in either case the interest of the legatee is not vested, but contingent.¹

A bequeaths a fund to *B* if *C* does not make any provision for *B* by will. The legacy is contingent until *C*'s death.

A bequeaths his farm to *B* when she shall attain the age of 18 or shall marry under that age with the consent of *C*, with a proviso that, if she neither attains 18 nor marries under that age with *C*'s consent, the legacy shall go to *D*. *B* and *D* each take a contingent interest in the legacy. *B* marries under the age of 18 without the consent of *C*. When she reaches the age of 18 the legacy vests in her.

A bequeaths his estate to *E* in case *B*, *C* and *D* shall all die under the age of 18. *E* has a contingent interest in the legacy until *B*, *C*, and *D* all die under 18, or until one of them attains 18. In the latter case the event contemplated becomes impossible, and the contingent interest drops.

A bequeathed his estate to *X*, if he or his wife adopt *X*, and if he and his wife die without adopting *X*, half the estate to *X* and the other half to *Y*. In the event *A* died without adopting *X*, leaving his wife surviving him. *Y* claimed that he had a vested interest in half the estate which would be divested by an adoption. But until *A*'s wife died without having adopted *X* any claim by *Y* was contingent, and if the wife adopted *X* the legacy to *Y* would drop.²

764. To pursue contingent interests further we note that a bequest is payable, unless a contrary intention appears in the will, at the death of the testator³ (subject to the executor's assent).⁴ Where a legacy is bequeathed if a thing shall happen and no time is mentioned in the will by which such thing shall have happened, the legacy cannot take effect unless the thing happens before the period when the bequest is payable.⁵ Where a bequest is made to such of certain persons as shall be surviving at some period, but the exact period is not specified, the legacy goes to such of them as are alive at the time of payment, unless a contrary intention appears.⁶

A bequeaths a farm to *B* and *C* or to the survivor of them. If both *B* and *C* survive *A*, the farm belongs to them equally. If *B* dies before *A*, and *C* survives him, the farm goes to *C*.

¹ ISA, s. 120.

² Based on *N. Kasturi* (cited above).

³ ISA, s. 104.

⁴ ISA, s. 332.

⁵ ISA, s. 124. *Ram v. Sec. of State* (1881) 8 I.A. 46, 7 Cal. 304, 10 C.L.R. 249.

⁶ ISA, s. 125.

A bequeaths a farm to *B*, and in case of *B*'s death to *C*. The legacy to *C* can only take effect if *B* does not survive *A*.

A bequeaths a farm to *B* for life and after his death to *C* and 'in case of *C*'s dying without male heirs' to *D*. The words 'in case of *C*'s dying without male heirs' must be construed as meaning 'in case *C* dies leaving no male heir during the lifetime of *B*'.¹

A bequest read: 'The residue shall be held in trust for such of my sons as are living at my death or the son or sons of such as are dead taking equally *per stirpes*. But nevertheless in the event of any sons or son's sons dying without lineal issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under Hindu law. The estate shall not be partitioned until the youngest son shall attain 25 years.' The testator was survived by two infant sons, the elder of whom died without male issue, but survived by a widow, after the younger had attained 25 years. The widow claimed that the elder son took a half absolutely, and that she succeeded to it; the younger son claimed that he was entitled to the moiety upon his brother's death without issue. It was held that s. 124 of the ISA did not apply, as the testator was providing for the possibility of a son dying without issue after his death, which was the period of distribution, not the time of attaining the age of 25 years. The younger son was entitled to the moiety under s. 131 of the ISA.²

A bequest read: 'If no daughter or daughter's son should be living at the time of the death of my wife, then my daughter's daughter shall become proprietor of my property. If the death of my wife should take place before my granddaughter arrives at majority and bears a son, then the estate shall remain in charge of the Court of Wards till she reaches majority and bears a son. If my granddaughter shall be barren or a sonless widow she shall be entitled only to maintenance. If my granddaughter should die before she bears a son or be barren or become a sonless widow the whole property will pass to Government.' It was held that the gift over to the Government took effect, if at all, at the death of the widow, in the event of the granddaughter predeceasing her before bearing a son or being disqualified at such death.³

765. Where the will imposes a condition before an interest may vest, the condition is considered to have been fulfilled if it has been substantially complied with.⁴

A bequeaths a fund to *B* on condition that she marries with the consent of *C*, *D*, and *E*. *E* dies. *B* marries with the consent of *C* and *D*. She has fulfilled the condition. If *E* had been alive and she had not obtained his consent she would not have been entitled to the legacy.

¹ For an example of a contrary construction, that is where on the terms of the will *D* took if *C* died without male heir at any time, see *Soorjeemoney v. Denobundoo* (1858) 6 M.I.A. 526.

² *Indira v. Akshoy* 59 I.A. 419, AIR 1932 P.C. 269, 64 M.L.J. 48.

³ *Ram* (cited above).

⁴ ISA, s. 128.

A bequeaths a farm to *B* on condition that he settles a fund on *C* within 14 days after *A*'s death. *B* settles the fund within 21 days but after 14 days from that date. *B* is not entitled to the legacy.

A bequeaths a farm to *B* on condition that she marries a man of a Brahman caste. *B* marries a man of a caste calling itself Vishvabrahmana but not recognized as Brahman by *A*'s community. *B* is not entitled to the farm.

766. Where a bequest to one person precedes a bequest of the same thing to another, as for example 'to *A* for life, remainder to *B*', or 'to *A* without power of sale or mortgage and after him to *B* who shall have absolute rights', and the prior bequest fails, the subsequent bequest may take effect if the prior bequest fails in a manner not contemplated by the testator,¹ unless a different intention appears from the will.²

A bequeaths his farm to his male issue and, if they die leaving no children of the same caste, to *B*. *A* dies leaving one son who dies unmarried. The bequest to *B* takes effect.

A bequeathed his property to his wives for life with instructions that it should belong to any sons born of *A*'s daughters. The will was executed before legislation enabling bequests to be made to unborn persons (§ 736). *A* further provided that if no male heir was born to any daughter the property should pass to a charity. It was held that the gift to the charity was conditional upon the absence of a male grandson. The failure, however, of the bequest to the grandsons had come about in a manner different from that contemplated by the testator, and under s. 130 of the ISA the conditional bequest could not take effect.³

A bequeathed property 'to *X* and his heirs'. In the event of these bequests failing a bequest was made to *Y*. *X* was held incompetent to take, as his spouse had attested the will. It was held⁴ on a construction of the will that the testator intended the words 'to *X* and his heirs' to be read as 'to *X* or his heirs', and a substitutional bequest was found to have been made to the heirs of *X*, whereupon the bequest to *Y* could not take effect.

767. Where a bequest is made under conditions that it shall cease to have effect, or the legacy shall go to another, unless the legatee performs an act, and no time is laid down within which he must do it, if the legatee does an act rendering impossible or indefinitely postponing the performance of the act required of him, the legacy must go as if the legatee had died without performing such act.⁵

¹ ISA, s. 129.

² ISA, s. 130.

³ *Nammalwar v. Appavu* AIR 1960 Mad. 283, [1960] Mad. 35.

⁴ *Shirinbai v. Nargecebhai* AIR 1956 S.C. 747, [1956] 2 M.L.J. (SC) 67, [1956] SCR 391.

⁵ ISA, s. 136.

A bequest is made to *A*, with a proviso that unless he marries and begets a son, the legacy shall go to *B*. *A* becomes a *sanyasi*. *B* is immediately entitled to the legacy, even though in possibility *A* might subsequently marry.

A bequeaths the income from a farm to *B* (who is domiciled in India) with a proviso that it should cease to have any effect if he does not marry *A*'s daughter. *B* marries the daughter of *C*, and thus indefinitely postpones the fulfilment of the condition. The bequest ceases to have effect at once.

768. The most effective manner of securing that the testator's property shall not be enjoyed in defiance of his intention is not to add precatory words to what may be construed as an absolute bequest, but to provide for the divesting of the interest upon the happening of the undesired event. Conditions subsequent create a contingent interest in the persons entitled to the legacy if the condition is fulfilled, and these persons naturally see whether the testator's intentions are observed. A bequest may be made to any person with the condition superadded that, in case a thing shall happen, the legacy shall pass to another person, or that in case a thing shall not happen, it shall go over to another person.¹

A bequeaths his residuary estate to *B* with a proviso that if *B* disputes *A*'s competence to bequeath the property (which was actually joint property of *A* and *B*), it shall go to *C*. *B* disputes *A*'s competence, and the legacy passes to *C*.

A bequeaths a farm to *B* for life, and after his death to *C*, but if *C* shall then be dead without a son, to *D*. *C* takes a vested interest in the farm, subject to be divested if he dies leaving no son in *B*'s lifetime (§ 749).²

769. Such an ulterior bequest cannot take effect unless the condition is strictly fulfilled.³

A bequeathed property to his wife absolutely with a proviso that if she were unchaste the reversioners (§ 685) should share the property equally. She remarried. Held: she was entitled to retain the property.⁴

770. Further a bequest may be made with a condition superadded that it shall cease to have effect in case a thing shall happen, or in case a thing shall not happen — whereupon the residuary legatee or the intestate heirs take the benefit.⁵

¹ ISA, s. 131.

² *Bhoobun v. Hurrish* (1878) 5 I.A. 138, 4 Cal. 23,

2 C.L.R. 339.

³ ISA, s. 132.

⁴ *Har v. Shanti* AIR 1941 Oudh 353, 16 Luck. 414.

⁵ ISA, s. 134.

A bequeaths a house to *B* with a proviso that in case *B* sells it to a non-caste-fellow the bequest shall cease to have effect. *B* sells to a non-caste-fellow, but his interest ceases immediately and the sale is ineffective to pass the house.¹

A bequeaths his farm to *B* until *B* shall become insolvent. On *B*'s insolvency his interest ceases, and the farm does not vest in the Receiver.

A bequeaths his house and furniture to his concubine, *C*, until she attaches herself to another man and resides with him. If another man visits her in *A*'s house *C* may not be deprived of the house; but if she resides under another man's protection the house and furniture are divested.

| No doubt the gift over is more efficacious.

A bequeaths his house to *B* and when *B* marries to a society for the preservation of cattle. The society will take the house if and when *B* marries.

A bequeaths shares in a limited company to the managers of a temple until they cease to perform worship thrice daily, and thereafter to the Imam of a mosque. The Imam takes as soon as the managers cease to carry out the stipulated worship.

771. A bequest of a limited estate may, on the other hand, be made with a condition superadded that it shall ripen into an absolute estate in case a thing shall happen, or in case a thing shall not happen.

'My daughters shall take absolutely, but if any has no issue she shall enjoy it for her life without subjecting it to any encumbrance and on her death it shall pass to her sister or sisters who have issue.' Held: a daughter who had no issue at the testator's death took a life estate, but if she had issue thereafter her life estate would be augmented into an absolute estate, even if the child died subsequently, and on her death the share would go to her own heirs.²

772. Other rules of importance may be grouped as a miscellaneous category:

(1) Where property is bequeathed in simple terms, the entire interest of the testator therein passes, unless apt words are used to convey a lesser interest.³ The bequest of the entire income from property conveys the property itself,⁴ unless it is clear from the terms of the bequest that only a

¹ See *Shyama v. Sarup* (1912) 17 C.W.N. 39. On attempts to force a widow to reside in a particular house see *Mulji v. Bai* (1888) 13 Bom. 218.

² *Narayan v. Arumugattammal* AIR 1958 Mad. 431, 71 L.W. 107. Cf. *Monoranjan v. Jatindra* PLR [1961] 2 Dac. 348.

³ ISA, s. 95.

⁴ ISA, s. 172.

charge was intended to be created for the purpose indicated during a specified period.¹

(2) A bequest to a class of persons under a general description only cannot be taken by anyone to whom the words are not applicable in their ordinary sense.² The share depends on the ultimate number of persons claiming.³

A bequeathed the income from certain lands upon trust to pay it on the anniversary of his death to 'the Brahmans of Sarvadanapalli'. On the first anniversary of his death 150 Brahmans appeared claiming to be resident in Sarvadanapalli, of whom 125 were Visvakarma Brahmans. Semble, the latter were not Brahmans in the ordinary sense of the word, and the remainder were entitled to 1/25th each of the sum distributable.

(3) A bequest to two or more persons jointly does not lapse if one dies before the testator: the other or others take the whole.⁴ But the court will not readily construe a mere bequest to 'A and B' as a joint estate with benefit of survivorship,⁵ unless the testator made it abundantly clear that, on the death of one, the other or others must take his interest by survivorship.⁶

A bequeathed property to 'my son and my wife'. The son predeceased A. Held: all went to the widow.⁷

A bequeathed property to 'my two brothers B and C and my nephew D'. B, C and D are members of a Mitakshara coparcenary. Nevertheless they take in one-third shares, if all survive A, as tenants-in-common.⁸

A bequeathed his house to 'my son and his wife so that it may serve as a home for them and their children and children's children'. The son and the wife survive A. The son divorces his wife, marries again, and dies leaving children by the second wife. The first wife takes the house by survivorship.⁹

A bequest read: 'The three nephews shall hold possession in equal shares... They shall have no right to alienate the same, but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively

¹ *Sri Thakur v. Kanhayalal* AIR 1961 All. 206.

² ISA, s. 98.

³ *Jiban v. Jitendra* AIR 1949 F.C. 64, [1948] FCR 239.

⁴ ISA, s. 106.

⁵ *Thambireddi v. V. Mallareddi* AIR 1935 Mad. 852, 158 I.C. 878.

⁶ *Bahu v. Rajendra* AIR 1933 P.C. 72, 60 I.A. 95, 8 Luck. 121.

⁷ *K. Surareddy v. K. Venkata* AIR 1960 An. P. 368, [1960] 1 An. W.R. 102.

⁸ *Srinath v. Ramsurat* AIR 1959 Pat. 116.

⁹ An example of a joint estate bequeathed to a husband and wife appears in *B. Shivaramiah v. Rangamma* AIR 1952 Mys. 32, [1952] Mys. 139.

shall see fit . . . If any of them dies without leaving a male child then his share shall devolve on the surviving nephews and their male descendants, and not on their heirs.' It was held that a life estate only was created in favour of the three nephews (§§ 754-5). Further, on the death of the first nephew his share went to the other two, and on the death of the second the share which he left behind him made up of his original and his accrued share went to the third nephew.¹ The English rule to the contrary² has no application in India.

773. It is established beyond question that the joint tenancy with benefit of survivorship known under the Mitakshara law of the joint family and succession is not to be created by any intention other than the most explicit and definite. If, as is most usual, the words imply that the legacy is to be taken in distinct shares, then if any legatee dies *before* the testator so much of it as was intended for him falls into the residue and does not pass by survivorship.³ This constitutes an important exception to the rule stated in the first sentence in § 772 (3) above.

A bequeaths Rs. 3,00,000 to *B*, *C*, and *D*, 'to be enjoyed equally between them'. *B* dies before *A*. *C* and *D* take Rs. 1,00,000 each, not Rs. 1,50,000.

When what is bequeathed in shares is the *residue*, any share that lapses must necessarily be treated as undisposed of by the testator.⁴

A bequeaths the residue of his estate to *B*, *C* and *D* in equal shares. *B* dies before *A*: his $\frac{1}{3}$ share passes as on an intestacy.

774. (4) A bequest to *A* and his wife may be made though the actual wife is not in contemplation. If at the testator's death *A* is unmarried, but the wife whom he subsequently marries was alive at the date of the testator's death (it seems),⁵ the rights of that wife relate back to the date of the testator's death.⁶

775. (5) A bequest of items of a specified description which are parts of the estate at the testator's death, without any provision as to who shall select the items, gives, unless the will must otherwise be construed, the right of selection to the legatee. *A* provided in his will, 'my residuary legatees

¹ *Tarakeswar v. Shoshi* (1883) 10 I.A. 51, 9 Cal. 952.

² *Pain v. Benson* (1744) 3 Atk. 80 = 26 E.R. 848.

³ ISA, s. 107.

⁴ ISA, s. 108.

⁵ § 735.

⁶ *Kuppuswami v. Jayalakshmi* AIR 1934 Mad. 705, 58 Mad. 15.

shall give the female children a field of wet and a field of dry land'. The residuary legatees claimed that they were entitled to transfer fields of middling quality, but it was held¹ that the daughters had a right to fields of their choice, even if these should turn out to be fields of the best quality.

BEQUESTS TO CHARITY

General principles

776. A Hindu is not hindered in bequeathing his property to charity by any rules rendering void 'superstitious bequests'.² Nevertheless the basic elements of a true charitable bequest must be present. A valid bequest to charity must be made in one of two ways, namely (i) to designated persons or to a corporation or artificial legal personality subject to such valid conditions precedent and/or subsequent as the testator may think fit, or (ii) to trustees named in the will, or to such trustees as the court may appoint or a designated person may choose, or without mentioning trustees (for the court will on application to it appoint trustees for a valid charitable trust) for a charitable purpose indicated in the will. The first alternative offers advantages. Litigation which eats up the estate is avoided by bequests to individuals or institutions, particularly if the conditions are simple, for example, 'I bequeath Rs. 50,000 to the managers of Sri Rangaswami temple to be spent by them for religious festivals undertaken at the temple', or 'I bequeath my residuary estate to the Sri Kashinathasamsthana'.³ A third possible course, which entirely rules out wasteful litigation, is to leave the property to named persons to be used by them in their absolute discretion. If a charitable purpose is added it must be precisely described or the whole bequest will fail (except for public trusts in Maharashtra and Gujarat)⁴ for uncertainty: the court will not admit a

¹ An adaptation of *E. V. Balakrishnan v. Mahalakshmi* AIR 1961 S.C. 1128.

² See *Jamshedji v. Soonabai* (1909) 33 Bom. 122; *Fatima v. Adv. Gen.* (1882) 6 Bom. 42.

³ *Rangrao v. Gopal* (1957) 60 Bom. L.R. 675, 677, with which compare the valid dedication of a grove in *Chandra v. Jnanendra* (1923) 27 C.W.N. 1033 (trees planted in consecrated ground).

⁴ Bombay Public Trusts Act 29 of 1950 ss. 10-11.

bequest which the trustees cannot be compelled to carry out. If, then, with a precise charitable purpose added, or without any purpose, persons are chosen by the testator, and they can be trusted, well and good. But since charity begins at home, a testator's reluctance to adopt this simple course is understandable.

777. In no case should the testator leave the property to trustees to be spent for purposes which are charitable *and* non-charitable or charitable *or* non-charitable. Any purpose which is not charitable is *per se* non-charitable, and a bequest to trustees which is susceptible of non-charitable application is not a bequest for charity, fails for uncertainty, and may bring with it disaster as well as frustration of what was, in all probability, the testator's purpose.¹ In Maharashtra and Gujarat many such defective bequests are saved by statute, if a 'public trust' may be made out.²

778. The court will supervise the performance of directions that property or its income should be spent for charitable purposes provided (i) that the purpose indicated is not uncertain, and (ii) the purpose is charitable. As to certainty, a bequest merely for *dharma* is void for uncertainty,³ and so also similarly vague bequests, except public trusts in Maharashtra and Gujarat under s. 10 of Bombay Act 29 of 1950. The court does not, in other cases, frame schemes for the administration of trusts for purposes which cannot be defined even if it seems that there was a general charitable intention. If the trustees are directed to choose between objects all of which are unquestionably charitable, the bequest is good. If, on the other hand, the testator is specific, the purpose is charitable and he has manifested a general intention to give to charity, but the charity he chooses is not extant at his death, and not capable of being brought into existence under the rule that saves gifts to non-existent idols, or has become impractical thereafter, the court will apply the property *cy près* to a charitable

¹ *Venkatanarasimha v. Nayapathy* (1923) 46 Mad. 300; *Brij Lal v. Narain* AIR 1933 Lah. 833, *sub nom. Narain v. Brij* 14 Lah. 827; *Chichester D. F. v. Simpson* [1944] A.C. 341 (HL).

² Bombay Act 29 of 1950, s. 11.

³ *Ranchordas v. Parvatibai* (1899) 26 I.A. 71, 23 Bom. 725, 3 C. W. N. 621 (PC). *Mukherjea*, 117-18.

purpose nearest to the testator's intention.¹ Where the residue is bequeathed to a non-charitable purpose, and the will must be construed as casting a bequest that fails into residue, the *cy près* doctrine is inapplicable.² If the object is not uncertain, but the intention is not specified in sufficient detail, the court will frame a scheme for the achieving of the testator's purpose.³ But where the purpose is clear and practicable the court will not substitute for it one of its own invention, however much the latter might be more rational or even more useful.⁴ No charitable bequest can be valid which is contrary to public policy, but public policy will not improve upon a stupid or shortsighted charitable bequest.

The definition of charity

779. An exhaustive definition of what is charitable is not possible at this place. A number of entirely secular objects, such as comforts for employees of a firm, have been held to be charitable,⁵ but this complicated subject is beyond the scope of an introductory book on Hindu law. A bequest in order to be charitable must in any case contain an element of public benefit, but one must bear in mind that religious purposes are presumed to be beneficial to the public and that Hindu doctrine insists that the proper performance of religious duties by individuals (as for example by facilitating the early marriage of poor marriageable girls or orphan girls) is conducive to the welfare of the community at large. An attempt to distinguish between 'religious' purposes and 'charitable' purposes will therefore fail. If it is religious it is bound to be charitable.

The court very narrowly construes a bequest for charity for three reasons: such bequests are exempt from the rule against perpetuities⁶ and the income from charitable trust-funds is exempt from income tax; moreover in the case of

¹ *Mayor of Lyons v. Ado. Gen.* (1876) 3 I.A. 32, 1 Cal. 303; *Balkrishna v. Vinayak* AIR 1932 Bom. 191, 34 Bom. L.R. 113; *Ratilal v. State* AIR 1954 S.C. 388, 394, [1954] S.C.J. 480, 56 Bom. L.R. 1184.

² *Ravanna Koovanna v. Vana* AIR 1962 Mad. 500, [1962] 2 M.L.J. 379.

³ *N. Ramaswami v. S. A. Aiyaswami* AIR 1960 Mad. 467; cf. *Comm. v. Dy. Comm.* AIR 1937 P.C. 240, 39 Bom. L.R. 1012, 41 C.W.N. 1072.

⁴ *Ado. Gen. v. Fardoonji* (1911) 13 Bom. L.R. 332.

⁵ *Oppenheim v. Tobacco* [1951] A.C. 297 (H.L.).

⁶ *Prafulla v. Jogendra* (1905) 9 C.W.N. 528.

private religious and charitable trusts it is really difficult to call the trustees to account. A certain vagueness in this direction has actually been traditional, and the charitable trust has served as a mask behind which benefits were secured to the family of the testator apart from the straightforward legacies to individuals (§ 787).

780. A bequest is *prima facie* charitable if it is for

- (1) secular or religious education,¹
- (2) relief of the poor,²
- (3) upkeep or foundation of public amenities such as hospitals, wells, tanks, shelters, halls, gardens, parks and the like,³
- (4) the feeding of Brahmans,⁴
- (5) the maintenance of ascetics, monks, or religious devotees and the provision or repair of their accommodation,⁵
- (6) worship of a deity, private or public, whether consecrated in a temple, or to be consecrated in future, or periodically consecrated or dedicated (provided that the deity can be plainly identified and has more than an occasional existence),⁶
- (7) the performance of *sraddhas*, pilgrimages or of *pūja* of any kind, provided that there is no doubt but that it is a recognized method of obtaining or conferring spiritual benefit,⁷
- (8) and for the construction or upkeep of temples.⁸

¹ *Tagore v. Tagore* I.A. Sup. Vol. 47, 9 B.L.R. 377; *Manorama v. Kali* (1903) 31 Cal. 166, 8 C.W.N. 273. A gift to a *svami* as he had decided to build a students' boarding-house is not a gift for *dharma* within *Mitakshara* I, i, 28, and probably not a valid charitable bequest: *Lilavati v. Takappa* AIR 1948 Bom. 315, [1948] Bom. 301. But a hostel as such might be a religious endowment: § 806.

² *Morari v. Nenbai* (1892) 17 Bom. 351 (a case of a *sadavrata*); *Puramanandass v. Venayekrao* (1882) 9 I.A. 86, 7 Bom. 19, 12 C.L.R. 921; *Ratan v. Suraj* AIR 1944 All. 1, [1944] All. 20; *Manorama* (cited above). *Mukherjea*, p. 75.

³ *Ram Lal v. Sec. of State* (1881) 7 Cal. 304 (PC), 8 I.A. 46, 59; *Jamna-bai v. Khimji* (1890) 14 Bom. 1.

⁴ *N. Ramaswami* (cited above). ⁵ *Puramanandass* (cited above).

⁶ *Bhupati Nath v. Ram Lal* (1910) 37 Cal. 128, 14 C.W.N. 18 (FB); *Brojobala v. Shebait* AIR 1953 Cal. 285, 57 C.W.N. 74; *Gostha v. Haridas* AIR 1957 Cal. 557, 558, 61 C.W.N. 325.

⁷ *Lakshmishankar v. Vajjnath* (1881) 6 Bom. 24; *Prafulla* (cited above).

⁸ *Gokool v. Issur* (1886) 14 Cal. 222, with which compare *Surbomungola v. Mohendronath* (1879) 4 Cal. 508.

781. There is no objection to bequests for the education of a sect or group, or persons from a locality, nor to feeding or clothing poor persons of a sub-caste, sect, or community, provided that the beneficiaries belong to a recognizable section of the public. In the case of bequests for religious purposes, however, the court will not recognize them as charitable unless the purposes are consistent with Hinduism in more than a narrowly sectarian sense. The religious spirit of Hinduism as it is known today is what is to be regarded. A bequest for the worship of a tomb, or for the commemoration of a deceased human being (however venerable while he was alive), or for tantric rites of an orgiastic character, or for the sacrifice of animals will almost certainly be void as either non-charitable, or contrary to public policy, or both.¹ In the case of peculiar practices such as the oiling of stones, it is conceivable that if proof were led that a substantial section of the community regarded those practices as conducive to spiritual benefit, the court would allow them to be charitable;² but the presumption is against the validity of a practice inconsistent with modern Hinduism as developed from the Vedas, *sastras* and *agamas*.³ Hinduism is not anchored to ancient superstitions,⁴ and what might have been charitable three centuries ago will not invariably be charitable now. The question whether a Hindu can create a valid religious charity for the benefit of Theosophical, Christian or Islamic faiths is not yet settled,⁵ but there is authority for the view that Hinduism, properly understood, regards as 'religious' all faiths which are consistent with the Hindu way of life, and a broad tolerance is certainly consistent with traditional Hinduism.⁶

¹ *Draiviasundaram v. Subramania* AIR 1945 Mad. 217, [1945] Mad. 854; *Rangrao v. Gopal* (1957) 60 Bom. L.R. 675, 677-8. Mukherjea, pp. 71-2, 82-3.

² *Jamshedji v. Soonabai* (1909) 33 Bom. 122. Mukherjea, p. 70.

³ *Saraswathi v. Rajagopal* AIR 1953 S.C. 491, 495, [1953] S.C.J. 714, [1954] SCR 277. *Ravanna Koovanna*, cited at § 778 above, follows this, but the judgment reveals that such *samadhis* were customarily erected, a fact which raises doubts as to the correctness of the decision.

⁴ Note the cautious dicta in *Durgah v. Syed* AIR 1961 S.C. 1402, 1415, col. ii.

⁵ *Fazlur v. Anath* (1911) 16 C.W.N. 114, 11 I.C. 436 ought not now to be followed if the opinions of Ameer Ali and Wilson there cited are no longer sound. Dedications by Hindus to mosques took place in medieval times. In *Mundaria v. Rai* AIR 1963 Pat. 98 it was held, following *Saraswathi* (above), that a Hindu could not make a public *wakf* of an *imambara*.

⁶ *Kolandai v. Gnanavaram* AIR 1944 Mad. 156, 157, [1943] 2 M.L.J. 664.

FURTHER READING

Though greatly out-of-date in respect of the number of sections of the Indian Succession Act applicable to Hindu wills, and in respect of the question of legacies to unborn persons, the textbook of A. Phillips and E. J. Trevelyan, *Law Relating to Hindu Wills*, 2nd edn, London/Calcutta, 1914 is still handy for the student. More complete and accurate, but very cumbersome to handle, is N. D. Basu, *Law of Succession*, 4th edn, Calcutta, 1957. M. Ramamurthy's *Law of Wills* (Madras, 1949) is frequently cited.

All writers on Hindu law have perforce to be selective in treating of topics on wills. Numerous valuable illustrations of points of general law, as well as discussions of the more obviously important doctrines relating to the disposing power of Hindus will be found at

J. D. Mayne, *Treatise on Hindu Law*, 11th edn, ch. xxi.

N. R. Raghavachariar, *Hindu Law*, 4th edn, ch. xi (Gifts and Wills).

D. F. Mulla, *Principles of Hindu Law*, 12th edn, chh. xix, xx.

CHAPTER NINE

Religious Endowments

THE PROPERTY OF IDOLS AND ITS MANAGEMENT

Dedication

782. Jurists were for long puzzled by the anomaly of the property of an idol, which could neither receive what was offered to it, nor manage it, nor vindicate its rights against trespassers. The modern doctrine is that a Hindu idol is a juristic person,¹ capable of owning property and of vindicating its rights by suit, which must be brought on its behalf by its legal manager or, in special cases, by others who have an interest in its welfare.² No one now doubts but that property can be dedicated to an idol, even without the interposition of trustees,³ and that that property belongs to the idol in perpetuity, even though no acceptance has been made on that idol's behalf. Transfers of immoveable property worth Rs. 100 or more are not complete, one must remember, until they have been registered in compliance with s. 17 (a) of the Registration Act.

783. Registration, and mutation of names in the revenue records, which normally follow the creation of a dedication of land to a deity, are neither perfect proof of the absolute title of the deity, nor the crucial indicia of the divesting by the founder of his interest in favour of the deity. The essential element of a dedication is the renunciation of property (*utsarga*) in favour of God, with the intention that the worship shall be of, or the application of the property or its income shall be in connexion with, a particular deity that is a manifestation of God, and is represented or to be represented by a properly consecrated idol with a particular name in a particular shrine or holy place. Hindus dedicate

¹ *Pramatha v. Pradyumna* AIR 1925 P.C. 139, 52 I.A. 245, 52 Cal. 809.

² § 798.

³ *Bhabatarini v. Ashmantara* AIR 1938 Cal. 490, 179 L.C. 847.

property to 'God Sri Ramesvara', rather than to 'God worshipped in the idol of Sri Ramesvara', but the meaning is the same. It is because all dedications are in favour of, or 'for', God, who cannot be confined within a name, sex, history, mythology, or temple, though chosen to be worshipped under a particular *avatara* (incarnation),¹ manifestation or cult, as the case may be, that it is not necessary that the idol should already have been consecrated. Nor, as we have seen (§ 780), need the idol have a permanent existence, though endowments for impermanent idols are rare. Nor can the desecration of the idol terminate the legal rights of the deity, for whose worship a new idol may be consecrated.² Nor can the subsequent abuse of the endowment by trustees alter the nature and purpose of the dedication.

784. The idol itself is the property of the deity, and is managed, like the idol's other property: where it is situated and in whose hands it remains are determined by the manager.³ There is no difference in law between the family idol and the public idol, the artistic bronze *murti* (image) and the lump of stone at the street-corner. The care spent on them will depend upon the property they own and the prestige which attaches to them.

785. The idol is called *devata*, 'deity'. The property dedicated to it is called *devottaram*, in Anglo-Indian jargon 'debutter'. 'Debutter-property' is the property of an idol. In order that property may become debutter, as the phrase is, it must be dedicated absolutely,⁴ and there must be a complete divesting by the dedicator of the interest dedicated.⁵ This does not, of course, prevent the dedication of an interest less than absolute as for example a charge over property for Rs. 100 a month, or the total income from a piece of land for the lifetime of a person, or the remainder after life-estates have been bequeathed to persons capable of taking in law. But a man cannot dedicate a

¹ Whence bequests to unnamed deities may be void for uncertainty: *Phundan v. Arya* (1911) 33 All. 793.

² *Purna v. Gopal* (1908) 8 C.L.J. 369; *Bijoychand v. Kalipada* (1913) 41 Cal. 57; *Ananthakrishnan v. Chidambaram* AIR 1953 T.C. 442.

³ Who may, for the benefit of the deity, alienate the idol itself: *Radhakrishna v. Radharamana* AIR 1949 Or. 1.

⁴ *Brojobala v. Shebait* AIR 1953 Cal. 285, 57 C.W.N. 74.

⁵ *Manorama v. Dasi* AIR 1931 Cal. 329, 34 C.W.N. 1087.

house to a deity reserving for himself the right to dispose of it thereafter. If he purports to dispose of it he may be held to have disposed of the *shebaiti* (§ 790), which will then pass to the alienee's heirs and not those of the dedicator or 'founder', unless the latter otherwise provides.¹ Even if the founder is the first manager, he, in his quality as manager, is distinct in law from himself as former owner. A dedication which purports to fetter the manager's dealing with the property is bad except to the extent that it provides for the method of worship and forbids alienation of the estate. One who has provided for succession to the *shebaiti* cannot interfere to alter its course of devolution. Nor does the family retain a right of recovery of the dedicated property, unless management is defective and the worship neglected.²

786. A dedication must not be illusory. The Hindu debutter cannot consist of a remainder, dedicated for worship or the expenditure ancillary to worship, after all, or any, of the founder's relatives have received as much of the income for their needs as the manager shall think fit to distribute.³ A gift to a deity must be a substantial gift, however small in value, and the court will not protect a purporting gift in charity which is really a covert provision for the founder's nominees. Thus a merely contingent benefit to the idol is no debutter.⁴ On the other hand the dedication is not rendered void because the shebaites receive a reasonable remuneration for managing the trust under the terms of the endowment. Nor need the idol take the bulk or even a substantial proportion of the income of the property dedicated to it.⁵ This apparent paradox requires explanation, otherwise the whole institution will be incomprehensible.

¹ *Dharam v. Shahzad* AIR 1953 All. 359, [1953] 2 All. 631.

² *Parameswaran v. M. Chandrasekhara* AIR 1956 T.C. 196, [1956] T.C. 606.

³ *Niranjan v. Behari* AIR 1929 All. 302, [1929] All. L.J. 324.

⁴ *Bhubaneshwari v. Brojo* AIR 1937 P.C. 185, 64 I.A. 203, 39 Bom. L.R. 933.

⁵ In *Balaram v. Ichha* AIR 1950 Or. 225 extensive family lands were held in trust for a deity. In *Sonatan v. Juggutsoondree* (1859) 8 M.I.A. 66 there was a disposition subject to a charge to pay expenses of worship. See § 772 (1). A decision that a dedication amounts to a charge would often frustrate the intentions of founders to create perpetual funds with the motives indicated in § 787.

787. Long ago it was discovered that neither a grasping king, nor selfish relatives or co-villagers would readily seize property which, while under the control of a man's descendants and representatives, was legally the property of a religious endowment. The concept of trust was not absent from the then Hindu law.¹ While the law of succession passed the residue of the property to a particular relation, who might maintain females and other dependants inadequately, and the same difficulty might arise when the local ruler escheated the estate for want of male issue, a fund dedicated to the family idol was safe for purposes of which the manager approved. In the case of family idols the cost of their worship in clothes and ornaments, and daily *puja* by a Brahman, could be (and still is) very small. The idol's food consists in the savour of food cooked for the family and placed before it. Its bath requires hardly any expenditure. Yet a fund of several thousands of rupees might be dedicated to it. The manager was entitled to spend as much in worship as he thought fit. If he chose he could attend to the idol's 'needs' at the meanest possible level, spending the remainder of the income on himself and the members of the founder's family at his discretion.² The motives of dedication to an idol were confirmed by the revenue laws, and to this day religious trusts are exempt from income tax.³ Thus such foundations served the same purpose as an investment, permanent as to capital, and flexible as to employment of the income. Small wonder that religious endowments, particularly private endowments, figure largely in the law-reports, and give rise to dubious transactions amounting in some cases to fraud.⁴

788. Nor are public temples exempt from similar considerations. Dedications to a deity of a public temple were often intended to enhance the prestige of the family. The temple-

¹ In the matter of the petition of Kahandas (1881) 5 Bom. 154 per West, J. Dicta of Mr Ameer Ali in *Vidyavaruthi v. Balusami* (1921) 48 I.A. 302, 311-12, 44 Mad. 831, 840, to the effect that the Muslims introduced the concept of trust (*wakf*) into India are without foundation: see the institutions of *nivi* and *kutta* discussed by Derrett at *Zeits. f. vergl. Rechtsw.*, vol. 64 (1962), pp. 68-72.

² *Kumaraswami v. Lakshamana* (1930) 53 Mad. 608; Mukherjea, p. 251.

³ Income Tax Act, 1961, s. 11.

⁴ A marvellous illustration of ingenuity and fraud practised with the aid of debutter is *Sri Iswar v. Gopinath* AIR 1960 Cal. 741.

treasury served principally to bolster up the class, group, or sub-caste which provided the managers, *pujaris* or both. In all religious endowments the two motives of gifts for the acquisition of religious merit, and investment for secular motives are found in combination. A founder of a public temple by no means put an end to the rights of himself and his family: he might allow only a restricted public access to the temple or parts of it.¹ His motive might be to increase the facilities of a sub-caste or sect. The word 'public' is thus used in a technical sense. The expenditure in a public temple is related to the income expected from visitors and worshippers. A costly establishment attracts gifts and offerings, not to speak of fees which may be charged, according to custom, for worship in the sanctum, a part of the temple not normally open to all comers. The managers of a public temple derive direct or indirect benefits of a pecuniary nature, or of natures that are as valuable as if they were pecuniary. The right to be a manager of such a temple is a valuable right. Small wonder that attempts are made to sell it. The right to be a *pujari*, that is to say the worshipper who regularly attends on the idol and acts as intermediary between it and the visitor who brings offerings, is in many temples so valuable that it has been hotly contested and in places has even been sold. That in such cases it is a right of property is past dispute.²

789. These facts explain what would otherwise be unexpected, namely the rule that the manager's position is a right in the nature of property.³ The law looks upon the manager as (1) a trustee for the idol, and (2) a beneficial owner of the property of the endowment. If the manager were treated as merely a bare trustee for the idol the purpose of many endowments would be frustrated and the whole institution might become unworkable. We are not surprised to find *shebaitis* being mortgaged.⁴ On the other hand the manager's interest in the income of the fund must not be

¹ *Comm. H. R. E. v. Sri Lakshmindra* AIR 1954 S.C. 282, [1954] S.C.J. 286, [1954] SCR 1005.

² *Raj Kali v. Ram Rattan* AIR 1955 S.C. 493, [1955] 2 SCR 186, [1955] Pat. 530; *Ramanujacharyulu v. Pandurangacharyulu* AIR 1957 An. P. 272, [1956] An. W.R. 272.

³ *Angurbala v. Debabrata* AIR 1951 S.C. 293, [1951] SCR 1125 [1951] S.C.J. 394; *Janki v. Koshyalyanandan* AIR 1961 Pat. 293.

⁴ *Mahamaya v. Haridas* 42 Cal. 455, AIR 1915 Cal. 161.

allowed to dominate to such an extent that the idol is ignored, and the worship is neglected, while corpus and income find their way into the shebait's pocket. The extreme theory (quite understandable in itself), that if no member of the family objects the manager of a family idol can break the trust and appropriate the idol's property, is without foundation.¹

Managers and their appointment

790. In the circumstances explained above it is not surprising that disputes occur as to who is manager. The word for manager is 'shebait', derived from the Sanskrit *seva*, 'service, worship'. It is his duty to see that worship is done.² He does not always do it himself. Because of heterodox or sectarian beliefs he may be disinclined or even disqualified to perform it.³ The duty is usually delegated to a *pujari*, a specialist in such matters,⁴ while the duty of management as such cannot be delegated. The *pujari* is the paid employee of the shebait,⁵ but in cases where families have acted as *pujaris* for generations it can happen that the *pujari* is entitled to a fixed share in the profits. In the South the term *dharma-karta* is used often instead of shebait, but in other contexts that term implies a manager of the business of the temple, and he is then a bare trustee.⁶ It is not unusual for the founder to appoint trustees for the endowment, in whom the property vests for purposes of investment and management, and at the same time shebait, who are responsible for the management of worship. Thus where *A* bequeaths, 'Rs. 10,000 from my residuary estate to my friends *B* and *C* upon trust to invest the same and to pay monthly the income to my brother *D* as first shebait of the idol Sri Trailokyanathesvara', the position is that the dedication to the deity is complete, *B* and *C* are trustees, but *D* has the responsibility of managing the endowment itself, of

¹ *Sukumar v. Abani* AIR 1956 Cal. 308, 60 C.W.N. 778. Mukherjea, pp. 192-4; Ragh., p. 588.

² Mukherjea, pp. 197-8.

³ *Iswar v. Kshetra* AIR 1949 Cal. 253, 53 C.W.N. 323.

⁴ *Raj v. Ram* (cited below).

⁵ *Sree Kalimata v. Jibandhan* AIR 1962 S.C. 1330, 1333.

⁶ *T. P. Srinivasa v. G. N. Evalappa*, AIR 1922 P.C. 325, 49 I.A. 237, 45 Mad. 565.

employing the *pujari*, and applying the surplus of the income in his discretion.¹ *D* would call *B* and *C* to account if they neglected their duties regarding the investment or its income. *B* and *C* would have no responsibility for the worship of the idol.

791. Females may be shebaiti.² A female or (it seems) a disqualified person may perform the duties, where these involve appearing before the idol, through a qualified deputy. The right to appoint a shebait lies with the founder. If his instructions cannot be traced the custom of the endowment formerly ruled.³ Prima facie shebaitship is partible property, descending as if the founder or the last shebait who held the *shebaiti* absolutely had died intestate in respect of it. Prima facie all cases in which a shebait dies after 17 June 1956 must be governed by the Hindu Succession Act, and the *shebaiti* will pass by survivorship or succession as the case demands. The inconveniences of fragmenting the responsibility for management of the idol, coupled with the rule that every shebait must join in all acts (§ 795), are not in themselves enough to avoid the plain sense of the Hindu Succession Act which, when speaking of property, does not in terms exclude *shebaiti*. If this is correct the right of founder's heirs to dispose of the *shebaiti* for failure of the line already provided for by the founder (§792) has been abolished, for no *shebaiti* can fail to reach an heir of the existing shebaiti, since the Government of India is ultimate heir to all property. See § 593 above.

Support for this inconvenient situation is to be found in *Gnanasambandha v. Velu*:⁴

Velu claimed to be manager of an endowment connected with a temple in Madras and to be in possession of the lands forming the endowment. The rights had been sold, but the sale was void, no custom having been proved to the contrary. The right of recovery by Velu's father was extinguished by limitation. Velu claimed that he did not derive his right from or through his father, but that on his father's death a fresh right accrued to Velu, and the period of limitation then began. This was not a case where a family as such had a right of

¹ *Raikishori v. Off. Trustee* AIR 1960 Cal. 235, 64 C.W.N. 646.

² *Raj v. Ram* AIR 1955 S.C. 493, [1955] S.C.J. 493, [1955] 2 SCR 186; *Palaniathal v. R. Udayappan* [1960] 1 M.L.J. 478.

³ *Bhabatarini v. Ashlata* (1943) 70 I.A. 57, AIR 1943 P.C. 89, [1943] 2 M.L.J. 70 (PC); *Sankareswar v. Bhagabati* AIR 1949 Pat. 193; § 593.

⁴ (1899) 27 I.A. 69, 23 Mad. 271.

management. Here management was hereditary. Under the *Tagore case* (§ 740) the creating of inconsistent estates of inheritance is impossible. 'The Hindu law of inheritance did not permit the creation of successive life estates in this endowment, and this ruling is decisive against the contention on behalf of Velu ...'

792. Formerly, where the original founder had failed to provide for the succession to the *shebaiti*, his heirs would take it.¹ In a case where the lack of such provision was filled by a direction by the founder's widow, it was held that her directions validly supplemented the founder's own provisions.² The founder's heirs are sufficiently interested to have a residual right, under the law as it stood prior to 17 June 1956, to appoint shebaites in default of those otherwise appointed.³ Where a new dedication is made subject to a condition that the *shebaiti* shall descend in a manner different from the manner applicable to the original endowment the gift is void, unless where it has been acted upon by shebaites in the idol's interest it may be presumed that the idol *elected* to accept the gift with the condition attached, whereupon the new order of descent will apply.⁴ It must always be remembered that dedications on condition that the shebaites shall not be succeeded in a manner consistent with the (current) Hindu law (§ 740) will be valid but the condition will be void. This leaves very little room for the founder, or his heirs, to provide for the devolution of the *shebaiti* otherwise than according to the scheme of succession set out in the Hindu Succession Act, 1956.

793. The shebait, though he may renounce his office, cannot alienate the *shebaiti* itself except by gift or bequest to a person who stands in any case in the line of succession to it.⁵ A somewhat better view is that the transferee must in such case be the sole and immediate heir, in which case the gift is nothing but a renunciation on the shebait's part.⁶

¹ *Bhabatarini* (cited above); *Angurbala v. Debabrata* AIR 1951 S.C. 293, [1951] SCR 1125, [1952] 2 Cal. 209.

² *Sri Ram v. C. P. N. Singh* [1952] Pat. 417, AIR 1952 Pat. 438.

³ *Bhabatarini* (cited above); *Sri Chandra v. Bhibuti* AIR 1945 Pat. 211, 23 Pat. 763.

⁴ *Gossamee v. Rumanlolljee* (1889) 16 I.A. 137, 17 Cal. 3; *Ashutosh v. Benode* (1929) 34 C.W.N. 177, AIR 1930 Cal. 495.

⁵ *Prayag v. Govindacharlu* AIR 1935 Mad. 220, 68 M.L.J. 295. Compare *Bhagaban v. Narayana* AIR 1946 Pat. 27, 223 I.C. 451.

⁶ *Bameswar v. Anath* AIR 1951 Cal. 490.

The same restriction applies to the office of hereditary *archaka* (or *pujari*).¹ This prohibition is virtually a prohibition of alienation. Instances where it was *customary* to dispose of the share of worship, or 'turn', or of the *shebaiti* for value are not unknown,² but such a curious custom must be strictly proved.

794. Where by the terms of a recent endowment *shebaiti* descends hereditarily in direct line from father to son (a situation which probably survives *pro tempore* notwithstanding the HSA, § 593), and inures only for the lifetime of each holder of the office, it is not competent to any one of them to relinquish his right of *shebaiti* to inure beyond his lifetime in favour of co-shebaiti to the exclusion of his own line.³

Powers of shebaiti

795. A decree or judgment against the shebait binds his successors provided it was properly obtained. A shebait may validly enter into a compromise which will bind the deity *without* the prior consent of the court.⁴ The shebait, or all the shebaiti together where there are more than one, have the power, unless the founder has expressly forbidden it, to charge, mortgage, or sell the property of the idol, or to dispose of its income, for the necessity of the idol, for example for its worship and for the repairs of the temple, or for the benefit of the idol's estate.⁵ The rule in *Hunooman Persaud's case* (§ 93) applies here also, and a third party dealing in good faith with the shebait after due inquiry into the necessity pressing upon the idol, is protected against suits on behalf of the idol. The shebait may not undertake anything with regard to the endowment which is speculative. Any improper alienations which he makes will not inure beyond the period of his office, that is to say normally beyond his life.⁶ To this there is an exception in that permanent

¹ *Seshacharyulu v. Venkatacharyulu* AIR 1957 An. P. 876, [1956] An. W.R. 1050.

² *Mahamaya v. Haridas* 42 Cal. 465, AIR 1915 Cal. 161 (2); *Hemanta v. Prafulla* AIR 1957 Cal. 685.

³ *Janki v. Koshalyanandan* AIR 1961 Pat. 293.

⁴ *Mukherjea*, pp. 273-4. ⁵ *Ananta v. Prayag* [1937] 1 Cal. 84.

⁶ *Ram v. Naurangilal* (1933) 60 I.A. 124, AIR 1933 P.C. 75, 12 Pat. 251.

leases, which are obviously objectionable, may give rise eventually to a good title in the lessee by adverse possession.¹ In general it is true to say that, apart from the protection afforded by the rule in *Hunooman Persaud's case* the shebait is confined to defensive acts and may not sell the idol's property in the hope, for example, of buying more remunerative property.² It is easy to understand, then, how permanent leases are indefensible, even if they purport to be supported by custom (§ 15). But somewhat wider powers than those which are justified by absolute necessity have occasionally been allowed. In *Baidyanath v. Kunja*,³ for example, the shebait was held to be justified in selling land which was almost inaccessible and which was difficult to manage, for an adequate price and with the intention and prospect of buying a better property. The court has, in any case, no jurisdiction to enlarge the shebait's powers at Hindu law — there is no analogy with the manager of a minor's estate in this instance (cf. § 68).⁴ In certain States, such as Andhra, Gujarat, Madras and Maharashtra, the prior consent of the Charity Commissioner is required to validate all sales and mortgages and certain leases in the case of a *public* temple.

796. In *Thakur Mukundji v. Goswami Persotam*⁵ it was urged with great plausibility that even for legal necessity, for example to pay debts binding upon the idol, it was legally impossible for the temple itself to be sold. Properties of an idol are normally inalienable, the alienation of a temple is commonly regarded as sacrilege, and procedure exists (for example by the appointment in an appropriate case of a receiver to receive rents and profits such as offerings) whereby the claims of the decree-holder can be met over a period of time. Since worship *need* not be costly, necessity can never justify transactions which imperil the very endowment itself. On the other hand, merely because the imprudence of the shebait has led to the idol's indebtedness that is not in itself a reason which would invalidate an alienation of the idol's lands: necessity is necessity, however

¹ *Daivasikhamani v. Periyanan* AIR 1936 P.C. 183, 63 I.A. 261, 59 Mad. 809.

² *Palaniappa v. Deivasikamony* 44 I.A. 147, AIR 1917 P.C. 33, 40 Mad. 709.

³ AIR 1949 Pat. 75.

⁴ Mukherjea, pp. 301-2. ⁵ AIR 1957 All. 7, [1956] 1 All. 421.

caused — but the protection of the rule in *Hunooman Persaud's case* is not extended to an *alienee* who is responsible for the idol's necessity (§ 93).¹

797. A shebait, by virtue of his office, can never possess adversely to the idol, whatever steps he takes in a manner hostile, it might appear, to the idol's interest. The idol of a public temple may not be removed except for its benefit or with the consent of the majority of the worshippers. We have already seen that nothing the shebait does to the idol can affect the legal rights of the latter (§ 783). But a stranger can hold the idol and its property or either of these adversely to the shebait, and so prevent the shebait from possessing, managing, or enjoying it. He can thus acquire title to the property under the Limitation Act, for if his intention is to engross the whole property, and not merely to exclude the shebait, he can prescribe for the estate against the idol itself.² So also the rights of hereditary worshippers (§ 788) may be ended by the operation of limitation.³ But a family of shebait, to point the contrast, cannot by arrangement amongst themselves cast the burden of worship on one or more of their number with the object of secularizing the remaining property, however convenient such an arrangement might be.⁴ One who is attempting to perfect title by adverse possession, and one who has taken from a previous shebait by an improper alienation, may be ousted by a subsequent shebait, provided the suit is brought within the period of limitation. This is 12 years, in the latter case, from the cessation of the alienor's tenure of office where the property is immoveable: see artt. 134B and 134C.⁵ Where an alienation was only partly supported by necessity, and the discrepancy between the necessity and the consideration is large (see § 485), the practice is to set aside the alienation on terms, if it be a sale, subject to the idol's paying that portion of the consideration which is covered by necessity;

¹ *Niladri v. Chaturbhuj* AIR 1926 P.C. 112, 53 I.A. 253, 28 Bom. L.R. 1418; *Biram v. Navendra* AIR 1961 All. 266.

² *Gossamee v. Rumanlolljee* (1889) 16 I.A. 137, 17 Cal. 3. This position does not obtain under certain State statutes regulating public religious and charitable endowments.

³ *Balakrishna v. Shri Dnyaneshwar* [1960] S.C.J. 1203, AIR 1959 S.C. 798.

⁴ *Padmanabha v. Ramachandra* AIR 1953 Mad. 842, [1953] 2 M.L.J. 382.

⁵ Limitation Act, 1908.

and if it be a mortgage the proper decree is for the mortgage to the extent covered by necessity. A compromise will not bind the idol if it was entered into by the shebait against the idol's interests, and a decree based upon such a compromise can be set aside¹ without waiting for the shebait's tenure of office to end.

798. Where shebait disagrees, or have precluded themselves by their conduct from suing, or a shebait is in collusion with the alienee under an improper alienation, it frequently happens that someone other than the shebait must bring a suit whether in his own name² or in the name of the deity to enforce the deity's rights. In the case of a family idol a member of the family may sue on the idol's behalf. In general there is a difference of judicial opinion whether one who is not a shebait may sue on the idol's behalf without first being appointed as next friend or as shebait by the court.³ The view that he cannot has recommended itself to the Calcutta High Court. In Orissa it has been held that a person interested in the deity should obtain the court's permission to prosecute the suit, making the *de facto* manager, if any, a party.⁴ Yet on principle the better view seems to be that where no shebait is in a position to represent the idol's interests one of the following, namely (i) a *de facto* shebait; (ii) a person participating in the management *de facto*, provided his interest is not fugitive or intermittent;⁵ (iii) a prospective shebait; (iv) a worshipper;⁶ (v) a member of the family in the case of a family idol or a member of the family of the founder, or any other person having a personal and independent interest in the endowment, may sue without first obtaining the court's sanction.⁷ The reason is that the

¹ *Sri Ram v. C. P. N. Singh* AIR 1952 Pat. 438, [1952] Pat. 417.

² *Jagadindra v. Hemanta* (1904) 31 I.A. 203, 32 Cal. 129, 8 C.W.N. 809.

³ *Sushama v. Atul* AIR 1955 Cal. 624, 59 C.W.N. 779. Mukherjea, pp. 262, 270 (a view different from that put forward here).

⁴ *Somanath v. Shri Gopal* AIR 1961 Or. 105.

⁵ *Vikrama v. Daulat* AIR 1956 S.C. 382, [1956] S.C.J. 418, [1956] 2 All. 103.

⁶ *Sankaranarayanan v. Shri Puvananthaswami* AIR 1949 Mad. 721, [1949] 2 M.L.J. 171 (FB).

⁷ *Deoki v. Murlidhar* AIR 1957 S.C. 133, [1957] S.C.J. 75, [1956] SCR 756; *Behari v. Thakur* AIR 1961 All. 73; *B. Jangi v. B. Panna* AIR 1957 All. 743; *Gopal v. Baldeo* (1946) 51 C.W.N. 383.

question whether the plaintiff, or next friend, is entitled to commence proceedings on the idol's behalf would normally be raised by the defendant in any event and will be before the court as a preliminary issue. The proposition which has been put forward¹ that in the absence of a shebait any person may sue on the idol's behalf as next friend seems to go further than the law allows. Certainly a complete stranger who has merely a benevolent interest in the endowment, or has a grudge against the dishonest shebait, will not be entitled to sue, or to apply for permission (according to the practice in the relevant High Court).² The right to commence proceedings on behalf of a public trust before the Charity Commissioner is minutely regulated in some States by statutes comprehensively regulating public endowments. The particulars are beyond our scope.

799. A *de facto* shebait is not disqualified from conducting suits to recover the idol's property merely because in substance he seeks to advance or protect his own interests — the blending of office and property in the character of the lawful shebait is present even in the case of a *de facto* shebait, and if the suit is framed in the deity's interests it will lie, though the court may well put the plaintiff on terms.³

800. Such suits must be commenced within three years in the case of moveable property sold by the shebait, the time running from the moment when the sale becomes known to the plaintiff, and twelve years in the case of an alienation of immoveable property (see artt. 48B and 134A of the Limitation Act). Where there are more than one shebaits all must be parties to the litigation whether as plaintiffs, or if this is not possible, as defendants or co-defendants. The idol itself need not be a party where the dispute is as to the rights of the shebaits themselves and the idol's own interests are not in issue.

Shebait's accountability and removal

801. 'The standard of rectitude and accuracy expected from every trustee of charitable funds is of the highest,

¹ *Monmohan v. Dibbendu* AIR 1949 Cal. 199.

² *Darshan v. Shibji* 45 All. 215, AIR 1923 All. 120; *Sri Thakur v. Kanhayalal* AIR 1961 All. 206.

³ *Sapta v. Ramchandra* AIR 1956 Bom. 615.

and that standard must in all circumstances be maintained by the courts if the safety of property held upon such trusts is not to be imperilled.¹ The founder and his heirs retain sufficient interest in the endowment to be able to bring suits against the shebait for an account of his management of the debutter property, as well as against alienees from the shebait to recover property improperly alienated. In a suit for accounts the court will make the shebait personally accountable for defalcations and deficiencies which are not adequately explained. An honest but mistaken shebait may be treated with leniency, and the court has discretion for how many years back-accounting should be ordered.² The position is not different where the debutter has been administered by a *de facto* shebait.³ If the founder expressly exempted the shebait from liability to account the court will, under its inherent jurisdiction, ignore the exemption as repugnant, and decree rendition of accounts notwithstanding.⁴ Shebait may obtain accounts from their co-shebait where their own rights are threatened by a breach of trust.

802. Where a sect or group have by custom or otherwise the right to remove a shebait they must act in accordance with the rules of natural justice.⁵ Notwithstanding the number of statutes, central and provincial, dealing with regulation and control of public religious trusts, there is still room for the common jurisdiction of the civil courts in remedying abuses in the management of debutter property. Under its inherent jurisdiction the court may frame a scheme even for a family debutter.⁶ In the case of a public trust s. 92 of the Civil Procedure Code provides machinery⁷ whereby two or more worshippers of the idol having an interest in the trust (that is to say a substantial and real interest, even if they worship irregularly or seldom)⁸ may approach the Advocate-General or the Collector as the case may be for

¹ *Gulzari v. Collector* (1931) 35 C.W.N. 699, 703, 58 I.A. 460, AIR 1931 P.C. 121.

² *Mukherjea*, pp. 450ff.

³ Cf. § 798.

⁴ *Upendra v. Nilmony* AIR 1957 Cal. 342.

⁵ *Juro v. Gobind* (1911) 12 C.L.J. 497, 8 I.C. 124; see *Jagannatha* (cited below).

⁶ *Bimal v. Gunendra* (1937) 41 C.W.N. 728, AIR 1937 Cal. 338.

⁷ *Ragh.*, p. 616; *Mukherjea*, pp. 409-40.

⁸ *Mukherjea*, pp. 437-9; *Narasimha v. Achuthana* AIR 1926 Mad. 267, 71 I.C. 924.

consent to sue for the removal of the shebait, for the appointment of a receiver, for directing accounts and inquiries, and, if necessary, for the appointment of new shebait and the framing of a scheme for the better investment and management of the idol's estate.¹ A shebait is removable for grossly improper conduct, or for placing himself in a position inconsistent with the faithful discharge of his duties, but not for laziness or mere incompetence.² A hereditary *pujari* can similarly be removed.³ The State statutes of Bombay, Madras and Orissa have provided other machinery for controlling the 'trustees' of public trusts, and in their regard the above-mentioned section of the C.P.C. is no longer in force.

Distinction between private and public temples

803. In recent years the legislation intended to control the affairs of public trusts has directed more attention than before to the question, how are we to determine whether an establishment is private or public? Formerly, as we have seen, it was important to know whether the trust which was suspected to be mismanaged was public, for if it was there were opportunities of removing the shebait and obtaining a judicially-controlled management of the assets for so long as was necessary to set the endowment on its feet again. In the private temple, however, only members of the family could call the shebait to account, and that might be neither tactful nor practicable.

804. One might suppose that where the public are admitted as a matter of course that would dispose of the question. But the test is not so simple. Shebait might determine for their own profit⁴ to admit the public to worship an essentially private idol⁵ without actually estopping themselves from

¹ *Laxmanrao v. Govindrao* AIR 1950 Nag. 215, [1950] Nag. 1.

² *Joygunnessa v. Majilullah* AIR 1924 Cal. 1024, 28 C.W.N. 781 (wakf); *Nirmal v. Jyoti* [1941] 2 Cal. 128, AIR 1941 Cal. 562; *Annaji v. Narayan* (1896) 21 Bom. 556.

³ *Jagannatha v. Seenu* (1919) 42 Mad. 618.

⁴ As in *Bhagwan v. Gir* (1939) 44 C.W.N. 294, 67 I.A. 1, AIR 1940 P.C. 7. Contrast *Lakshmana v. Subramania* (1923) 29 C.W.N. 112 (PC).

⁵ *Koman v. Achutan* (1934) 61 I.A. 405, 58 Mad. 91, AIR 1934 P.C. 230; *Venugopalaswamy v. H.R.E.B.* AIR 1938 Mad. 214, [1937] 2 M.L.J. 876.

asserting that it was a private temple as happened in *Lakshmana v. Subramania*.¹ The topic has been treated in *Deoki v. Murlidhar*² and in *Narayan v. Gopal*,³ both cases in the Supreme Court. The following are indicia of the temple's being a public temple: that the idol was installed permanently with the ritual referred to as *pratishtha*, with or without attendant idols, in a building separate from the residential quarters of the family; or that the idol in view of its size, age or position could never have been within a private house; that the building was erected at the instance of villagers; that an *utsava* (or 'festival') image was taken in procession round the town; that strangers added to the endowment; that subscriptions for repairs were collected from the public; that a *dharmasala* was attached to the temple open to the public or a section of the public;⁴ that the shebait was strangers to the family; that the founder alluded to his lack of issue; that the public had continuously visited and worshipped without interference from any family claiming it as a private temple — for user is always presumed to be based upon right.⁵ Of all tests the most relevant is whether the foundation was originally for the benefit of others besides the family of the founder. For dedication of an idol and its temple and endowment for its worship are never for the benefit of the idol, but for that of the worshippers. Where the shebait has for a long time admitted others than the family to this benefit it may well be claimed that what was once a private has become a public temple, by implied dedication apart from the question of estoppel.

805. Whether an endowment is public or private is in no way affected by the nature of the dedication, whether complete or partial. There is nothing to prevent a founder's providing for the establishment of a public temple either out of a limited interest, for example a charge upon property which he intends to belong to his heirs,⁶ or out of the income

¹ Cited above.

² AIR 1957 S.C. 133, [1956] SCR 756, [1957] 1 M.L.J. (SC) 28.

³ AIR 1960 S.C. 100, [1960] 1 SCR 773, [1960] S.C.J. 263.

⁴ *Indrakanti v. H.R.E.B.* AIR 1957 An. P. 824, [1955] An. W.R. 671.

⁵ *Narayan* (cited above).

⁶ *Har v. Surja* (1921) 48 I.A. 143, 43 All. 291, AIR 1921 P.C. 20; *M. Dasaratharami v. D. Subba* AIR 1957 S.C. 797, [1957] 2 M.L.J. 175 (SC).

of property entirely dedicated to the idol, reserving certain rights, for example of residence, to the shebait of his choice.¹ The distinction between a complete or partial dedication of particular property operates equally with reference to public and private endowments, and must be established from a construction of the document of dedication read as a whole.²

RELIGIOUS INSTITUTIONS OTHER THAN TEMPLES AND MATHS

806. The idol and the math (to which we shall come) are not the only juristic persons known to Hindu law in this connexion. A *sadavrata* ('endowment for charitable feeding'),³ a tank, even a sacred grove,⁴ a *dharmasala*, a students' hostel provided it be dedicated to religious purposes,⁵ and homes for the destitute and/or disabled, and other charitable foundations may be legal personalities. Their managers for the time being are in a position of trust which is analogous to that of the shebait of an idol.⁶

807. Where the image of a sage or saint is located in a building which, according to Hindu practice, is a centre of worship and exists for the expression and realization of Hindu religious sentiments which that sage or saint's memory arouses and tradition perpetuates, the *sansthanam*, as the institution is called, is a juridical person and its manager may bring suits on its behalf and is a limited owner, like a shebait.⁷ Depending upon proof of the beliefs of the sect or class, even *samadhis* (sites of funerals of ascetics) may be legal personalities (cf. § 781).

¹ *Bhubaneshwari v. Brojo* AIR 1937 P.C. 185, 64 I.A. 203, [1937] 2 Cal. 447; *Sree Sree Ishwar v. Dushila* AIR 1954 S.C. 69, [1954] SCR 407, [1954] 1 M.L.J. 55; *B. Narsi v. T. Balamma* [1962] 2 An. W.R. 28.

² *Dasaratharami* (cited above).

³ *Adv. Gen. v. Strangman* (1904) 6 Bom. L.R. 56; *Narayana v. Comm. M.H.R.C.E.* [1961] 1 M.L.J. 198.

⁴ *Chandra v. Jnanendra* (1923) 27 C.W.N. 1033. Compare § 780.

⁵ *Monie v. Scott* (1918) 43 Bom. 281. Compare § 780 (1).

⁶ *V. Mariyappa v. B. K. Puttaramayya* AIR 1958 Mys. 93.

⁷ *Gajanan v. Ramrao* AIR 1954 Nag. 212, [1954] Nag. 302.

808. It is open to a founder to create a religious institution resembling a college with rules of his own devising which partake of some features of a math. He may even name it a math. But it may be necessary to distinguish it from a math as known to the Hindu law. Yet the foundation may be valid as a religious institution *sui generis* and a juristic person on that account.¹

809. A *samaradhanai* for feeding the poor and even a *dharmam* (in South Indian parlance) for feeding Brahmans may be a public charitable trust to which s. 92 of the Civil Procedure Code applies. The court can remove the manager and frame a scheme for the proper management of the trust exactly as in the cases of temples and maths.²

810. In all such cases the court must determine whether the original grant was to an individual with the obligation to spend on a particular charity, or to charity, of which the individual grantee was manager. In each case the court will decide upon a construction of the grant, if necessary in the light of relevant circumstances, so as to elicit the intention of the grantor.³ Similarly the court will distinguish between a 'service grant', which is resumable for non-performance of the duties of worship, feeding, etc., and a grant of land burdened with service, which is not resumable by the founder or his heir unless a condition to that effect can be made out in the grant itself.⁴

MATHS

The nature of a math

811. A math (Sanskrit *matham*, Anglo-Indian 'mutt') is an institution *sui generis*. It is indivisible and inalienable, though its properties may be alienated by an authorized individual for authorized purposes. It resembles a college,

¹ *V. Mariyappa* (cited above).

² *N. Ramaswami v. S. A. Aiyasami* AIR 1960 Mad. 467.

³ *N. Yogananda v. Sri Agatheswaraswamivar* AIR 1960 S.C. 622, [1960] S.C.J. 954, [1960] 2 SCR 763.

⁴ *Lakhamgouda v. Baswantrao* AIR 1931 P.C. 157, 61 M.L.J. 449, 33 Bom. L.R. 974; *P. V. Bheemsena v. Sirigiri* AIR 1961 S.C. 1350, [1961] 2 S.C.J. 671, [1961] 2 M.L.J. (SC) 190.

in that it exists for the advancement of education,¹ normally religious education, and is a juristic personality.² But a math need not necessarily be the residence of more than one person, who is usually its manager, custodian, and 'incumbent' or 'head', the mahant (Anglo-Indian 'mohunt') or *mathadhikari*. Unlike a college which has fellows, the math need have no representative other than this mahant, but, in very many cases, persons interested in the math, as the founder's heirs, or the community or sect which acts as patron, have a say at critical moments in the life of the math, as for example when a mahant is to be appointed or recognized or deposed. Though these persons are very much in the background and the responsibility of the mahant for the time being is of the widest, he is in fact a trustee for the math and does not cease to be such merely because *de facto* his powers of administration seem to be unregulated.³

812. Many maths were founded by Sri Sankaracharya in the period when Hinduism was struggling to compete with powerful Buddhist and Jaina institutions. Others were founded by leaders of later sects, more or less in imitation of that model. The mahants in the ancient maths often bear in succession the name of the founder. The mahant is the spiritual guide of a sect or sub-sect, and often acts as caste head, settling disputes and serving as an authority in matters of conscience. The foundation serves to provide the mahant with his residence and dignity, and enables poor students to be maintained while they are undergoing instruction from him or his deputies. In some respects a math resembles a monastery without regular monks,⁴ and apart from custom the mahant's pupils are not legally entitled to maintenance out of the math's funds.⁵ Here, however, as elsewhere, custom is the foundation of the law controlling the math, and there are no presumptions or analogies which ought to be applied until custom has been fully consulted.

¹ One may compare the definition of 'math' in the Bombay Public Trusts Act, 1950 and the Madras Hindu Religious Endowments Act, 19 of 1951, which applies for the purposes of those statutes.

² Mukherjea, p. 366. Suits are brought in the name of the mahant.

³ *Ram v. Anand* AIR 1916 P.C. 256, 43 I.A. 73, 43 Cal. 707; *Raghavendraswami v. H.R.E.B.* AIR 1957 An. P. 150, [1957] 1 An. W.R. 152.

⁴ For the origin of maths see *Gangeshwara v. Som* AIR 1949 All. 718.

⁵ *Ram v. Basudebdass* AIR 1950 Or. 28.

813. In another respect the analogy with the monastery is not inappropriate. There are indeed *grihi* (or *gruhi*) maths in which the mahant is expected, according to the tenets of the sect, to be a married man. In such maths the succession is very often from father to son. In others, however, and these are the majority, the mahant is a *sanyasi*, and is expected to be celibate. If he violates a customary requirement of celibacy he endangers not only the reputation of his institution but also his tenure of office.¹

814. In most maths there are temples. Math property is often derived, wholly or in part, from dedications to the 'principal' deity. The mahant may be a shebait of one or all of them. His character as shebait will then differ from his character as mahant of the math.² The mahant as spiritual leader of the sect has a customary right to offerings from the members of that sect. These are normally paid for the upkeep of the math and its purposes, which naturally include the dignity and efficiency of the mahant himself, and such offerings are accepted by him as acquisitions of the math. If he takes offerings as presents to himself personally, on the other hand, he may well treat them as a personal estate, for even *sanyasis* are competent in law to own personal property (§ 592). To determine in what capacity he receives offerings it is necessary to determine the intention of the donors, and this will be elicited with the aid of evidence of custom in the math. Since persons claiming to be mahants of maths have been found to be moneylenders, or otherwise engaged in worldly pursuits, under the cloak of a spiritual profession, the law will not conclude that property is the property of a math (and so perpetually dedicated to pious uses) merely because it is found in the possession of an individual purporting to be a mahant. It may well be his personal fortune. As Niyogi, A.J.C. (as he then was), put it in the instructive and comical case of *Ganeshgir v. Fatehchand*³

Cases . . . are not infrequent when disgruntled souls, incapable of maintaining themselves by honest labour or thwarted in their worldly

¹ *Kartick v. Gossain* AIR 1921 Cal. 482, 25 C.W.N. 908; compare *Tiruvambala v. Chinna* (1915) 40 Mad. 177.

² *Bhagaban v. Narayana* AIR 1946 Pat. 27, 223 I.C. 451.

³ (1934) 31 Nag. L.R. 282, 289.

life, assume the garb of *sadhus* or *bairagis*¹ and establish themselves in the midst of an ignorant and credulous population to draw from their blind faith and devotion a sustenance for themselves and their indolent satellites. Devoid of the lofty ideal of promoting the spiritual, moral and social well-being of the community they do not hesitate to dupe the poor under various false but alluring pretences. Courts are to be chary of readily yielding to the claims of unscrupulous persons masquerading as mahants and ought to insist on clear and positive evidence of the *bona fide* nature of such foundations.

The appointment of mahants

815. Custom determines who may be mahant, and how he is to be appointed. Many maths are so old that custom alone is evidence of the terms of the original foundation. In the case of recently founded maths, however, it is possible to look to the intention of the founder, who will usually have provided for the devolution of mahantship and a method of solving disputes. Failing proof of custom the rules of justice, equity and good conscience will prevail. Disagreeable disputes occur from time to time as to the right to become mahant, and it is the variety of custom obtaining amongst maths which has hindered the development of a clear common law on the subject. Important as custom is it cannot, it must be remembered, abrogate the terms of the original foundation if these can be ascertained and turn out to be plainly at variance with the custom: the rule *contemporanea expositio* cannot apply to an evident disregard for the founder's wishes.²

816. There are in general three main types of math: *maurusi* (or *mourusi*), 'hereditary' or appointable maths, in which the reigning mahant has the main say, or absolute discretion, as the case may be, in the choice of his successor; *panchayati*, 'elective' maths, for which a new mahant is chosen either by a committee of mahants of other, sometimes senior, maths, or by the effective leadership of a caste or sect; and *hakimi*, 'nominative' maths, for which the mahants are appointed upon the sole nomination of the ruler, or descendant of a former ruling house. The last are the least common; the first the most common.³ The remarks

¹ i.e. *sanyasis* and *vairagis*.

² *Somar v. Shyam* AIR 1954 Pat. 586.

³ Mukherjea, pp. 345-58.

that follow are in general directed to varieties of the *maurusi* math.

817. No one can be a mahant unless he has received *diksha*, 'ordination'. He should have received this from the mahant himself or from the guru, or spiritual leader of the *sampradaya*, or sect, to which the math belongs. He must be orthodox from the standpoint of the sect (and in this he differs completely from the shebait, § 790). He must be qualified in point of character, but of this the reigning mahant, and failing him the patrons of the math, are normally absolute judges. The attitude or consensus of the sect will form the criterion in such matters and the court will not substitute its own judgment for theirs.¹ The reigning mahant normally makes a choice from amongst the pupils to whom he or his predecessor has given *diksha*. The pupils are referred to as *chelas* in our cases.² The senior *chela* is he who first received *diksha*, but it does not follow as a matter of course that he will succeed, for he may not receive nomination, and in many maths the fraternity as patrons must confirm any nomination.³ When the mahant nominates by testament one *chela*, and then nominates another by a subsequent will, the first has no ground for complaint, for, quite apart from the mahant's right to choose the best qualified rather than the senior, no nomination by will confers a vested interest in the mahantship;⁴ and it is only by custom that nomination may carry with it some present rights to perquisites or honours during the mahant's lifetime, in which case an 'heir apparent', as it were, cannot be ousted merely by nomination of a rival.⁵ The relationship by spiritual connexion will normally be observed, and spiritual sons will exclude spiritual brothers or nephews,⁶ but the mahant's right of nomination cannot be ousted by mere claims of spiritual relationship, and a disqualified or unsuitable *chela* or *guru-bhai*, 'spiritual brother', may properly be

¹ *Ram v. Anand* AIR 1916 P.C. 256, 43 I.A. 73, 18 Bom. L.R. 490; *Ramamohan v. Basudeb* AIR 1950 Or. 28.

² *Sishyas* would have been better: (1843) Fulton 217 (P.K. Tagore's view).

³ *Mahant v. Bawan* AIR 1938 P.C. 216, 40 Bom. L.R. 912, [1938] 2 M.L.J. 332.

⁴ *Ramprapanna v. Sudarsan* AIR 1961 Or. 137.

⁵ *Tiruvambala v. Chinna* AIR 1917 Mad. 578, 40 Mad. 177.

⁶ *Sital* (cited at § 592 above).

passed over.¹ The mahant's duty is an onerous one and cannot be performed by deputy, unless custom permits.

818. In *grihi* maths selection is normally confined to the mahant's male issue.² In all *maurusi* maths the residual power of appointment lies with the patrons of the math, and it is not unusual for them to have by custom the right to approve a valid nomination by the mahant. The implication, that if this approval is withheld the nomination is ineffective, would seem to follow, but here again custom is the deciding factor. In all such functions order and attention to the requirements of responsibility and natural justice are essential. A 'hole-and-corner' appointment may be open to question, and the appointment of someone selected by advertisement in the newspapers may be regarded as objectionable.³

819. The mahant is entitled to be installed and to be put into possession of all the math's property, which will remain distinct from the mahant's private property,⁴ though it is open to him at any time to merge his private assets with the former. Whether he has merged these funds or not will be determined upon the principles applicable to the question of merger by a widow or other female holding a limited estate at Hindu law (§ 680). There is a perpetual succession amongst mahants. The acts of one will bind his successor, and decrees passed against him bind the math, the exceptions being cases where alienations are made without necessity and without benefit to the math (§ 820), or the decree was collusive or otherwise improperly obtained. The successor can, within the period of limitation, sue to set aside his predecessor's acts and to recover property improperly alienated.⁵ Though the math is a juristic personality it sues by its mahant, who is the plaintiff in all actions on the math's behalf. Alienations by the mahant for unauthorized purposes will in any case bind the math for the

¹ *Prithi v. Birkha* AIR 1956 S.C. 192. *Tulsiram v. Ramprasanna* AIR 1956 Or. 41; *Bhagaban v. Ram Praparna* (1894) 22 Cal. 843 (PC), sub nom. *Mohunt v. M. Roghunundun* at 22 I.A. 94.

² *Tulsiram* (cited above).

³ *Surendra v. Dandiswami* AIR 1953 Cal. 687.

⁴ *Parma v. Nihal* AIR 1938 P.C. 195, 65 I.A. 252, [1938] Lah. 453.

⁵ *Vidyavaruthi v. Balusami* AIR 1922 P.C. 123, 48 I.A. 302, 44 Mad.

duration of the alienor's incumbency.¹ If the alienee is protected under the rule in *Hunooman Persaud's case* (§ 93), the alienation will bind the math absolutely.

Powers of mahants

820. We have seen that the mahant is the master of the property and may alienate for any purpose for so long as he remains incumbent. Otherwise what is authorized by law depends upon the circumstances. The defence of the math's property from litigation, protection against destruction or loss, and other defensive acts are obviously within his powers. He may also invest in projects which will plainly bring in a bigger income from offerings or otherwise consistently with the purposes of the math. A permanent lease of math lands is *prima facie* outside his powers, since the opportunity of obtaining better rents as the land appreciates in value is lost thereby to the math.² The mahant is on the whole as much a limited owner as a shebait, and can be called to account equally with him. Therefore although he may alienate imprudently and fail to save or invest wisely, action can be taken against his alienees only, and apart from fraud and misappropriation he is not liable personally to account for past spending or dissipation of the math's funds. There is a difference between the mahant's and the shebait's positions which arises out of the nature of their offices. When as a result of good administration there arises a surplus income over and above the needs of the math and its usual functions, the mahant may apply it at his discretion.³ Though it is objectionable that the math's income, or any of it, should be spent on purposes inconsistent with the math's functions,⁴ there is no rule of Hindu law which positively obliges the mahant to save or spend in a particular manner, or to be liable as if he were a technical trustee for unauthorized spending. He can sever surplus income from the pool constituted by the math's general income, and,

¹ *Ram v. Naurangilal* AIR 1933 P.C. 75, 60 I.A. 124, 35 Bom. L.R. 530.

² *Daivasikhamani v. Periyanan* AIR 1936 P.C. 183, 63 I.A. 261, 59 Mad. 809.

³ *Vidyapurna v. Vidyandhi* (1903) 27 Mad. 435, 14 M. L. J. 105.

⁴ *Arunachellam v. Venkatachalapathi* AIR 1919 P.C. 62, 46 I.A. 204, 43 Mad. 253; *Comm. H.R.E. v. Lakshmindra* AIR 1954 S.C. 282.

although he cannot make it legally his own, he can dispose of it at his pleasure.¹ If not severed it is regarded as an accumulation to the math's property. When he dies, in any event, the unspent surpluses do *not* pass as his personal estate to his personal heirs.² The shebait, as we have seen, holds all the income for the purposes of the debutter, and his personal interest in the debutter never exceeds that of the family of which he himself is a member, or the profits to which, in the case of a public temple, he may be entitled by custom (§ 804).

A mahant has no power to fragment, delegate, or transfer his powers or authority. It is only the founder-mahant who can dispose of the math by testament.³

As with public temples, the mahant's power of alienation is limited under State statutes such as those of Bombay, Madras, and Orissa by the further requirement that the previous consent of charity commissioners must be obtained.

Control of mahants

821. Because of the mahants' prestige and discretion they are very difficult to control, and irregularities have occurred. Though the remedies open to the communities interested in the maths were already extensive the difficulty was to take initiative effectively in the face of superstition, collusion, and secrecy. Extensive legislation has been introduced to enable maths to be publicly controlled, as a result of which undoubtedly in many cases a greater proportion of math funds has been used for genuine charitable purposes. The statutes have perhaps not yet reached their final shape, and they are beyond the scope of this book.

822. At Hindu law, and under s. 92 of the Civil Procedure Code (§ 802), remedies remain for the introduction of order into an ill-managed math. Any two members of the sect interested in the math may sue with the consent of the Advocate-General or Collector, as the case may be, for the removal of the mahant, for the appointment of a receiver,

¹ Mukherjea, pp. 341, 343, 364-6. *Daivasikhamani v. Periyanan* (cited above).

² *Appa v. Vignesam* AIR 1937 Mad. 118, 71 M. L. J. 797.

³ *V. Mariyappa v. B. K. Puttaramayya* AIR 1958 Mys. 93.

for accounts, and for framing a scheme for the better management of the math. A mahant will be removed for gross misconduct, a total failure to keep accounts, immorality, or alienation of math properties for private purposes, but not for mere inefficiency or improvidence.¹ A *de facto* mahant is as subject to control as a lawful mahant. His alienations are equally subject to question.² A *de facto* mahant may well be a proper person to sue in the math's interest for the recovery of math property improperly alienated, even when a lawful mahant might claim to have been wrongfully ousted by the *de facto* mahant.³ In Maharashtra, Gujarat, Madras and other States which possess statutes regulating maths, the former remedies under s. 92 have been replaced by proceedings before the relevant charity commissioner.

REDIRECTING A RELIGIOUS ENDOWMENT

823. We have seen how, when an endowment becomes impractical or useless, the court has jurisdiction to frame a scheme and apply the funds *cy près*, provided only that the general charitable intention of the founder is not in doubt. A further question arises where the endowment is still practical and useful, and indeed the funds can attract the attention of possible direct or indirect beneficiaries under the terms of the original foundation, but those nearest to the endowment, as for example the shebait, mahant, or patrons of a math, are not agreed how the funds should be spent. Normally the authority of the shebait or of the mahant will settle doubts. But if it is suggested that the religious purpose has failed, or that the funds are being spent in directions no longer consistent with the purpose of the endowment, a question can arise whether those who make such allegations are themselves proper representatives of the foundation. We have seen how legal steps can be taken to remove or control mahants, for example, if they are

¹ *Tiruvengadath v. Srinivasa* (1899) 22 Mad. 361; *Tiruvambala v. Chinna* (1915) 40 Mad. 177, AIR 1917 Mad. 578; *Vidyapurna v. Vidyanidhi* (1903) 27 Mad. 435, 14 M.L.J. 105; *Satish v. Dharamidhar* AIR 1940 P.C. 24, 67 I.A. 32, [1940] 1 Cal. 266.

² *Ram v. Naurangilal* AIR 1933 P.C. 75, 12 Pat. 251, 60 I.A. 124; *Mahadeo v. Karia* AIR 1935 P.C. 44, 62 I.A. 47, 68 M.L.J. 499.

³ *Vikrama v. Daulat* AIR 1956 S.C. 382, [1956] 2 All. 103 (SC).

abusing their trust. What is to be done if it is the persons interested in the endowment who are deviating from the doctrines or attempting to change the nature of the endowment made by the founder? It might seem at first sight that if the body of worshippers, or patrons of the math, are agreed that the doctrines of the founder were different from what they had formerly been supposed to have been, or if they agree that, notwithstanding his doctrines and intention, the funds shall be spent in fostering other beliefs or facilitating other lines of charitable expenditure than the founder had contemplated, the court should have no power to interfere. This is not the case so long as one faithful representative of the original founder's sect or doctrine can be found having an interest in the endowment.

It has been established that the identity of a religious community consists in the identity of its doctrines, creeds, confessions, formularies and texts (if any). The bond of union of a religious association may contain a power in some recognized body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved. A man having a right to worship can do so, but the right to worship connotes the profession by the would-be worshipper of the religion practised in the place of worship, and, even though the views of the majority of the worshippers may change and develop to such an extent that they may wish to alter and even to make a radical change in the form of worship, they have no right to do so, and the minority, however small, which adheres to the original practices, retains the control and possession of the place of worship and its endowments. The same applies with full force to a math, or indeed any other religious endowment. No attention to the majority of persons can affect the question, but the original purposes of the trust must be the guide.¹ Complete unanimity of the community can, however, redirect the endowment, whether towards different objects of charity, or along different lines of worship. Apart from statute, however, there can be no question of even unanimous redirections which amount to a breach of trust.

¹ *Mahant Basant v. Hem Singh* (1925) 7 Lah. 275, 295-6, AIR 1926 Lah. 100 following *General Assembly v. Overtoun* [1904] A.C. 515.

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CHAPTER TEN

Miscellaneous Topics

DAMDUPAT

824. *Damdupat*, which in Marathi means 'a principal with interest reaching double the amount', is an institution of law deriving from *smṛiti*.¹ It is of great age, and is found in other eastern countries as also formerly in Europe. In essence, its purpose is to prevent the collection at law of interest on loans of money amounting to more than the total of the principal debt. It is part of the personal law of Hindus. Its original function was to limit the liability of debtors' descendants in the male line whose responsibility to pay debts was originally not limited to the assets, to pay debts with interest when the creditors of their ancestors might otherwise allow the amount of interest to accumulate indefinitely at a period when there was no efficient law of limitation of actions. Other reasons for the rule's existence may yet be discovered by legal historians. It is, at any rate, a rule of equity and good sense,² and has been incorporated in several State statutes, to which we need not refer. Alongside what we now know as *damdupat* there were once comparable rules limiting the maximum recoverable by way of interest on loans in specie, for example loans of clothing or comestibles; these have disappeared from the law. The court construes *damdupat* as it is laid down by *smṛiti* with great strictness, and its territorial applicability has, rightly or wrongly, been severely reduced.

825. *Damdupat* is in force in the town of Calcutta,³ in the Santhal Parganas,⁴ in Gujarat and Maharashtra and parts of Mysore to the extent that these correspond to the former

¹ Manu VIII, 151; Gautama XII, 28. See *Dhondv v. Narayan* (1863)

1 B.H.C.R. 47.

² For authorities see *Bapurao v. Anant* AIR 1946 Nag. 210, [1946] Nag. 407.

³ *Nobin v. Romesh* (1887) 14 Cal. 781 (FB).

⁴ *Kunja v. Tarapada* (1919) 4 Pat. L.J. 49.

Presidency of Bombay and the former Madhya Pradesh.¹ It is in force in modern Madhya Pradesh also.² In *Sheokaran-singh v. Daulatram*³ a full bench of the Rajasthan High Court held that *damdupat* was not in force in Rajasthan, on the grounds (i) that it discriminated against non-Hindus on the ground of religion, contrary to Art. 15 (1) of the Constitution; (ii) that as it was not in force in *all* the states which merged to form Rajasthan it discriminated between citizens of Rajasthan merely on the ground of residence, contrary to Art. 14 of the Constitution; (iii) that it is a matter of civil law and not personal law. The last ground appears to be incorrect. The cogency of grounds (i) and (ii) is somewhat diminished by the decision (§ 16) that the personal laws are not 'laws in force' within the meaning of Art. 13 (1) of the Constitution. The personal laws, notwithstanding their discrimination between males and females, between persons belonging to different schools, or residents or owners of property situated in different regions, are preserved by the policy of the Constitution until such time as they are amended or abolished by Parliament or the legislatures of the States.⁴

826. Under *damdupat* the interest, whether to be paid in cash or kind,⁵ on a loan of money (whether secured or unsecured) may not at any one time be recovered to an amount exceeding the principal. The principal means here the principal payable when arrears of interest accrued, and not the balance that remains unpaid at the time of suit.⁶ A suit against a Hindu debtor for interest actually and legally accrued is not barred merely because the principal sum lent has been paid off. The rule has no application where, as in the case of a possessory mortgage, the debtor and creditor account to each other: it is limited to debts arising where one party only may take an account.⁷

¹ *Bapurao* (cited above).

² *Nawaneetdas v. Gordhandas* AIR 1955 M. Bh. 113.

³ AIR 1955 Raj. 201 (FB).

⁴ *State v. Narasu* AIR 1952 Bom. 84, 53 Bom. L.R. 779.

⁵ *Anandarao v. Durgabai* (1897) 22 Bom. 761.

⁶ *Nusserwanji v. Laxman* (1906) 30 Bom. 452.

⁷ *Dagdusa v. Ramchandra* (1895) 20 Bom. 611.

827. There is no limit to the amount which might, in total, be recovered at various different times from the debtor.¹ Moreover arrears of interest may be added by agreement to the principal and the sum thus capitalized may be treated as a new principal, whereby eventually much more than the double amount might be recovered by the creditor.² It is not against public policy to avoid the operation of *damdupat* by this method.

828. *Damdupat* does not apply to liabilities which are not in the nature of liquidated debts, whether these arise out of loans or otherwise. Thus a personal liability that arises when a trustee is guilty of a breach of trust is not a liability to which the rule is attracted.³ Moreover the effect of the rule is exhausted when the relationship of debtor and creditor comes to an end, as for example by reason of a decree. When the matter passes into the domain of judgment, to adopt the words of the Privy Council in *Kusum v. Debi*,⁴ there remains no reason why interest at court rate should not be decreed on the amount due. This applies equally in suits on mortgages, and interest may accumulate after the passing of the decree to an amount in excess of what would have been allowed under *damdupat* if the creditor had not prosecuted his remedy in court.

829. There is a difference of opinion between the High Courts as to the circumstances in which the defendant can rely upon *damdupat*. Since the institution was originally intended to protect Hindu debtors it should be possible for the Hindu debtor or assignee of the liability to rely upon it whether or not the creditor or assignee of the debt is a Muslim or Christian when the debt originated or at any later stage. The Calcutta High Court insists that the rule cannot be invoked unless both the parties were Hindus at all relevant stages.⁵ The Bombay High Court however takes the more rational view that the rule applies if the original debtor was a Hindu, irrespective of the religion

¹ *Nobin v. Romesh* (1887) 14 Cal. 781 (FB) ; *Dagdusa* (cited above).

² *Sukalal v. Bapu* (1899) 24 Bom. 305, 1 Bom. L.R. 18.

³ *Phulchand v. Hukumchand* AIR 1960 Bom. 438, 62 Bom. L.R. 308,

314.

⁴ AIR 1936 P.C. 63, 15 Pat. 210, 63 I.A. 114; *Devidas v. Yeotmal* AIR 1956 Nag. 239, [1956] Nag. 535.

⁵ *Wooma v. Sreebarinath* (1897) 1 C.W.N. (SN) clxxviii.

of the creditor or of any subsequent creditor. But if the subsequent debtor is a non-Hindu the rule ceases to apply at the date of the assignment to him.¹

BENAMI TRANSACTIONS

830. *Benami* transactions, that is to say purchases and transfers in the name of, or nominally for the benefit of, one other than the real beneficial owner, are of great antiquity in India. They are common and have always been recognized for what they are.² Since the institution forms a part of the background to family life and the management of family property it is a part of the personal laws of Hindus — as also of Muslims amongst whom the institution is often called *farzi* — and is carried by them to countries where they hold property. In India the relationship between father and son, father and daughter, husband and wife, and so on, being very different from that in England, and the rights and expectations of the issue and wife being markedly different, the so-called ‘presumption of advancement’ well known to English law does not apply.³ It does not apply to Indian families because there is no *presumption* that a gift to wife or issue by an Indian (other than a European or Eurasian) or a fictitious sale to them must be intended for their absolute benefit. On the contrary, if a son, for example, wishes to assert against his father that a gift to him or purchase in his name by his father was intended to create a beneficial right in himself, and that he does not hold as express trustee for his father, he must prove it. It is not quite accurate to say that a son, for example, is presumed to be owner of what his father gives him, but that the presumption is readily rebutted. The position is that anything more substantial than a suspicion will serve to lay the burden of proof that the transfer was *not benami* upon him who asserts it. This, interpreting the Privy

¹ *Ali v. Shabji* (1895) 21 Bom. 85; *Narayan v. Purushottam* AIR 1931 Nag. 144, 27 N.L.R. 144.

² *Kedar v. Prahlad* [1960] S.C.J. 1072, AIR 1960 S.C. 213, [1960] 1 SCR 161.

³ *Gopeekrist v. Gungapersaud* (1854) 6 M.I.A. 53; *Shambhu v. Pushkar* 71 I.A. 197, [1944] 2 M.L.J. 348 (PC); *D. Nagarajamma v. State Bank* [1962] 1 An. W.R. 51. Compare the valuable case of *Kerwick v. Kerwick* AIR 1921 P.C. 56, 47 I.A. 275, 48 Cal. 260.

Council's words on the subject,¹ amounts virtually to a presumption of *benami* once the relationship is shown and the fact that the father supplied the consideration. The two contrary presumptions, of advancement in England and of *benami* in India, indicate where the burden of proof lies. They are employed in equity. The appropriate statutory recognition of the equitable rights of the beneficial owner is s. 82 of the Indian Trusts Act.² When it is evident that a holder of land is holding *benami* for another he is under a personal obligation which binds him whether or not the law governing the land and relating to transfer or registration of title insists that he is the legal owner: to this extent Indian law, and indeed the law of other countries, must recognize the existence of equitable ownership, independently of legal ownership.

831. Where an owner, hereafter called the 'beneficiary', that is to say the beneficial owner of the property, supplies consideration, provides money, and purchases property in the name of a close relative or dependant, or the family idol,³ or transfers his own property to the latter by a gift or fictitious sale or exchange, without any intention that the other should have any beneficial interest in the property so purchased or transferred, it is *benami*. It is, in effect, popularly speaking, a kind of deposit. The intention is to frustrate the natural curiosity of relatives or proposed relations by marriage, to frustrate the cupidity of coparceners, and to hinder rivals or the Government. The transferee or receiver of the *benami* transfer is called the *benamidar* (otherwise *farzidar*). He is a bare trustee for the beneficiary and must usually render up the property, or reconvey it to the latter on the latter's demand.⁴ As a matter of practice the beneficiary usually maintains management or control of the property and arranges to take its profits. It is unusual for the *benamidar* to have any positive unremunerated duties with regard to it. Nevertheless he is entitled to represent the beneficiary. Suits decided against

¹ Compare *Faez v. Fukeeroodeen* (1871) 14 M.I.A. 234, 244-6 with *Lakshmiah* (cited below).

² *C. Kotaiah v. A. Venkata* [1961] 2 An. W.R. 196 (FB).

³ *Brojsoondery v. Lachmee* (1873) 20 W.R. 95 (PC).

⁴ *Bilas v. Desraj* (1915) 37 All. 557 (PC); *Gur v. Sheo* (1918) 46 I.A. 1, 46 Cal. 566 (PC); *Raja of Deo v. Abdullah* (1918) 45 Cal. 909 (PC), 45 I.A. 97.

him bind the latter, and he may sue in his own name to protect the owner's interest.¹ The law is naturally concerned to discover who is the true owner, and there are very few other contexts in which the ostensible, or fictitious, owner is treated as if he were the beneficial owner. These require study. Fictitious transfers and fictitious recitals are so common in India that the court invariably directs its attention to the questions where the consideration came from, and whether the parties really had the intentions attributed to them. A man's signature is never conclusive against him.

832. Though it is perfectly true as a matter of principle that the law presumes that the ostensible owner is the beneficial owner — a presumption without which life would hardly proceed — the allegation that an owner holds *benami* is readily sustained once the source of the consideration is indicated and the circumstances are outlined. If the alleged *benamidar* is wife, child, concubine, or family idol of the alleged beneficiary there is, as we have seen, virtually a presumption in favour of *benami*.² The presumption is rebutted if it is shown, for example, that there was a real intention to advance the transferee, or that the transfer was not fictitious, as for example where it was for valuable consideration. The court in deciding whether the party holds *benami* must determine whether a beneficial interest was intended to pass to the ostensible transferee,³ and the dealings between the parties and the management of the property after the transfer will supply evidence of value for this purpose. Naturally allegations of *benami* in cases where the alleged *benamidar* is closely related or is a dependant will not serve to shift the onus of proof to the alleged beneficiary, or otherwise, unless there is evidence that the latter was in a position to create an interest in favour of the alleged *benamidar*, and actually did so. Not all fictitious transfers are *benami*, and certainly not all fraudulent transfers. A fraudulent transfer cannot raise a trust in favour of the transferor.

¹ Gur (cited above); *Narendra v. Midnapore* AIR 1940 Cal. 115, 120.

² *Lakshmiah v. Kothandarama* (1925) 48 Mad. 605 (PC), AIR 1925 P.C. 181, 52 I.A. 286.

³ *Sitamma v. Sitapatirao* AIR 1938 Mad. 8, [1937] 2 M.L.J. 606.

833. The beneficiary cannot in every case recover the property from his *benamidar*. Hard as these cases are, the grounds are such as are well known to equity. Where the plaintiff's 'hands' are not 'clean', as for example where the intention was to effect a fraud or deceit on the Government,¹ or to evade provisions of law, or in defiance of statutory prohibitions, or where it was otherwise against public policy, the suit cannot be granted even if the *benami* character of the transaction is apparent to the court² and the *benamidar* knew of the fraudulent or otherwise illegal purpose. *In pari delicto potior est conditio possidentis*. If the intention was merely to facilitate a collateral purpose and no actual fraud was involved the suit may be decreed.³ As the Supreme Court recently explained,⁴ where the illegality is of a slight or venial character it is deemed more opposed to public policy to allow the defendant to violate his fiduciary relation with the plaintiff than to allow the latter to gain the benefit of an illegal transaction. If fraud was intended but not actually carried out the plaintiff may successfully plead that the transfer was nominal and that the transferee holds as trustee for him.⁵ Otherwise that party is bound to fail who first is obliged to plead his own fraud. In a recent Privy Council case concerned in fact with a *benami* transfer the transferor had intended to deceive government officials, though his hope of profiting therefrom was slender. It was held that he could not recover the land he had transferred, but the case is of little authority in view of the failure of their Lordships to hear arguments directed to the institution of *benami*.⁶ A more valuable authority on this difficult question is the Supreme Court case referred to above. In order to avoid resumption of the lands on termination of a lease and also to avail himself of lower premia a lessee acquired leases in the names of *benamidars* with the knowledge of the lessors. It was claimed that the lessee could not

¹ *Punjab v. Daulat* AIR 1942 F.C. 38, 40-1, [1942] FCR 67, 74-5, referring to *Qadir v. Hakam* AIR 1932 Lah. 503, 13 Lah. 713 (FB).

² *Sundrabai v. Manohar* AIR 1933 Bom. 262, 35 Bom. L.R. 404; *Kotayya v. Mahalakshamma* AIR 1933 Mad. 457, 56 Mad. 646.

³ *Dhirendra v. Chandra* AIR 1923 Cal. 154, 68 I.C. 648.

⁴ *Kedar v. Prahlad* [1960] S.C.J. 1072, AIR 1960 S.C. 213, [1960] 1 SCR 861.

⁵ *Petherpermal v. Muniandi* (1908) 35 I.A. 98, 18 M.L.J. 277 (PC), 35 Cal. 551; *Subbaraya v. Venkatesa* AIR 1934 Mad. 252, 39 L.W. 357.

⁶ *Chettiar v. Chettiar* [1962] 1 All E.R. 494 (PC).

recover the lands as the maxims *in pari delicto* and *ex turpi causa non oritur actio* would apply. It was held that these maxims cannot apply to a case where there was no conspiracy to defraud a third person or to commit an act illegal in itself. Even in cases of illegality, the Supreme Court said, the court must weigh the illegality up with the breach of trust. Where the intended fraud has been wholly or partially carried into effect, as in the case of *Govinda v. Kishun*,¹ where the beneficiary made the transfer to defraud his creditors, the court will not allow him to resume the individuality which he had once cast off (*Jadu v. Rup*²).

834. The beneficiary cannot recover when the *benamidar* has transferred the property to a *bona fide* purchaser without notice.³ This is one of the risks inherent in the institution of *benami* transfers.

IMPARTIBLE ESTATES

835. No estates now exist in India which are permanently impartible by nature.⁴ On the death of the holder of a formerly impartible estate it will descend, notwithstanding any custom to the contrary, to the heirs of the holder and will be divisible amongst them as if it had been in all respects partible property. As we shall see (§ 839), an impartible estate is fundamentally impartible joint-family property of the holder unless he acquired it as a self-acquired and separate estate, and from this it follows (i) that it cannot be partitioned by the holder or his coparceners during the holder's lifetime, (ii) that many customs do not allow disposition of it by will, and (iii) that the debts of the last holder are not binding on his successor unless he is his son, or they were incurred for family necessity.⁵ The only impartible estates which continue to descend, after 17 June

¹ (1900) 28 Cal. 370.

² (1906) 33 Cal. 967, 978.

³ Transfer of Property Act, s. 41; *Ramcoomar v. MacQueen* (1873) I.A. Supp. Vol. 40, 11 B.L.R. 46. If the *benamidar* does not have possession, or the documents of title, these facts may amount to notice that he is a mere *benamidar*: *Vyankapacharya v. Yamanasami* (1911) 35 Bom. 269. Of course, a beneficiary may be estopped from disputing the transfer's validity: *Annada v. Prasannamoyi* (1907) 34 I.A. 138, 34 Cal. 711.

⁴ *Chelladorai v. Varagunarama* AIR 1961 Mad. 42, 44.

⁵ *Gur v. Dhani* (1911) 38 Cal. 182; *Indar v. Harpal* (1912) 34 All. 79, 12 I.C. 915.

1956, to a single heir are those which so descend by virtue of an unrevoked statute, or by virtue of an *agreement* between the former ruler of an Indian State with the Government of India.¹ Since nearly all impartible estates, in the nature of *zamindaris*, *rajyas* and the like have been 'abolished', 'liquidated', or 'enfranchised' by post-Independence State statutes, the reservation first mentioned is of very little importance in practice. The law stated in the following paragraphs is current for an impartible estate which was acquired prior to 17 June 1956 and whose holder subsequently has not yet renounced or surrendered the estate by *sanyasa* (§ 592) or otherwise.

836. Impartible estates, which for convenience we shall call here 'rajyas', were for the most part created by acts of state. They were originally kingdoms or fiefs which were carved out of kingdoms for the good government of the regions in question. The East India Company frequently resumed, liquidated, recognized, created, recreated, diminished or enlarged them, and the most notable formed the former Princely States which acknowledged the paramountcy of the British Crown. An *ancient* rajya may have become impartible by custom, but in such cases it is better to presume that such were the terms of a lost grant. Naturally the fundamental purpose of rajyas leans in favour of impartibility. In modern times a family cannot constitute its assets into an impartible estate descending to a single heir.² A rajya might however take its origin in a family arrangement (which would permit of the creation of rights of maintenance somewhat more extensive than normally allowed in the case of rajyas (§ 839)), provided that that was so distant in time as to permit the impartibility to have been established by custom. In all cases the onus of proving that an estate is impartible lies on the party asserting it.³ The holder, or raja, as we shall call him, could create smaller rajyas, derivative from his own, for the maintenance of a junior branch of the family or of a junior member.⁴ Normally such derived rajyas would revert to the parent rajya when

¹ HSA, s. 5 (ii).

² *Palani v. Muthuvenkatacharla* AIR 1925 P.C. 49, 52 I.A. 83, 48 M.L.J. 83.

³ *Martand v. Malhar* AIR 1928 P.C. 10, 55 I.A. 45, 30 Bom. L.R. 251.

⁴ *Promod v. State of Orissa* AIR 1962 S.C. 1288.

the line of the grantees died out, and indeed most grants for maintenance of a branch lapse and the property reverts to the parent estate when the purpose for which it was granted fails.¹ But in some instances such grants have become a source of genuine impartible estates which could not revert to the parent rajya for failure of heirs.²

837. Where a rajya is acquired by the Government in exchange for compensation to the holder or his family, the compensation itself attracts the incidents of the original estate, that is to say it will be impartible.³ A different view however has been taken in Madras, where, in *Janardhana v. State of Madras*,⁴ confirmed subsequently in *Chelladorai's case*,⁵ it was held that, under the Madras zamindari-abolition statutes, the compensation monies, which are payable under the acts, are joint-family property like the impartible estates themselves, but do not have the character of impartibility, so that persons entitled to benefit out of them may be entitled to shares.

838. The character of all rajas has been misunderstood in the Privy Council. We are no longer bound by the spirit, let alone the letter, of the earlier Privy Council cases, since their Lordships in more recent decisions have virtually apologized for the earlier mistakes,⁶ and set the law, so far as they might, upon a sounder footing.

839. Unless he received it by will (which is permitted by the custom of some rajas) or as a gift, both of which are rare, most rajas hold their rajas as ancestral property. At Mitakshara law this will be joint-family property but without the incident of partibility. The rajya could pass by survivorship to the next nearest member of the branch, and on failure of the branch of the holder to the nearest collateral branch of the family. It would be wrong, however, to suppose that the male issue of the raja would have a

¹ *Darbar Shri Vira v. State* [1960] 3 SCR 521.

² *Indramani v. Raghunath* AIR 1961 Or. 9 (for want of proof of custom of reverter, the grant passed under the ordinary Hindu law of succession).

³ *Gopalakrishna v. Sarvagna* AIR 1955 Andh. 264.

⁴ AIR 1953 Mad. 185, [1953] Mad. 479.

⁵ AIR 1961 Mad. 42.

⁶ *Bajinath v. Tej* AIR 1921 P.C. 62, 48 I.A. 195, 23 Bom. L.R. 654.

birthright in the rajya to the same extent as they would have in other, partible, joint-family property. Impartibility removes that most important incident of the birthright, namely the right to call for a partition. Except where he is prohibited from doing so by statute¹ the raja is entitled to deal with the corpus and the income of the rajya at his pleasure. Therefore the normal right of Mitakshara coparceners to question alienations is absent. The right of junior members to be maintained out of the income of a rajya formerly held by their father is founded upon custom, which is so readily assumed to exist that it does not require to be proved by evidence.² This is a rather feeble way of admitting, indirectly, that the joint-family character of this rather special type of asset cannot be lost sight of.³ Whenever property belonging to the rajya is alienated by the raja it is presumed to become partible,⁴ unless its nature is such as normally to make it impartible — but a bequest to the heir at law will not necessarily change its character,⁵ a rule of law which seems to be in conflict with the general presumptions in reference to bequests by ancestors to their descendants.⁶

840. Succession to a rajya was regulated formerly by the custom of each rajya. Customs of male lineal primogeniture were very common, and in default of evidence to the contrary lineal primogeniture would be presumed to apply, whence an elder son's son, or even grandson, would exclude a younger son. The eldest son was preferred, except where he was the *aurasa* son of a wife of inferior caste.⁷ Instances of general primogeniture were not unknown.⁸ Under the more usual principle the senior branch of collaterals would be preferred even if its representative was not the senior collateral in age: the reverse position obtained under the less common custom.

¹ As for example the Madras Impartible Estates Act, 1904.

² *Comm. I.T. v. Narayana* AIR 1934 Mad. 608 (SB); *K. V. Thangavelu v. Court of Wards* AIR 1947 Mad. 38, [1946] 2 M.L.J. 143.

³ *Comm. I.T.* (cited above).

⁴ *Veerappa v. Thangachami* [1946] Mad. 343, AIR 1946 Mad. 5.

⁵ *K. Shyam v. Collector* AIR 1946 P.C. 103, [1946] 2 M.L.J. 235, [1946] All. L.J. 280 (dictum). ⁶ See § 547 (i).

⁷ *Ramasami v. Sundaralingasami* (1894) 17 Mad. 422. Cf. *Jagdish v. Sheo* (1901) 28 I.A. 101.

⁸ *Ragh. s.* 634.

841. Except where custom prevailed the general law, as usual, applied. The Hindu Women's Rights to Property Act (§§ 412ff) did not apply to this type of property.¹ As a result a coparcener, for example an elder brother, even if only a half-brother, might take it by survivorship and a divided brother might be excluded by a much younger brother with whom the raja died joint in respect of the rest of the joint-family property.² The only exceptions would be the very rare cases where the rajya was the self-acquired property of the deceased raja, when it descended as if it were separate property to the widow, and so on (§ 607).³ If the right to take by survivorship is to be renounced or surrendered this must be done expressly — a contingency which, one would have thought, could but rarely be contemplated, since to hold a rajya is the average man's dream of heaven upon earth.⁴ A partition, nevertheless, we are solemnly told, with regard to partible property (which is usually all that a family are concerned to partition and have at such a time within their contemplation) does not imply a renunciation of survivorship to an impartible asset. The result is that it may pass, under the old system of law, by survivorship to a remote branch of the family as a veritable windfall.⁵

842. In the absence of a legitimate child and of a widow an illegitimate child could take the rajya⁶ if he were a genuine *dasiputra* (§ 32) of a Sudra raja, and if that rajya had been separated from his coparceners, or had no coparceners (any one of whom would normally exclude the *dasiputra*), or if the rajya had been self-acquired. A *dattaka* would not succeed to any part of the rajya in the presence of any undisqualified *aurasa*.

¹ HWRPA, s. 3 (4).

² *Bajinath v. Tej* AIR 1921 P.C. 62, 48 I.A. 195, 23 Bom. L.R.

³ *Ulagalum v. Subbalakshmi* AIR 1939 P.C. 95, 66 I.A. 134, 41 Bom. L.R. 718.

⁴ *Chinnathayi v. Kulasekhara* AIR 1952 S.C. 29; *Senthathi v. Varguna* AIR 1954 Mad. 5.

⁵ *Konammal v. Annadana* AIR 1928 P.C. 68, 55 I.A. 114, 51 Mad. 189; and in the court below: AIR 1923 Mad. 402.

⁶ *K. V. Thangavelu v. Court of Wards* (cited above).

843. The raja owns the income absolutely as his separate property,¹ and may alienate the corpus or income *inter vivos* or by testament where he is not restrained by custom or by statute.² Proof of inalienability is extremely difficult: but even when it is shown that the estate is inalienable the raja may still alienate it for necessity (cf. § 438).³ As in the cases of the coparcener and the widow holding a limited estate (§§ 549, 680), the raja may blend with the rajya both his purchases out of income and other self-acquired land, with the result that it becomes impartible like the nucleus itself.⁴ But since this takes it out of the scope of the general law the incorporation or blending must be proved strictly. There is a presumption that acquisitions out of the estate are intended to pass with the estate, while acquisitions out of its income are intended to pass as the raja's separate and self-acquired property apart from the rajya.⁵ These presumptions are, as all presumptions of this nature (cf. § 680), rebuttable by evidence of intention to treat the acquisition otherwise.

844. Members of the family have no right to maintenance out of the corpus or income except for those who are dependants of the deceased raja,⁶ whose right to be maintained attached to the rajya as to any other property of the deceased. By custom junior members may be entitled to be maintained out of the rajya in their character of male issue of the previous raja.⁷ Illegitimate sons of the holder are not entitled to be maintained out of the rajya unless a custom can be proved in their favour.⁸ In one view this rather

¹ *Sartaj v. Deoraj* (1888) 15 I.A. 51, 10 All. 272; *Comm. I.T. v. Krishna* AIR 1941 P.C. 120, 68 I.A. 155, [1941] 2 M.L.J. 972.

² *Venkata v. Court of Wards* (1899) 26 I.A. 83, 22 Mad. 383, 1 Bom. L.R. 277.

³ *Gopal v. Raghunath* (1905) 32 Cal. 158.

⁴ *Shiba v. Prayag* AIR 1932 P.C. 216, 59 I.A. 331, 59 Cal. 139 (PC).

⁵ *Aparna v. Shiba* (1924) 3 Pat. 367, AIR 1924 Pat. 451.

⁶ *Comm. I.T. v. Gyan* AIR 1945 Pat. 205, 24 Pat. 159 (mother); *Nanda Kishore v. Patta* AIR 1940 Mad. 850, [1940] 2 M.L.J. 47 (widow of deceased coparcener); *Rama v. Raja of Pittapur* AIR 1918 P.C. 81, 45 I.A. 148, 35 M.L.J. 392.

⁷ *Collector of Gorakhpur v. Ram* (1934) 61 I.A. 286, 56 All. 488, 36 Bom. L.R. 867; *Subbaya v. Sivagnana* [1937] Mad. 42, AIR 1936 Mad. 828.

⁸ *Kumara v. Rajeswara* AIR 1942 P.C. 3, 68 I.A. 181, 44 Bom. L.R. 551; *Comm. I.T. v. Krishna* AIR 1941 P.C. 120, [1942] 2 M.L.J. 972, 54 L.W. 635; *Harisingji v. Ajitsingji* AIR 1949 Bom. 391; *Chelladorai v. Varagunarama* AIR 1961 Mad. 42.

harsh rule applied only where the rajya was the self-acquired property of the raja, but it seems that the exclusion was properly applied to all rajyas. In most cases the raja will have an interest in other joint-family property, to which the illegitimate son's rights will attach for his life (§ 550 (vi)), so that he is unlikely to suffer hardship.

FURTHER READING

Damdupat

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 D. F. Mulla, *Principles of Hindu Law*, 12th edn, 1959, ch. xxviii.
 P. V. Kane, *History of Dharmasastra*, III, 422-5.
 Ram Keshav Ranade, 'Damduppat in Hindu Law,' (1952) 54 Bombay Law Reporter, Journal, pp. 49-57.
 J. D. M. Derrett, 'The Death of Damduppat?', (1956) 58 Bombay Law Reporter, Journal, pp. 65-70.

Benami Transactions

- H. S. Gour, *Hindu Code*, 4th edn, 1938, ss. 218-21.
 J. D. Mayne, *Hindu Law and Usage*, 11th edn, 1950, ch. xxiii.
 N. R. Raghavachariar, *Hindu Law, Principles and Precedents*, 4th edn, 1960, s. 324.
 A. Ghosh, *Law of Benami Transactions*, 2nd edn, 1928, is still of use.
 J. D. M. Derrett, 'Fictitious Transfers (Benami) and the Presumption of Advancement,' (1962) 11 *International and Comparative Law Quarterly*, pp. 864-72.

Impartible Estates

- J. D. Mayne (above), ch. xix.
 N. R. Raghavachariar (above), ch. xvi.

CHAPTER ELEVEN

Hindu Law in East Africa

845. Hindus have migrated to East Africa for business during many centuries past. Some set up their homes in East Africa; but others, and these seem to be the majority, preserved a more or less close connexion with India. There has always been a great deal of coming and going, and many families maintain a dual residence, living much of their working lives in East Africa and intending to return to the ancestral home on retirement. It is remarkable that many families which do business almost continuously in East Africa go to India for their marriages, and at other important crises in the families' lives. The castes represented in East Africa are chiefly commercial. The predominant *varna* (§ 27) is Vaisya, but there are Sudras also. Sikhs are numerous. Most Hindus originate from Saurashtra, Gujarat and the Punjab, though many come from Bombay. Western India rather than any other quarter has maintained, naturally enough, a traditional connexion with East Africa. Hindus are found residing in Kenya, Uganda, Tanganyika, and also, in some numbers, in Zanzibar. There is also a community at Aden. Aden having been administered judicially from India until relatively recently, there is no problem regarding the administration of Hindu law, which will follow, wherever practical, the Anglo-Hindu law of the so-called Bombay school (§ 24). The administration of Hindu law in the other territories may be described fairly as in a critical and transitional stage. There are disturbing contradictions in the cases reported to date (and it is to be remarked that comprehensive reporting of Hindu law cases has yet to be undertaken) and the commentator cannot at this stage do more than note what these amount to.

846. The general law of the courts set up under the East Africa Order in Council, 1897, and its counterparts, is not the exact equivalent of the mixed collection of laws which from the first were administered by the East India Company and the King's courts in India (§ 8). It is called 'non-personal, non-religious law', but it is in effect English law,

common law and equity, so far as this has not been modified or codified by local ordinances. Hindus therefore expect to litigate, if at all, in English-type courts, where Hindu law appears as if it were a foreign law, though it would be quite misleading to say that it was a foreign law. The result is that the judges adopt an independent attitude towards the 'Asiatic' laws they apply, failing, for the most part, to keep a clear distinction, as they should, between the personal law of Hindus which is part of the law of the land, and the same system of law which has to be proved in evidence as a foreign law when it is referred to under the Conflict of Laws rules, whether as the *lex loci rei sitae* or the *lex domicilii*. In the latter case they can quite properly refuse to apply a rule which they feel is unduly antiquated, perverse, or otherwise not in accord with natural justice. Naturally, out of comity, they will not seek to find fault with a system of law which their colleagues applied in India for many years past. Nor would it be convenient for a Hindu to be governed in Gujarat by one rule, and in Kenya by another. But it is unquestionably open to East African judges to criticize and appraise a rule of Hindu law which is being sought to be applied in a *conflict* matter. It is quite a different question where the law is sought to be applied between Hindus domiciled in East Africa, as for example where a Hindu adopts a son in Dar-es-Salaam and both the adopter and the alleged adopted child were domiciled at all material times in Tanganyika. The court, it is submitted, has no jurisdiction to appraise the Hindu law of adoption (the Anglo-Hindu law) and to refuse to apply an established rule because it conflicts with the conception of adoption entertained in England, or elsewhere, or fails to coincide with any East Africa ordinance on the subject. Yet, where the rule of Hindu law sought to be applied is not clear from the cases available for study in East Africa, and textbook-writers are unclear or contradict one another (as not infrequently happens), the court has a residual jurisdiction to determine what is the law for East Africa, and may well determine that of possible alternatives one is more consistent with the habits of Hindus and the welfare of the community: this has actually happened, and though it gives rise to controversy¹ it is not inconsistent with the actual practice

¹ *Vishram Dhanji v. Lalji Ruda*, C.A.E.A., 1 Mar. 1957, Civil Appeal No. 51 of 1956, from Kenya. I discuss this at AIR 1958 Journal 1ff.

of High Courts in India.¹ The situation in Zanzibar, by contrast with the other jurisdictions, is more favourable to the direct application of Hindu law, as understood by the Bombay High Court, (apart from post-1884 statutes) without any such reservations (§ 875).

847. The duty, therefore, it is submitted, of East African courts is to administer Hindu law (otherwise than in cases of conflict of laws) in the spirit in which it is (or was) administered in India or Pakistan. Difficulties must arise, however, where the court's jurisdiction has been settled by ordinance, so that a legislative measure passed without contemplating the embarrassment it must cause to Hindus and other Asiatics will accidentally preclude the administration of any law inconsistent with it. Thus at one time the court had no jurisdiction to hear suits for restitution of conjugal rights between Hindus or Muslims, their marriages being at that time potentially polygamous.² The jurisdiction, and the potentially polygamous character of Hindu marriages, were in Kenya recently amended together. That same ordinance, to which extensive reference is made below, enabled for the first time nullity suits between Hindus to be heard.³ The reason for the court's reluctance to act as if it were an Indian court is not so much the former reluctance of English courts to have any truck with potentially polygamous marriages (a sensitiveness now much relaxed) as the fact that Hindus in East Africa have made great use of their ancient right to have marriages dissolved by panchayat at customary law (§ 274), a right now taken away in Kenya and Uganda. It is necessary for us to review the territories independently, and, so far as practical, the topics upon which Hindu law is administered.

848. Hindu law is applied in East Africa to Ismaili Khojas,⁴ but not (*prima facie*) to Memons,⁵ in matters of succession;

¹ On the Indian court's jurisdiction to appraise a rule of Hindu law and custom see *Madhavrao v. Raghavendrarao* [1946] Bom. 375 and my article in *Comparative Studies in Society and History*, 4, 1961 at pp. 31ff.

² *Madan Lall Kakar v. Nirmal Kumari* (1943) 20 K.L.R., pt. 2, 34, cited in *Fatima v. Majothi* (1946) 13 E.A.C.A. 50, 52. The position was relieved for Kenya by the Ordinance of 1946 referred to below.

³ Cf. *Ganga Devi v. Tulsi Dass* (1922) 9 E.A.L.R. 64.

⁴ *Jafferai v. Standard Bank* (1927) 11 K.L.R. 1 (PC); *Fatmabai v. Mahomed Ladha* (1928) 1 Tang. L.R. 715.

⁵ *Halimabhai v. Abdarrahim* (1913) 5 E.A.L.R. 34 reversed in (1914) 5 E.A.L.R. 130 (CA).

but the Hindu Wills Act, 1870, does not apply to such Muslims.¹

KENYA

849. In matters of marriage and matrimonial causes the law is provided partly in the Hindu Marriage and Divorce Ordinance, No. 28 of 1960, reproduced below in Appendix IV, and partly in the Matrimonial Causes Ordinance, 1941, *Laws of Kenya*, Cap. 145, and the Subordinate Courts (Separation and Maintenance) Ordinance, 1929, Cap. 6. It is expedient to note briefly the differences between the first ordinance and the Hindu Marriage Act of India. The conception as well as draftsmanship will be found to be different.

850. The definition of 'marriage' for purposes of the ordinance includes marriages in the Colony that would have been valid under § 3 (1) of the Hindu Marriage, Divorce and Succession Ordinance, 1946, No. 43 of 1946 (*Laws of Kenya*, Cap. 149). These were marriages contracted in a manner customary in the Colony among persons professing the religion of *either* party to the marriage. It also includes marriages solemnized after the commencement of the ordinance of 1960 (apparently anywhere), and also marriages solemnized under the Special Marriage Act, 1954, or the Hindu Marriage Act, 1955, or any amendment of these statutes or enactment substituted for them.

851. One may marry, under this Ordinance, a brother's widow;² one may not marry a father's or mother's sister's husband, nor the grandfather's or grandmother's sister's husband.³ Instead of our sapindaship rules (§ 240) the parties must not have a common ancestor less than three generations distant if ancestry is traced through the mother of either, or five generations distant if ancestry is traced through the father.⁴ A provision is inserted to give the moment when a Sikh marriage is completed.⁵ Dissolution (e.g. by a panchayat) is prohibited unless it conforms to the

¹ *In the matter of the trusts of the Will of Premji Dhanji* (1950) 24 K.L.R., pt. 1, 40 following AIR 1920 Bom. 140.

² s. 3 (2) (c). ³ s. 3 (2) (d). ⁴ s. 3 (2) (f). ⁵ s. 5 (3).

requirements of the Ordinance.¹ Polygamous marriages after 19 July 1960 are declared bigamous and provisions of the Penal Code apply.² The Subordinate Courts (Separation and Maintenance) Ordinance (*Laws of Kenya*, Cap. 6) applies to marriages which were valid on 17 July 1960 under the Ordinance of 1946 (then repealed in part) and marriages within the Ordinance of 1960 itself. This extends to Hindus remedies roughly comparable to those under the Code of Criminal Procedure (§ 35), in addition to the remedies available in the courts of the Justices of the Peace in England, whereby the wife may obtain judicial separation from her husband and the latter may be ordered to pay maintenance to her and to the children who are dependent upon him, and further remedies. The particulars are summarized below in Appendix IV.

852. Grounds of divorce include simple adultery,³ desertion for three years,⁴ cruelty,⁵ the respondent's being incurably of unsound mind and under care and treatment for five years,⁶ conversion,⁷ and remaining in a religious order for three years.⁸

The Hindu Marriage and Divorce Ordinance, 1960, by s. 9, incorporated the new Hindu matrimonial causes law with the general law, and modified the latter where inconsistent with the new Ordinance. As a result many provisions of the general law are now applicable to Hindus. Neither divorce nor nullity may be granted unless the petitioner is domiciled in the Colony at the time of the petition, the only exception being where the wife has been deserted or the husband deported, when he was domiciled in the Colony immediately previously to the desertion or deportation.⁹ It follows from this that Hindus domiciled in India or Pakistan, or in Tanganyika or Uganda, cannot take advantage of the new Ordinance, nor obtain matrimonial relief *in respect of divorce or nullity* by reliance upon any earlier jurisdiction the court may have had. The adultery of the petitioner for divorce is normally fatal to the petition, except where the respondent has condoned it: there is a statutory definition

¹ s. 7 (1).

² s. 7 (3).

³ s. 10 (1) (a). Note that leprosy and venereal disease are omitted.

⁴ s. 10 (1) (b). ⁵ s. 10 (1) (c).

⁶ s. 10 (1) (d); sec. 10 (2). ⁷ s. 10 (1) (e). ⁸ s. 10 (1) (f).

⁹ Cap. 145, s. 4.

of condonation for this purpose.¹ The court, if satisfied that the grounds alleged in the petition are true, will grant a decree *nisi* either in a divorce or a nullity case,² and the Queen's Proctor may show cause why a decree absolute should not be granted if it appears that the proceedings have been conducted in collusion.³ In no case may a petition be presented within three years of the marriage, apart from exceptional hardship or exceptional depravity (as under Indian law : § 363).⁴ Immediately after a decree absolute has become final the parties may remarry as if the marriage had been dissolved by death.⁵

The court has power to award alimony *pendente lite*,⁶ and permanent alimony and maintenance.⁷ It may order the settlement of the wife's property for the benefit of the innocent party and of the children of the marriage,⁸ but this jurisdiction may not be relevant to Hindu families where the institution of *stridhanam* remains untouched by legislation and the husband and wife have normally no claim upon each other's estates apart from the wife's right to maintenance. The question whether Hindus domiciled in Kenya must be presumed to have adopted European ideas on these subjects is beyond the scope of this summary treatment, but it is tentatively submitted that they cannot be, and each case must be examined on its merits. The court has power to make orders as to the application of any settled property.⁹ The court has power to make an order protecting a deserted wife's property from her husband or his creditors.¹⁰ Here, too, the court will take notice of the fact that between Hindu husbands and wives no presumption of advancement applies (§ 830), and this may have the effect of increasing the utility of this power. Finally the court may make orders for the custody and maintenance of children.¹¹

A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with his wife, and the court may award damages, and direct how it shall be recovered, and may direct the whole or part of it to be settled for the benefit of the children of the marriage, or as provision for

¹ Cap. 145, s. 9.

² Cap. 145, ss. 32, 33.

³ Cap. 145, s. 24 (1).

⁴ Cap. 145, s. 26.

⁵ Cap. 145, s. 14.

⁶ Cap. 145, s. 5.

⁷ Cap. 145, s. 24 (2).

⁸ Cap. 145, s. 27.

⁹ Cap. 145, s. 15.

¹⁰ Cap. 145, s. 25.

¹¹ Cap. 145, s. 28.

the maintenance of the wife.¹ Guilty co-respondents may be ordered to pay the costs.² Interested parties may be allowed to intervene, if necessary upon terms.³

Where the respondent has been continuously absent from the petitioner for seven years or more and there is no reason to believe that he has been alive during that period, or there are other reasonable grounds for believing that the respondent is no longer alive, the court may make a decree of presumption of death and of dissolution of the marriage.⁴

853. From these general provisions we resume consideration of the Hindu Marriage and Divorce Ordinance, 1960, in relation to nullity. Grounds of nullity include impotence *at the time of the marriage*;⁵ unsoundness of mind or recurrent fits of insanity or epilepsy;⁶ force or fraud in any case in which the marriage might be annulled on this ground by the law of England;⁷ suffering from venereal disease in a communicable form at the time of the marriage;⁸ pregnancy at the time of the marriage by some person other than the petitioner,⁹ provided that in the case of fits, etc., venereal disease and pregnancy the petitioner was ignorant of the facts at the time of the marriage, and subject to the safeguards found also in the Hindu Marriage Act (§ 301).¹⁰

854. Judicial separation is available for any ground on which divorce might be decreed; for desertion for two years; for cruelty; or for failing to comply with a decree for restitution of conjugal rights.¹¹

855. The law of restitution of conjugal rights applied to Hindus is not that set out in s. 4 of the Ordinance of 1946, now repealed, but ss. 19 and 20 of the Matrimonial Causes Ordinance (Cap. 145)¹² which read as follows:

s. 19. A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

s. 20. (1) A decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court, at the time of making the decree or at any time afterwards, may,

¹ Cap. 145, s. 22.

² Cap. 145, s. 23.

³ Cap. 145, s. 31.

⁴ Cap. 145, s. 21.

⁵ s. 11 (1) (b) (i).

⁶ s. 11 (1) (b) (ii).

⁷ s. 11 (1) (b) (iii).

⁸ s. 11 (1) (b) (iv).

⁹ s. 11 (1) (b) (v).

¹⁰ s. 11 (1) proviso.

¹¹ s. 12.

¹² s. 9.

in the event of the decree not being complied with within any time in that behalf limited by the court, order the respondent to make to the petitioner such periodical payments as may be just, and the order may be enforced in the same manner as an order for alimony made under the provisions of this Ordinance.

(2) The court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments.

856. In matters of intestate succession the Hindu Marriage, Divorce and Succession Ordinance, 1946, provides by s. 2 that 'Hindu' includes Sikhs, etc. (as in India) and 'any person who, for the purpose of marriage, divorce, or succession, is governed by Hindu law'. 'Hindu law' means 'the law... adopted by any school or sub-school of Hindu law'. Section 9 reads as follows:

(1) Subject to the provisions of this or any other Ordinance for the time being in force in the Colony, the succession to the moveable property in the Colony of a deceased Hindu who at his death is domiciled in the Colony and to the immoveable property in the Colony of a deceased Hindu, whether domiciled in the Colony at his death or not, shall be regulated by Hindu law.

Provided that every creditor shall have the same rights and remedies against the estate of a deceased Hindu (including the right to follow assets) as he has against the estate of a deceased Christian.

(2) This section shall apply to the estate of a Hindu who died before the commencement of this Ordinance¹ in like manner as it applies to the estate of a Hindu dying after the commencement of this Ordinance:

Provided that no part of an estate which has been distributed before the commencement of this Ordinance shall be recoverable by reason only of any alteration in the law effected by this Ordinance.

Section 11 provides as follows:

A court may ascertain the Hindu law or any custom by any means which it thinks fit, and in case of doubt or uncertainty may decide as the principles of justice, equity and good conscience may dictate.

857. The only point worthy of emphasis here is that, though the normal Hindu law, i.e. the Anglo-Hindu law and *not* the Hindu Code, is to be administered to Hindus in matters of succession (which necessarily includes survivorship at Mitakshara law), the Indian rule (§ 486) that a decree must be obtained against a Mitakshara coparcener, or at the least an attachment must be obtained, against his undivided interest if the creditor is to obtain his remedy out of the interest after his debtor's death, does not apply in Kenya.

¹ 14 August 1946.

The interest will pass subject to the debts. This is evidently the object and purpose of s. 9 (1), prov., of our Ordinance.

858. In *Basant Kaur v. Rattan Singh*¹ a widow sued the son and sole male heir of a deceased Mitakshara coparcener for maintenance at Mitakshara law and under ss. 9 and 11 of the Hindu Marriage, Divorce and Succession Ordinance, for a charge and for arrears of maintenance. Bourke, J., held under the terms of the then s. 3 (1) of cap. 149 (the same Ordinance) that as the marriage took place outside Kenya it 'cannot be deemed for the purposes of succession or any other purpose to be a valid marriage'. With respect, this was an astounding proposition, and cannot be correct. Section 3 (1) defined a valid marriage 'for all purposes', i.e. those which came within s. 3 (1) were valid for all purposes: the Ordinance nowhere said that other marriages should not be valid for any purposes. The provisions of s. 2 in any case refer to and define 'Hindu law', and when ss. 2, 9 and 11 are read together it is evident that the legislature intended that an heir at Hindu law, e.g. Mitakshara school, such as a widow as defined according to that school, should inherit, subject to the provisions of Kenya ordinances. The provision of s. 3 (1) not being intended to exclude from validity marriages other than those there embraced, but intended to define marriages to which the new law of matrimonial causes was to apply, is not a provision limiting the enactment of s. 9, which corresponds on the whole with the pre-1946 law of Kenya and the present law of Tanganyika. Bourke, J., following this false reasoning, therefore, held that the plaintiff's claim was not within the Ordinance. He went on to add error to error, and held that, even if it had been, her claim was not one to succession. Citing Mulla he held that a widow was entitled only to maintenance (the Act of 1937 not being cited to him, and presumably not being applicable)² and added, 'I do not think that the section can be held to cover the right to maintenance and the obligation of an heir to provide maintenance out of the estate he inherits'. It is submitted that the widow's claim came within s. 9 of the Ordinance of 1946, and that the learned judge should have decreed her

¹ (1952) 25 K.L.R. 24.

² The current law, then as now, required schools or sub-schools of Hindu law to be applied. It is doubtful whether Indian legislation after the East Africa Order in Council, 1897, can apply in Kenya.

maintenance, and arrears of maintenance according to the Hindu law. Now that the Ordinance of 1946, s. 3, has been repealed a possible cause of embarrassment has been removed. The sections which remain of the Ordinance of 1946, namely sections 1, 2, 9, 10, and 11, leave us in a position to administer the Hindu law of succession, including the qualifications required of claimants, such as widows, according to the law of the school or sub-school, without reference to any technical definitions laid down in connexion with matrimonial causes.

859. The law of testamentary succession comes within s. 9 of the Ordinance of 1946, which is not confined to intestate succession. In *Charan Singh Chadha v. Mohinder Singh*¹ it was held that since s. 11 (b) of the East Africa Order in Council, 1897, applied the Indian Succession Act, 1865 (except s. 331 which exempted Hindus) to the East Africa Protectorate, and on 30 September 1898 the Secretary of State for the Colonies made an Order under s. 11 (c) of the said Order in Council whereby the Hindu Wills Act, 1870 and the Probate and Administration Act, 1881, should apply to the then Protectorate, all wills executed by Hindus in Kenya (and not merely those within the contemplation of the Hindu Wills Act itself) must conform to the requirements of s. 50 of the Indian Succession Act, 1865. Hence due signing and attestation are required (§ 703) and oral wills and informal revocations are not allowed. It had been thought² that the question turned on domicile; but it was held here that all Hindu wills without exception are within s. 50 of the Act of 1865 as applied to Kenya.

860. In matters of adoption,³ minority,⁴ guardianship,⁵ religious endowments, and other topics within the scope

¹ C.A.E.A., Civil Appeal No. 6 of 1960, decided 16 Nov. 1961.

² In *Re Jethalal Govindji* (1942) Tang. L.R. (Rev.) 732.

³ *Att. Gen. v. Govindji H. N. Shah* (1961) E.A.C.A. 110; *Hirji D. Ramji v. Att. Gen.* (1956) 23 E.A.C.A. 20.

⁴ In *re Gordhandas* (1931) 4 Uganda L.R. 32 (the youth was domiciled in India). It is submitted that the personal law should apply in East Africa failing a majority ordinance enacting the common law rule for Asiatics.

⁵ In *Gajree Siri Krishnan v. Krishna Kumari* (1955) 28 K.L.R. 32, 35, 49 Cram, Ag. J., held that under the inherent jurisdiction of the court the general law would be applied but that as a matter of fact the Hindu

of Hindu law,¹ that system is applied by virtue of s. 4 (2) of the Kenya Order in Council, 1921, which corresponds to the Tanganyika Order in Council, 1920, art. 17 (2) and is derived from the Order in Council of 1897 (where it is art. 11) through that of 1902 (where it is art. 15) and that of 1911 (where it is art. 1). The section, whose counterpart in Tanganyika will be set out more fully below, contains the proviso:

Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in the territory so far only as the circumstances of the territory and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualifications as local circumstances may render necessary.

It is evident that Hindu law is readily ousted by a comprehensive local ordinance. But until this takes place the principle for East Africa is indicated by a dictum of Sir Norman Whitley, C. J.:²

'It would be strange if the common and statute law of England and English rules of equity as applied in England in such matters (i.e. family life and giving in marriage) were to be held to be binding regardless of their own customs upon a community such as the Sikh community who follow the Hindu religion and it seems to me that the proviso is designed to allow of elasticity in such cases and to empower the courts of the Colony to have regard to the customs and way of living of such a community, provided of course that such customs and way of living are not repugnant to natural justice or in direct conflict with the provisions of any local ordinance.'

861. The practice is to plead that the parties are governed by Hindu law, to plead the rule of Hindu law or custom applicable to the issues,³ and then for counsel to argue at the hearing, presenting an established textbook (Mulla is often cited) supported by Indian decisions. For this latter purpose one should commence with Privy Council decisions and those of the Supreme Court of India, and amongst

law may be pleaded and invoked: thus Hindu law would come in indirectly. Yet the close dependence of the Hindu law of guardianship upon the English law (§ 11) should facilitate the direct governing of Hindu guardianship matters by Hindu law. See also *P. B. Damani v. Salim* (1947) 6 Uganda L.R. 179.

¹ Claims for damages for breach of contract of betrothal have been entertained. See *Mistry Amar Singh v. Hazara Singh* (1946) 13 E.A.C.A. 18, cited below; also *Vishram Dhanji* (cited above at § 847).

² At 13 E.A.C.A. 18, 19.

³ per Sir G. Graham Paul, C.J., at 13 E.A.C.A. 18, 23.

High Court decisions one should give preference to the High Courts of the Punjab, Bombay, Gujarat and the former High Court of Saurashtra where divergences between the High Courts occur (§ 26), recollecting that the prestige of the senior of these (Bombay) is at present paramount.

TANGANYIKA

862. Under Article 13 of the Trusteeship Agreement by which the British Crown assumed responsibility for the government of Tanganyika it was made obligatory to recognize the religious laws of the non-Christian Asiatics, and from the inception of British rule in Tanganyika the religious communities were governed by their religious laws in appropriate matters. There is no reason to doubt but that the former German administration recognized personal laws, and, as usual in all settlements of Indians overseas, much power in practice must have rested with the panchayats. According to the better opinion Hindu and Islamic law were from the first parts of the law of the land and not foreign laws.

863. Article 17 (2) of the Tanganyika Order in Council, 1920 (Imperial Laws, 5)¹ provides :

Subject to the other provisions of this Order, such civil and criminal jurisdiction shall . . . be exercised in conformity with the Civil Procedure, Criminal Procedure and Penal Codes of India and the other Indian Acts and other laws which are in force in the territory at the date of the commencement of this Order or may hereafter be applied or enacted, and subject thereto and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England at the date of this Order and with the powers vested in and according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said Civil Procedure and other Indian acts and other laws in force as aforesaid and the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the commencement of this Order, have been or may hereafter be modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of

¹ Repealed but substantially reenacted by Ordinance No. 57 of 1961.

His Majesty in Council, or by any Proclamation issued or by any Ordinance or Ordinances passed in and for the territory :

And here follows the proviso we have already set out in connexion with Kenya (§ 860). The Indian Acts (Application) Ordinance (Cap. 2), 1920, provided that the Indian Succession Act, 1865 (except s. 268, which dealt with personal rights of action) and the Hindu Wills Act, 1870, the Probate and Administration Act, 1881,¹ the Majority Act, 1875,¹ and the Indian Contract Act, 1872¹ (except chap. 7) should apply to Tanganyika. It will be observed that statutes amending the Hindu law or the law of Hindu wills passed after 1920 are not applied to Hindus as part of the municipal law of Tanganyika.

864. The Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance (cap. 112) of 1923 includes the following provisions which are self-explanatory :

s. 2 (1) The marriage in the Territory of non-Christian spouses either of whom is an Asiatic, whether domiciled in the Territory or not, who are not related to each other in any of the degrees of consanguinity or affinity prohibited by the law of the religion of either party to the marriage, shall, if the marriage is contracted in the manner customary in the Territory among persons professing the religion of either party to the marriage be deemed for all purposes to be a valid marriage.

(2) This section shall apply to marriages contracted either before or after the commencement of this Ordinance but shall not render valid any invalid marriage —

(a) which, before the commencement of this Ordinance, has been declared to be invalid by any competent court, or

(b) where either party to the marriage has, before the commencement of this Ordinance, lawfully contracted a subsequent marriage which would be avoided by the validation of the previous marriage.

Section 3 gave the High Court jurisdiction to hear and determine all matrimonial suits and suits arising out of the marriage. The High Court in fact exercises its inherent jurisdiction under the common law derived from the practice of the ecclesiastical courts. Although the Ordinance expressly gives jurisdiction in respect of marriages in the Territory, this does not deny the court's jurisdiction to grant matrimonial relief in other cases, but it had been held, as we have seen,² that the court could not grant

¹ Tanganyika Ordinances of 1960/1 have repealed these Acts and substituted other provisions which are outside our scope.

² Above, § 847.

relief in the nature of restitution of conjugal rights where the marriage in question was potentially polygamous. It was this rule which the Ordinance sought to remove. The law actually applied is, of course, not the English matrimonial law, but the religious law.

865. In matters of succession the Ordinance provides by s. 6:

(1) Subject to the provisions of this or any other Ordinance or applied Act for the time being in force in the Territory, the succession to the moveable property in the Territory of a deceased non-Christian Asiatic who at his death is domiciled in the Territory and to the immoveable property in the Territory of such an Asiatic, whether domiciled in the Territory at his death or not, shall be regulated by the law of the religion professed by him at his death:

Provided that:

(a) so much of the law of any religion as deprives any person of a right of succession to property by reason of that person having renounced or having been excluded from the communion of any religion or having been deprived of caste shall not be in force in the Territory;¹ and

(b) every creditor shall have the same rights and remedies against the estate of a deceased non-Christian Asiatic (including the right to follow assets) as he has against the estate of a deceased Christian.²

(2) This section shall apply to the estate of a non-Christian Asiatic who died before the commencement of this Ordinance in like manner as it applies to the estate of a non-Christian Asiatic dying after the commencement of this Ordinance:

Provided that no part of an estate which has been distributed before the commencement of this Ordinance shall be recoverable by reason only of any alteration in the law effected by this Ordinance.

Section 8 provides:

(1) For the purposes of this Ordinance the law of the religion of any person shall be that law subject to any special custom recognized and adopted by his co-religionists domiciled in the Territory, or, in the case of a Hindu, by members of the caste so domiciled.

(2) A court may ascertain the law of any religion or any custom by any means which it thinks fit, and may act on information which appears to the court to be credible though it is not legal evidence, and in case of doubt or uncertainty may decide as the principles of justice, equity, and good conscience may dictate.

There is no reason to suppose that proof of custom in

¹ This extends to all non-Christian Asiatics the provisions of the Act of 1850 referred to above, § 595.

² See § 856.

Tanganyika differs in any way from proof of a corresponding, or the same, custom in India. The principles applied by the Indian courts seem to leave little to be desired and the East African courts may very well follow them.

366. In conclusion, the Hindu law applied in Tanganyika bears on the whole a much closer resemblance to that applied in Pakistan than does the Hindu law applicable by the courts of Kenya, and the scope for the personal law seems to be wider. It must be emphasized however that the Hindu law, even in Tanganyika, is not the Anglo-Hindu law of India or Pakistan in its entirety, since statutes of the post-1920 period are excluded.

UGANDA

367. The situation in Uganda is curious. Prima facie Hindu law would be applicable as in Tanganyika prior to the Tanganyika Ordinance of 1923 set out above. The Uganda Order in Council which came into effect on 11 August 1902 corresponds practically exactly with the Tanganyika Order in Council, 1920. Until 1 September 1961 the court, it appears, could not administer Hindu law in matrimonial causes. After that date a statutory 'Hindu law', partially integrated with an obsolete English system of divorce law, came into force. We are obliged by the Hindu Marriage and Divorce Ordinance, No. 2 of 1961, s. 9 (1), to apply to matrimonial causes between Hindus under this Ordinance such provisions of the Divorce Ordinance (*Laws of Uganda*, Cap. 112) as are not modified by s. 9 (2) and (3). The Ordinance of 1961 differs in many respects (some of them very important) from the Kenya Ordinance of 1960 which we have seen above, and it differs (needless to say) from the (Indian) Hindu Marriage Act, 1955. The Uganda Divorce Ordinance (Cap. 112) differs considerably from the Kenya Matrimonial Causes Ordinance, 1941 (Cap. 145), and again from the Indian Divorce Act and the (Indian) Special Marriage Act, 1954. In view of the interrelation between Uganda Ord. 2 of 1961 and *Laws of Uganda*, Cap. 112, it is not desirable to reproduce the Uganda Ordinance *in extenso*, but its provisions will be summarized below.

868. The definition of 'marriage' for purposes of the Ordinance includes marriages solemnized under the provisions of the Ordinance itself;¹ marriages, including polygamous marriages, solemnized before 1 September 1961 inside or outside the Protectorate of Uganda and 'recognized as such by both parties' (a curious expression the meaning of which may well be canvassed in nullity cases but which cannot detain us now);² a marriage solemnized under the Kenya Ordinance of 1960, the Indian Special Marriage Act, 1954, or the Hindu Marriage Act, 1955, or any enactment substituted for those Acts or that Ordinance;³ or a marriage declared by the Minister responsible for the administration of the Ordinance by notice in the Gazette to be a marriage for the purposes of the Ordinance.⁴ The definitions of 'custom' and 'Hindu' correspond⁵ to those in the Kenya Ordinance of 1960.

869. The conditions for solemnization of marriage under the Ordinance are identical with the Kenya Ordinance, s. 3 of each Ordinance corresponding exactly: see the text of the Kenya Ordinance and § 851 above. The consent of the guardian in marriage is required for the marriage of a girl under eighteen years of age (but see § 211). The provisions of s. 4 differ from s. 4 of the Kenya Ordinance in the following respects: (i) eight relations only are listed in order of preference as guardians, brothers and uncles of the half blood are omitted and the maternal uncle is omitted; and (ii) the Uganda legislature has very sensibly provided⁶ that if there is no listed guardian a guardian in marriage may be appointed by a first-class magistrate on the application of an interested party. The provisions regarding rites and ceremonies agree exactly with those of the Kenya Ordinance, s. 5 of each corresponding precisely. The provisions regarding the Minister's power to make rules requiring marriages to be registered differ from those set out for Kenya in s. 6 of the Kenya Ordinance, but this topic is outside the scope of this book. Polygamous marriages solemnized after 1 September 1961 are declared bigamous and the provisions of the Penal Code apply: s. 7 (1) corresponds to s. 7 (3) of the Kenya Ordinance save for the difference in the relevant section-number of the Penal Code.

¹ s. 2 (1) at (a).² s. 2 (1) at (b).³ s. 2 (1) at (c).⁴ s. 2 (1) at (d).⁵ s. 2 (1), (2).⁶ s. 4 (4). Compare § 214.

No dissolution of a marriage within the Ordinance may take effect otherwise than in accordance with the provisions of the Ordinance: s. 7 (2) corresponds to s. 7 (1) of the Kenya Ordinance. There are no provisions in the Uganda Ordinance concerning separation and maintenance orders: Hindus must in these connexions avail themselves of the Divorce Ordinance, Cap. 112, which, as its s. 3 plainly shows, was intended to govern all communities. Under s. 9 (1) of our Ordinance a spouse may apply for judicial separation on the ground of cruelty, or adultery, or desertion without reasonable cause for two years or upwards.¹ During a decree of judicial separation the wife acquires and may dispose of property (apparently including *stridhanam*) exactly as if she were an unmarried woman.² It is most important to observe that where a decree of judicial separation has been granted and has not been vacated by resumption of cohabitation or otherwise, and the wife dies intestate, her estate will be distributed as if her husband had predeceased her. The husband is liable for her necessities during the pendency of such a decree, unless alimony has been decreed and has been duly paid.³ The provisions regarding restitution of conjugal rights correspond closely to s. 9 of the Hindu Marriage Act, 1955, though in the last sentence the words 'or for divorce' are omitted.⁴ The remarks at § 310 above apply.

870. The grounds for divorce are the general grounds and in addition some special 'Hindu' grounds. The husband may petition for divorce on the ground of his wife's adultery simply.⁵ The wife may petition on the grounds that the husband has been guilty of incestuous adultery; bigamy with adultery; marriage with another woman with adultery; rape, sodomy or bestiality; adultery coupled with cruelty; or adultery with desertion without reasonable excuse for two years or more.⁶ The 'Hindu' grounds added to these by our Ordinance are that either party has ceased to be a Hindu by conversion to another religion; and that the respondent has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the

¹ Cap. 112, s. 15.

² Cap. 112, s. 16.

³ Cap. 112, s. 17.

⁴ Cap. 112, s. 21.

⁵ Cap. 112, s. 5 (1).

⁶ Cap. 112, s. 5 (2).

presentation of the petition.¹ The wife in a case where the marriage was solemnized before the commencement of the Ordinance may also petition on the ground that her husband was then already married; or that he had married again before 1 September 1961; and that that other wife, in either case, was still alive at the date of presentation of the petition.²

871. The grounds on which a decree of nullity may be made are to be gathered from s. 9 (3) of our Ordinance read with s. 13 (1) of the Divorce Ordinance, Cap. 112. They are (a) that the respondent was permanently impotent at the time of the marriage; (b) that the parties were within the prohibited degrees (see § 869) and no custom governing each of them permitted a marriage between them;³ (c) that either party was a lunatic or idiot at the time of the marriage (compare § 279); (d) that the consent of a guardian in marriage was necessary under our Ordinance and was obtained by force or fraud;⁴ and (e) that the consent of either party to the marriage was obtained by force or fraud, in any case in which the marriage might be annulled on this ground by the law of England. The safeguards found elsewhere (§ 299) are missing, though they may well be imported under the fundamental jurisdiction of the court to apply equity in all cases including matrimonial causes; and there is no specific reference to pregnancy by one other than the husband-petitioner.

872. All decrees of nullity and divorce are decrees *nisi*, to be enlarged into decrees absolute upon the motion of the petitioner, provided that six months, or such longer period as the court prescribes by Rule, have passed and no one has shown cause why the decree should not be made absolute on the grounds of collusion or the fact that a material fact has not been brought before the court.⁵ Remarriage of the parties may take place immediately after the marriage has been finally dissolved.⁶

A husband may claim damages from his wife's lover, and the provisions resemble those referred to above in connexion with Kenya.⁷ Costs may be awarded against a guilty co-respondent.⁸ The court's powers regarding alimony,

¹ s. 9 (2) (a) (ii). ² s. 9 (2) (b).

³ s. 9 (3) (a) read with Cap. 112, s. 13 (1).

⁴ s. 9 (3) (c).

⁵ Cap. 112, ss. 9, 13 (2), 38.

⁶ Cap. 112, s. 40.

⁷ Cap. 112, s. 22.

⁸ Cap. 112, s. 23.

settlement of the wife's property, varying settlements, provision for the custody of children and their maintenance, and provisions *pendente lite* resemble those found in the Kenya Matrimonial Causes Ordinance, Cap. 145, referred to summarily above (§ 852). It will be observed that there is no provision in Uganda for a decree of presumption of death and dissolution of marriage in the case of a missing spouse.

873. There is a peculiar provision in Uganda relating to the status of the children of marriages annulled on certain grounds. As it differs from the Indian law and the law of Kenya, and as it is perspicuous from its literal terms the section may be reproduced here verbatim:¹

Where a marriage is annulled on the ground that a former husband or wife was living, and it is found that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the *decree nisi* is made shall be specified in the decree, and shall be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.

It appears that even where a marriage is annulled for impotence (§ 871), and both parties were 'competent to contract', the children of the marriage cannot take advantage of this protection and succeed to either parent on intestacy.

874. Curiously the Uganda Succession Ordinance, 1906 (Cap. 34), which is the law of Uganda applicable to all cases of intestate or testamentary succession,² applies to all Hindus. The provisions bear a close resemblance to the Indian Succession Act, 1865, and apply to the descent of all lands in Uganda, whatever the religion of the owner, and whatever his domicile. Hindus domiciled in Uganda are governed by this utterly un-Hindu law of succession. As a result an adopted son, validly adopted under the personal law, would not be entitled to inherit upon intestacy to a Hindu domiciled in Uganda, since the Indian Succession Act did not contemplate adoptions in the relevant chapter. Execution and revocation of wills must in all cases, if they take place in Uganda, be in conformity with s. 50 of the

¹ Cap. 112, s. 14.

² s. 50 of the 1906 Ordinance itself.

Indian Succession Act, 1865, to which s. 50 of the Uganda Succession Ordinance corresponds. Muhammadans, strange to relate, are exempted from s. 50, and from part V of the Ordinance, which regulates the descent and distribution of property in ss. 30-42;¹ but Hindus have not been exempted, possibly because their numbers and importance have not yet been thought sufficient. The provisions of part V are available to every Indian student in the corresponding portions of the Indian Succession Act, 1865. No amendment has been made to cope with the special requirements of Hindus marrying under a Marriage Ordinance, and indeed the law of succession applied to Hindus as stated above can hardly be characterized otherwise than as crude and out-of-date.

ZANZIBAR

875. Perhaps the most straightforward (for our purposes) of the East African jurisdictions is that of Zanzibar and Pemba (referred to here as Zanzibar). Unlike the other territories, Zanzibar has not recently modified Hindu law by statute; yet the Hindu law administered there is the personal law of most of the considerable Indian population, defined in such a manner as to let in the entire Anglo-Hindu law and any custom validly departing therefrom as these might have been administered in the High Court of Bombay in 1884. This leaves the door open for the reform of Hindu law in Zanzibar by the simple process of enacting, by Decree of the Sultan (countersigned by the British Resident), the entire 'Hindu Code' of India. Meanwhile the older Anglo-Hindu law holds sway, subject to an important reservation, namely that the voluntary transfer *inter vivos* and dedication to charity of land in Zanzibar is governed by the fundamental law of Zanzibar, which is the Shafei or Ibadi law as the case may be.²

¹ Order of the Governor dated 22 Jan. 1906.

² *Sec. of State v. Charlesworth* [1901] A.C. 373, 26 Bom. 1, 1 Z.L.R. 105. The implications of this case are discussed by J. H. Vaughan in *Dual Jurisdiction in Zanzibar* (London 1935), at pp. 56-62. Succession is exempted from the *lex loci rei sitae* by the provisions of the Succession Decree and Probate and Administration Decree (below): Vaughan, p. 67.

Art. 8 (a) of the Zanzibar Order in Council, 1884, provided that Her Majesty's civil and criminal jurisdiction in Zanzibar should, so far as circumstances admitted, be exercised on the principles of and in conformity with the enactments (specified in the same Order in Council) of the Governor-General of India in Council, and of the Governor of Bombay in Council, and according to the course of procedure and practice observed by and before the Courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the Bombay High Court, and so far as such enactments, procedure and practice are inapplicable, should, so far as circumstances admitted, be exercised under and in accordance with the common and statute law of England at the date of the Order in Council. Art. 21 directed that the Bombay Civil Courts Act, 1869, and other enactments relating to civil matters were to take effect as if Zanzibar were a District of the then Bombay Presidency. This scheme applied to Zanzibar the Bombay Regulation IV of 1827, and other provisions¹ conferring jurisdiction to apply the personal laws of the inhabitants. The Zanzibar Orders in Council of 1897, 1906, 1914, and 1924 continued this jurisdiction, and in consequence petitions for restitution of conjugal rights may be filed in the court of the Resident Magistrate.²

The Transfer of Property Decree, 1917, by ss. 2 and 129, preserved the rules of Hindu law. The Probate and Administration Decree, s. 2 (2), provided that subject to the provisions of the Decree Hindus should be governed in matters relating to inheritance by their personal law. The Succession Decree (*Laws of Zanzibar*, Cap. 13) makes the same reservations in favour of Hindus as the Indian Succession Act, 1865, and the Hindu Wills Decree (Cap. 15) applies to Hindus in Zanzibar the same rules as the Hindu Wills Act in India. Both these Decrees were applied in *Santokbai v. Ramniklal*.³

¹ Reg. 11 of 1827 (see *Nathu v. Keshawji* (1901) 26 Bom. 174), Letters Patent of the High Court of 1862 and 1865.

² *Rana Ramji v. Radhabai Natha* (1937) 5 Z.L.R. 91 (reproduced and discussed by H. E. Kingdon, *Conflict of Laws in Zanzibar*, Zanzibar 1940, pp. 16-19).

³ (1953) 8 Z.L.R. 323.

The wills of Khojas are construed according to Hindu law.¹ The descent of the estate of a deceased Khoja intestate follows Hindu law, and in applying to Khojas the law of *stridhanam* the Zanzibar courts consult and follow the provisions of the *Vyavaharamayukha*.²

¹ *Fazal Haji v. Fatmabai* (1918) 1 Z.L.R. 598.

² *Purbai Dedhar v. Adm. Gen.* (1936) 5 Z.L.R. 48.

APPENDIX I

Current Indian Statutes

Hindu Marriage Act, 1955
Hindu Succession Act, 1956
Hindu Minority and Guardianship Act, 1956
Hindu Adoptions and Maintenance Act, 1956
Dowry Prohibition Act, 1961

The Hindu Marriage Act

Act 25 of 1955

[18 May 1955]

*An Act to amend and codify the law relating
to marriage among Hindus*

BE it enacted by Parliament in the Sixth Year of the Republic of India as follows:

PRELIMINARY

1. *Short title and extent*

(1) This Act may be called the Hindu Marriage Act, 1955.

(2) It extends to the whole of India except the State of Jammu and Kashmir, and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. *Application of Act*

(1) This Act applies—

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion ;
 - (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jain or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged ; and
 - (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jain or Sikh religion.
- (2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
- (3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions*

In this Act, unless the context otherwise requires,—

- (a) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family :

Provided that the rule is certain and not unreasonable or opposed to public policy ; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family ;

- (b) 'district court' means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act ;

- (c) 'full blood' and 'half blood' — two persons are said to be related to each other by full blood when

they are descended from a common ancestor by the same wife and by half blood when they are descended from a common ancestor but by different wives;

(d) 'uterine blood' — two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;

Explanation. In clauses (c) and (d), 'ancestor' includes the father and 'ancestress' the mother;

(e) 'prescribed' means prescribed by rules made under this Act:

(f) (i) '*sapinda* relationship' with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;

(ii) two persons are said to be '*sapindas*' of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them;

(g) 'degrees of prohibited relationship'—two persons are said to be within the 'degrees of prohibited relationship'—

(i) if one is a lineal ascendant of the other; or

(ii) if one was the wife or husband of a lineal ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or

(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation. For the purposes of clauses (f) and (g), relationship includes—

(i) relationship by half or uterine blood as well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly.

4. *Overriding effect of Act*

Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

HINDU MARRIAGES

5. *Conditions for a Hindu marriage*

A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) neither party is an idiot or a lunatic at the time of the marriage;

(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two;

(vi) where the bride has not completed the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage.

6. *Guardianship in marriage*

(1) Wherever the consent of a guardian in marriage is necessary for a bride under this Act, the persons entitled to give such consent shall be the following in the order specified hereunder, namely:

(a) the father;

(b) the mother;

- (c) the paternal grandfather ;
- (d) the paternal grandmother ;
- (e) the brother by full blood ; as between brothers the elder being preferred ;
- (f) the brother by half blood ; as between brothers by half blood the elder being preferred :

Provided that the bride is living with him and is being brought up by him ;

- (g) the paternal uncle by full blood ; as between paternal uncles the elder being preferred ;

- (h) the paternal uncle by half blood ; as between paternal uncles by half blood the elder being preferred :

Provided that the bride is living with him and is being brought up by him ;

- (i) the maternal grandfather ;

- (j) the maternal grandmother ;

- (k) the maternal uncle by full blood ; as between maternal uncles the elder being preferred :

Provided that the bride is living with him and is being brought up by him.

(2) No person shall be entitled to act as a guardian in marriage under the provisions of this section unless such person has himself completed his or her twenty-first year.

(3) Where any person entitled to be the guardian in marriage under the foregoing provisions refuses, or is for any cause unable or unfit, to act as such, the person next in order shall be entitled to be the guardian.

(4) In the absence of any such person as is referred to in subsection (1), the consent of a guardian shall not be necessary for a marriage under this Act.

(5) Nothing in this Act shall affect the jurisdiction of a court to prohibit by injunction an intended marriage, if in the interests of the bride for whose marriage consent is required, the court thinks it necessary to do so.

7. *Ceremonies for a Hindu marriage*

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

8. *Registration of Hindu marriages*

(1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.

(2) Notwithstanding anything contained in subsection (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in subsection (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.

(3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.

(4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.

(5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry.

RESTITUTION OF CONJUGAL RIGHTS
AND JUDICIAL SEPARATION

9. *Restitution of conjugal rights*

(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground

for judicial separation or for nullity of marriage or for divorce.

10. Judicial separation

(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the district court praying for a decree for judicial separation on the ground that the other party —

(a) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or

(c) has, for a period of not less than one year immediately preceding the presentation of the petition, been suffering from a virulent form of leprosy; or

(d) has, for a period of not less than three years immediately preceding¹ the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner; or

(e) has been continuously of unsound mind for a period of not less than two years immediately preceding the presentation of the petition; or

(f) has, after the solemnization of the marriage, had sexual intercourse with any person other than his or her spouse.

Explanation.— In this section, the expression ‘desertion’, with its grammatical variations and cognate expressions, means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage.

(2) Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such

¹ Substituted by Act 73 of 1956, s. 2.

petition, rescind the decree if it considers it just and reasonable to do so.

NULLITY OF MARRIAGE AND DIVORCE

11. *Void marriages*

Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5.

12. *Voidable marriages*

(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely :

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding ; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5 ; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or fraud ; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in subsection (1), no petition for annulling a marriage —

(a) on the ground specified in clause (c) of subsection (1) shall be entertained if —

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered ;

(b) on the ground specified in clause (d) of subsection (1) shall be entertained unless the court is satisfied —

- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged ;
- (ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage ; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

13. *Divorce*

(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party —

- (i) is living in adultery ; or
- (ii) has ceased to be a Hindu by conversion to another religion ; or
- (iii) has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition ; or
- (iv) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from a virulent and incurable form of leprosy ; or
- (v) has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form ; or
- (vi) has renounced the world by entering any religious order ; or
- (vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive ; or
- (viii) has not resumed cohabitation for a space of two years or upwards after the passing of a decree for judicial separation against that party ; or

- (ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree.¹
- (2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—
- (i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner :
Provided that in either case the other wife is alive at the time of the presentation of the petition ; or
- (ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

14. *No petition for divorce to be presented within three years of marriage*

(1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition three years have elapsed since the date of the marriage :
Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before three years have elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of three years from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

¹ For the effect of the insertion here of clause (Ia) for Uttar Pradesh by Uttar Pradesh Act 13 of 1962 see § 384 above.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of three years from the date of the marriage, the court shall have regard to the interests of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said three years.

15. *Divorced persons when may marry again*

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again.

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

16. *Legitimacy of children of void and voidable marriages*

Where a decree of nullity is granted in respect of any marriage under section 11 or section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

17. *Punishment of bigamy*

Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of

such marriage either party had a husband or wife living; and the provisions of sections 494 and 495 of the Indian Penal Code¹ shall apply accordingly.

18. *Punishment for contravention of certain other conditions for a Hindu marriage*

Every person who procures a marriage of himself or herself to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), (v) and (vi) of section 5 shall be punishable —

(a) in the case of a contravention of the condition specified in clause (iii) of section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both; and

(c) in the case of a contravention of the condition specified in clause (vi) of section 5, with fine which may extend to one thousand rupees.

JURISDICTION AND PROCEDURE

19. *Court to which petition should be made*

Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.

20. *Contents and verification of petition*

(1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.

(2) The statements contained in every petition under this Act shall be verified by the petitioner or some other

¹ 45 of 1860.

competent person in the manner required by law for the verification of complaints, and may, at the hearing, be referred to as evidence.

21. *Application of Act V of 1908*

Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

22. *Proceedings may be in camera and may not be printed or published*

(1) A proceeding under this Act shall be conducted *in camera* if either party so desires or if the court so thinks fit to do, and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in subsection (1), he shall be punishable with fine which may extend to one thousand rupees.

23. *Decree in proceedings*

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that —

(a) any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (f) of subsection (1) of section 10, or in clause (i) of subsection (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

(c) the petition is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties.

24. *Maintenance pendente lite and expenses of proceedings*

Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.

25. *Permanent alimony and maintenance*

(1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, while the applicant remains unmarried, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immoveable property of the respondent.

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under subsection (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.

(3) If the court is satisfied that the party in whose favour an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it shall rescind the order.

26. *Custody of children*

In any proceeding under this Act, the court may, from time to time, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time, all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the court may also from time to time revoke, suspend or vary any such orders and provisions previously made.

27. *Disposal of property*

In any proceeding under this Act, the court may make such provisions in the decree as it deems just and proper with respect to any property presented, at or about the time of marriage, which may belong jointly to both the husband and the wife.

28. *Enforcement of, and appeal from, decrees and orders*

All decrees and orders made by the court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the court made in the exercise of the original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force.

Provided that there shall be no appeal on the subject of costs only.

SAVINGS AND REPEALS

29. *Savings*

- (1) A marriage solemnized between Hindus before the commencement of this Act, which is otherwise valid, shall not be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara* or belonged to different religions, castes or sub-divisions of the same caste.
- (2) Nothing contained in this Act shall be deemed to affect any right recognized by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.
- (3) Nothing contained in this Act shall affect any proceeding under any law for the time being in force for declaring any marriage to be null and void or for annulling or dissolving any marriage or for judicial separation pending at the commencement of this Act, and any such proceeding may be continued and determined as if this Act had not been passed.
- (4) Nothing contained in this Act shall be deemed to affect the provisions contained in the Special Marriage Act, 1954¹ with respect to marriages between Hindus solemnized under that Act, whether before or after the commencement of this Act.

[s. 30, the repealing section, was itself repealed by Act 58 of 1960.]

The Hindu Succession Act

Act 30 of 1956

[17 June 1956]

*An Act to amend and codify the law relating
to intestate succession among Hindus*

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows:

¹ 43 of 1954.

CHAPTER I—PRELIMINARY

1. *Short title and extent*

(1) This Act may be called the Hindu Succession Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Application of Act*

(1) This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be,—

(a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

(b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though

not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. *Definitions and interpretation*

- (1) In this Act, unless the context otherwise requires,—
 - (a) 'agnate' — one person is said to be an 'agnate' of another if the two are related by blood or adoption wholly through males;
 - (b) '*aliyasantana* law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Aliyasantana Act, 1949,¹ or by the customary *aliyasantana* law with respect to the matters for which provision is made in this Act;
 - (c) 'cognate' — one person is said to be a 'cognate' of another if the two are related by blood or adoption but not wholly through males;
 - (d) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:
 Provided that the rule is certain and not unreasonable or opposed to public policy: and
 Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;
 - (e) 'full blood', 'half blood' and 'uterine blood'—
 - (i) two persons are said to be related to each other by full blood when they are descended from a common ancestor by the same wife, and by half blood when they are descended from a common ancestor but by different wives;
 - (ii) two persons are said to be related to each other by uterine blood when they are descended from a common ancestress but by different husbands;*Explanation.* In this clause 'ancestor' includes the father and 'ancestress' the mother;
 - (f) 'heir' means any person, male or female, who is entitled to succeed to the property of an intestate under this Act;

¹ Madras Act 9 of 1949.

(g) 'intestate'—a person is deemed to die intestate in respect of property of which he or she has not made a testamentary disposition capable of taking effect;

(h) '*marumakkattayam* law' means the system of law applicable to persons—

(a) who, if this Act had not been passed, would have been governed by the Madras Marumakkattayam Act, 1932;¹ the Travancore Nayar Act;² the Travancore Ezhava Act;³ the Travancore Nanjinad Vellala Act;⁴ the Travancore Kshatriya Act;⁵ the Travancore Krishnanvaka Marumakkathayee Act;⁶ the Cochin Marumakkathayam Act;⁷ or the Cochin Nayar Act⁸ with respect to the matters for which provision is made in this Act; or

(b) who belong to any community, the members of which are largely domiciled in the State of Travancore-Cochin or Madras as it existed immediately before 1st November, 1956⁹ and who, if this Act had not been passed, would have been governed with respect to the matters for which provision is made in this Act by any system of inheritance in which descent is traced through the female line;

but does not include the *aliyasantana* law;

(i) '*nambudri* law' means the system of law applicable to persons who, if this Act had not been passed, would have been governed by the Madras Nambudri Act, 1932;¹⁰ the Cochin Nambudri Act;¹¹ or the Travancore Malayala Brahmin Act¹² with respect to the matters for which provision is made in this Act;

(j) 'related' means related by legitimate kinship: Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.

(2) In this Act, unless the context otherwise requires, words importing the masculine gender shall not be taken to include females.

¹ Madras Act 22 of 1933. ² 2 of 1100. ³ 3 of 1100. ⁴ 6 of 1101.

⁵ 7 of 1108. ⁶ 7 of 1115. ⁷ 33 of 1113. ⁸ 29 of 1113.

⁹ Clause added by A.L.O., No. 3 of 1956.

¹⁰ Madras Act 21 of 1933. ¹¹ 17 of 1113. ¹² 3 of 1106.

4. Overriding effect of Act

- (1) Save as otherwise expressly provided in this Act,—
(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.
- (2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

CHAPTER II—INTESTATE SUCCESSION*General***5. Act not to apply to certain properties**

This Act shall not apply to—

- (i) any property succession to which is regulated by the Indian Succession Act, 1925,¹ by reason of the provisions contained in section 21 of the Special Marriage Act, 1954;²
(ii) any estate which descends to a single heir by the terms of any covenant or agreement entered into by the Ruler of any Indian State with the Government of India or by the terms of any enactment passed before the commencement of this Act;
(iii)³

6. Devolution of interest in coparcenary property

When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a

¹ 39 of 1925.

² 43 of 1954.

³ This clause is omitted from the date of execution of a partition deed authorized by ss. 3 and 6 of Kerala Act 16 of 1961.

Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

7. *Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom*

(1) When a Hindu to whom the *marumakkattayam* or *nambudri* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a *tarwad*, *tavazhi* or *illom*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *marumakkattayam* or *nambudri* law.

Explanation. For the purposes of this subsection, the interest of a Hindu in the property of a *tarwad*, *tavazhi* or *illom* shall be deemed to be the share in the property of the *tarwad*, *tavazhi* or *illom*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *tarwad*, *tavazhi* or *illom*, as the case may be, then living, whether he or she

was entitled to claim such partition or not under the *marumakkattayam* or *nambudri* law applicable to him or her, and such share shall be deemed to have been allotted to him or her absolutely.

(2) When a Hindu to whom the *aliyasantana* law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a *kutumba* or *kavaru*, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the *aliyasantana* law.

Explanation. For the purposes of this subsection, the interest of a Hindu in the property of a *kutumba* or *kavaru* shall be deemed to be the share in the property of the *kutumba* or *kavaru*, as the case may be, that would have fallen to him or her if a partition of that property *per capita* had been made immediately before his or her death among all the members of the *kutumba* or *kavaru*, as the case may be, then living, whether he or she was entitled to claim such partition or not under the *aliyasantana* law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in subsection (1), when a *sthanamdar* dies after the commencement of this Act, the *sthanam* property held by him [or her] shall devolve upon the members of the family to which the *sthanamdar* belonged and the heirs of the *sthanamdar* as if the *sthanam* property had been divided *per capita* immediately before the death of the *sthanamdar* among himself [or herself] and all the members of his [or her] family then living, and the shares falling to the members of his [or her] family and the heirs of the *sthanamdar* shall be held by them as their separate property.¹

Explanation I. For the purposes of this subsection, the family of a *sthanamdar* shall include every branch of that family, whether divided or undivided, the members of which would have been entitled by any custom or usage to succeed to the position of *sthanamdar* if this Act had not been passed.

¹ Amended by s. 27 of Kerala Act 28 of 1958: words in brackets inserted as shown. In the original *Explanation* for the present 'members' 'male members' was read.

Explanation II. The devolution of *sthanam* properties under subsection (3) and their division among the members of the family and heirs shall not be deemed to have conferred upon them in respect of immoveable properties any higher rights than the *sthanamdar* regarding eviction or otherwise as against tenants who were holding such properties under the *sthani*.¹

8. General rules of succession in the case of males

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter :

(a) firstly upon the heirs, being the relatives specified in class I of the Schedule ;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule ;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased ; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

9. Order of succession among heirs in the Schedule

Among the heirs specified in the Schedule, those in class I shall take simultaneously and to the exclusion of all other heirs ; those in the first entry in class II shall be preferred to those in the second entry ; those in the second entry shall be preferred to those in the third entry ; and so on in succession.

10. Distribution of property among heirs in class I of the Schedule

The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules :

Rule 1. The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2. The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3. The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

¹ Added by Kerala Act 28 of 1958, s. 27 (c).

Rule 4. The distribution of the share referred to in Rule 3—

- (i) among the heirs in the branch of the predeceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions, and the branch of his predeceased sons gets the same portion ;
- (ii) among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

11. *Distribution of property among heirs in class II of the Schedule*

The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

12. *Order of succession among agnates and cognates*

The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder :—

Rule 1. Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2. Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3. Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

13. *Computation of degrees*

(1) For the purposes of determining the order of succession among agnates or cognates, relationship shall be reckoned from the intestate to the heir in terms of degrees of ascent or degrees of descent or both, as the case may be.

(2) Degrees of ascent and degrees of descent shall be computed inclusive of the intestate.

(3) Every generation constitutes a degree either ascending or descending.

14. *Property of a female Hindu to be her absolute property*

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act,

shall be held by her as full owner thereof and not as a limited owner.

Explanation. In this subsection, 'property' includes both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.

(2) Nothing contained in subsection (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

15. General rules of succession in the case of female Hindus

(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16,—

- (a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in subsection (1),—

- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the father; and
- (b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in subsection (1) in the order specified therein, but upon the heirs of the husband.

16. *Order of succession and manner of distribution among heirs of a female Hindu*

The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestate's property among those heirs shall take place according to the following rules, namely :

Rule 1. Among the heirs specified in subsection (1) of section 15, those in one entry shall be preferred to those in any succeeding entry, and those included in the same entry shall take simultaneously.

Rule 2. If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3. The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of subsection (1) and in subsection (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

17. *Special provisions respecting persons governed by marumakkattayam and aliyasantana laws*

The provisions of sections 8, 10, 15 and 23 shall have effect in relation to persons who would have been governed by the *marumakkattayam* law or *aliyasantana* law if this Act had not been passed as if—

(i) for sub-clauses (c) and (d) of section 8, the following had been substituted, namely :

'(c) thirdly, if there is no heir of any of the two classes, then upon his relatives, whether agnates or cognates. ;'

(ii) for clauses (a) to (e) of subsection (1) of section 15, the following had been substituted, namely :

'(a) firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the mother ;

(b) secondly, upon the father and the husband ;

(c) thirdly, upon the heirs of the mother ;

- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the husband;'
- (iii) clause (a) of subsection (2) of section 15 had been omitted;
- (iv) section 23 had been omitted.

General provisions relating to succession

18. *Full blood preferred to half blood*

Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

19. *Mode of succession of two or more heirs*

If two or more heirs succeed together to the property of an intestate, they shall take the property,—

- (a) save as otherwise expressly provided in this Act, *per capita* and not *per stirpes*; and
- (b) as tenants-in-common and not as joint tenants.

20. *Right of child in womb*

A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.

21. *Presumption in cases of simultaneous deaths*

Where two persons have died in circumstances rendering it uncertain whether either of them, and if so which, survived the other, then, for all purposes affecting succession to property, it shall be presumed, until the contrary is proved, that the younger survived the elder.

22. *Preferential right to acquire property in certain cases*

- (1) Where, after the commencement of this Act, an interest in any immoveable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devolves upon two or more

heirs specified in class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation. In this section 'court' means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may, by notification in the Official Gazette, specify in this behalf.

23. *Special provision respecting dwelling-houses*

Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein :

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

24. *Certain widows remarrying may not inherit as widows*

Any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased

son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

25. *Murderer disqualified*

A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

26. *Converts' descendants disqualified*

Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

27. *Succession when heir disqualified*

If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.

28. *Disease, defect, etc., not to disqualify*

No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

Escheat

29. *Failure of heirs*

If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the Government; and the Government shall take the property subject to all the obligations and liabilities to which an heir would have been subject.

CHAPTER III—TESTAMENTARY SUCCESSION

30. *Testamentary succession*

Any Hindu may dispose of by will or other testamentary disposition any property¹, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925,² or any other law for the time being in force and applicable to Hindus.

Explanation. The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* in the property of the *tarwad*, *tavazhi*, *illom*, *kutumba* or *kavaru* shall, notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this subsection.³

CHAPTER IV—REPEALS

31. *Repeals*

The Hindu Law of Inheritance (Amendment) Act, 1929,⁴ and the Hindu Women's Rights to Property Act, 1937,⁵ are hereby repealed.

THE SCHEDULE

(See Section 8)

HEIRS IN CLASS I AND CLASS II

Class I

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased

¹ Sic for 'dispose, by will . . . disposition, of any property'.

² 39 of 1925.

³ The original section had two subsections. Subsection (2) was repealed by HAMA, s. 29, and the figure '(1)' was removed by Act 58 of 1960.

⁴ 2 of 1929.

⁵ 18 of 1937.

son; daughter of a predeceased son of a predeceased son;
widow of a predeceased son of a predeceased son.

Class II

I. Father.

II. (1) Son's daughter's son, (2) son's daughter's daughter, (3) brother, (4) sister.

III. (1) Daughter's son's son, (2) daughter's son's daughter, (3) daughter's daughter's son, (4) daughter's daughter's daughter.

IV. (1) Brother's son, (2) sister's son, (3) brother's daughter, (4) sister's daughter.

V. Father's father; father's mother.

VI. Father's widow; brother's widow.

VII. Father's brother; father's sister.

VIII. Mother's father; mother's mother.

IX. Mother's brother; mother's sister.

Explanation. In this Schedule, references to a brother or sister do not include references to a brother or sister by uterine blood.

The Hindu Minority and Guardianship Act

Act 32 of 1956

[25 August 1956]

*An Act to amend and codify certain parts of
the law relating to minority and guardianship
among Hindus*

BE it enacted by Parliament in the Seventh Year of the
Republic of India as follows :

1. Short title and extent

(1) This Act may be called the Hindu Minority and
Guardianship Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir and applies also to Hindus domiciled in the territories to which this Act extends who are outside the said territories.

2. *Act to be supplemental to Act 8 of 1890*

The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of, the Guardians and Wards Act, 1890.¹

3. *Application of Act*

(1) This Act applies —

(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

Explanation. The following persons are Hindus, Buddhists, Jains or Sikhs by religion, as the case may be:

(i) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jains or Sikhs by religion;

(ii) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged; and

(iii) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.

(2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause

¹ 8 of 1890.

(25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

(3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

4. *Definitions*

In this Act,—

(a) 'minor' means a person who has not completed the age of eighteen years;

(b) 'guardian' means a person having the care of the person of a minor or of his property or of both his person and property, and includes —

(i) a natural guardian;

(ii) a guardian appointed by the will of the minor's father or mother;

(iii) a guardian appointed or declared by a court; and

(iv) a person empowered to act as such by or under any enactment relating to any court of wards;

(c) 'natural guardian' means any of the guardians mentioned in section 6.

5. *Overriding effect of Act*

Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act.

6. *Natural guardians of a Hindu minor*

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint-family property), are —

(a) in the case of a boy or an unmarried girl — the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;
 (b) in the case of an illegitimate boy or an illegitimate unmarried girl — the mother, and after her, the father;
 (c) in the case of a married girl — the husband:
 Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section —

(a) if he has ceased to be a Hindu, or
 (b) if he has completely and finally renounced the world by becoming a hermit (*vanaprastha*) or an ascetic (*yati* or *sanyasi*).

Explanation. In this section, the expressions 'father' and 'mother' do not include a step-father and a step-mother.

7. *Natural guardianship of adopted son*

The natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother.

8. *Powers of natural guardian*

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,—

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immoveable property of the minor, or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immoveable property by a natural guardian, in contravention of subsection (1) or subsection (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the minor.

(5) The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the court under subsection (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular —

(a) proceedings in connexion with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;

(b) the court shall observe the procedure and have the powers specified in subsections (2), (3) and (4) of section 31 of that Act; and

(c) an appeal shall lie from an order of the court refusing permission to the natural guardian to do any of the acts mentioned in subsection (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

(6) In this section, 'court' means the city civil court or a district court or a court empowered under section 4A of the Guardians and Wards Act, 1890, within the local limits of whose jurisdiction the immoveable property in respect of which the application is made is situate, and where the immoveable property is situate within the jurisdiction of more than one such court, means the court within the local limits of whose jurisdiction any portion of the property is situate.

9. *Testamentary guardians and their powers*

(1) A Hindu father entitled to act as the natural guardian of his minor legitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(2) An appointment made under subsection (1) shall have no effect if the father predeceases the mother, but shall revive if the mother dies without appointing, by will, any person as guardian.

(3) A Hindu widow entitled to act as the natural guardian of her minor legitimate children, and a Hindu mother

entitled to act as the natural guardian of her minor legitimate children by reason of the fact that the father has become disentitled to act as such, may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property (other than the undivided interest referred to in section 12) or in respect of both.

(4) A Hindu mother entitled to act as the natural guardian of her minor illegitimate children may, by will, appoint a guardian for any of them in respect of the minor's person or in respect of the minor's property or in respect of both.

(5) The guardian so appointed by will has the right to act as the minor's guardian after the death of the minor's father or mother, as the case may be, and to exercise all the rights of a natural guardian under this Act to such extent and subject to such restrictions, if any, as are specified in this Act and in the will.

(6) The right of the guardian so appointed by will shall, where the minor is a girl, cease on her marriage.

10. *Incapacity of minor to act as guardian of property*

A minor shall be incompetent to act as guardian of the property of any minor.

11. *De facto guardian not to deal with minor's property*

After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.

12. *Guardian not to be appointed for minor's undivided interest in joint-family property*

Where a minor has an undivided interest in joint-family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest :

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

13. *Welfare of minor to be paramount consideration*

(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor.

The Hindu Adoptions and Maintenance Act

Act 78 of 1956

[21 December 1956]

*An Act to amend and codify the law relating
to adoptions and maintenance among Hindus*

BE it enacted by Parliament in the Seventh Year of the Republic of India as follows :

CHAPTER I—PRELIMINARY

1. *Short title and extent*

(1) This Act may be called the Hindu Adoptions and Maintenance Act, 1956.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Application of Act*

(1) This Act applies—

(a) to any person, who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj,

(b) to any person who is a Buddhist, Jaina or Sikh by religion, and

(c) to any other person who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

*Explanation.*¹ The following persons are Hindus, Buddhists, Jainas or Sikhs by religion, as the case may be:

- (a) any child, legitimate or illegitimate, both of whose parents are Hindus, Buddhists, Jainas or Sikhs by religion;
 - (b) any child, legitimate or illegitimate, one of whose parents is a Hindu, Buddhist, Jaina or Sikh by religion and who is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged;
 - (bb) any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as a Hindu, Buddhist, Jaina or Sikh; and
 - (c) any person who is a convert or re-convert to the Hindu, Buddhist, Jaina or Sikh religion.
- (2) Notwithstanding anything contained in subsection (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
- (3) The expression 'Hindu' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion, is, nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section.

3. Definitions

In this Act, unless the context otherwise requires,—

- (a) the expressions 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:

¹ As amended by the Hindu Adoptions and Maintenance (Amendment) Act 45 of 1962 (which came into force on 29 Nov. 1962).

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family;

(b) 'maintenance' includes—

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage;

(c) 'minor' means a person who has not completed his or her age of eighteen years.

4. *Overriding effect of Act*

Save as otherwise expressly provided in this Act,—

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

CHAPTER II—ADOPTION

5. *Adoptions to be regulated by this Chapter*

(1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this Chapter, and any adoption made in contravention of the said provisions shall be void.

(2) An adoption which is void shall neither create any rights in the adoptive family in favour of any person which he or she could not have acquired except by reason of the adoption, nor destroy the rights of any person in the family of his or her birth.

6. *Requisites of a valid adoption*

No adoption shall be valid unless—

(i) the person adopting has the capacity, and also the right, to take in adoption;

- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption; and
- (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

7. *Capacity of a male Hindu to take in adoption*

Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption :

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation. If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

8. *Capacity of a female Hindu to take in adoption*

Any female Hindu—

- (a) who is of sound mind,
- (b) who is not a minor, and
- (c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption.

9. *Persons capable of giving in adoption*

(1) No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption.

(2) Subject to the provisions of subsection (3) and subsection (4), the father, if alive, shall alone have the right to give in adoption, but such right shall not be exercised save with the consent of the mother unless the mother has completely and finally renounced the world

or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.¹

(3) The mother may give the child in adoption if the father is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

(4) Where both the father and mother are dead or have completely and finally renounced the world or have abandoned the child or have been declared by a court of competent jurisdiction to be of unsound mind or where the parentage of the child is not known, the guardian of a child may give the child in adoption with the previous permission of the court to any person including the guardian himself.¹

(5) Before granting permission to a guardian under subsection (4), the court shall be satisfied that the adoption will be for the welfare of the child, due consideration being for this purpose given to the wishes of the child having regard to the age and understanding of the child and that the applicant for permission has not received or agreed to receive and that no person has made or given or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court may sanction.

Explanation. For the purposes of this section—

- (i) the expressions 'father' and 'mother' do not include an adoptive father and an adoptive mother;
- (ia) 'guardian' means a person having the care of the person of a child or of both his person and property and includes— (a) a guardian appointed by the will of the child's father or mother, and (b) a guardian appointed or declared by a court; and
- (ii) 'court' means the city civil court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides.¹

10. *Persons who may be adopted*

No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:—

- (i) he or she is a Hindu;

¹ These portions are printed as amended with effect from 29 Nov. 1962 by Act 45 of 1962.

- (ii) he or she has not already been adopted ;
- (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption ;
- (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

II. *Other conditions for a valid adoption*

In every adoption, the following conditions must be complied with :—

- (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption ;
- (ii) If the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption ;
- (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted ;
- (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted ;
- (v) the same child may not be adopted simultaneously by two or more persons ;
- (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or, in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption :¹

¹ As amended by Act 45 of 1962.

Provided that the performance of *datta homam* shall not be essential to the validity of an adoption.

12. *Effects of adoption*

An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family : Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth ;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth ;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

13. *Right of adoptive parents to dispose of their properties*

Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property by transfer *inter vivos* or by will.

14. *Determination of adoptive mother in certain cases*

(1) Where a Hindu who has a wife living adopts a child, she shall be deemed to be the adoptive mother.

(2) Where an adoption has been made with the consent of more than one wife, the seniormost in marriage among them shall be deemed to be the adoptive mother and the others to be step-mothers.

(3) Where a widower or a bachelor adopts a child, any wife whom he subsequently marries shall be deemed to be the step-mother of the adopted child.

(4) Where a widow or an unmarried woman adopts a child, any husband whom she marries subsequently shall be deemed to be the step-father of the adopted child.

15. *Valid adoption not to be cancelled*

No adoption which has been validly made can be cancelled by the adoptive father or mother or any other person, nor can the adopted child renounce his or her status as such and return to the family of his or her birth.

16. *Presumption as to registered documents relating to adoptions*

Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved.

17. *Prohibition of certain payments*

(1) No person shall receive or agree to receive any payment or other reward in consideration of the adoption of any person, and no person shall make or give or agree to make or give to any other person any payment or reward the receipt of which is prohibited by this section.

(2) If any person contravenes the provisions of subsection (1), he shall be punishable with imprisonment which may extend to six months, or with fine, or with both.

(3) No prosecution under this section shall be instituted without the previous sanction of the State Government or an officer authorized by the State Government in this behalf.

CHAPTER III — MAINTENANCE

18. *Maintenance of wife*

(1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance,—

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her

consent or against her wish, or of wilfully neglecting her ;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband ;

(c) if he is suffering from a virulent form of leprosy ;

(d) if he has any other wife living ;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere ;

(f) if he has ceased to be a Hindu by conversion to another religion ;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

19. *Maintenance of widowed daughter-in-law*

(1) A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law : Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance —

(a) from the estate of her husband or her father or mother, or

(b) from her son or daughter, if any, or his or her estate.

(2) Any obligation under subsection (1) shall not be enforceable if the father-in-law has not the means to do so from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share, and any such obligation shall cease on the remarriage of the daughter-in-law.

20. *Maintenance of children and aged parents*

(1) Subject to the provisions of this section a Hindu is bound, during his or her life-time, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property.

Explanation.— In this section 'parent' includes a childless step-mother.

21. *Dependants defined*

For the purposes of this Chapter 'dependants' mean the following relatives of the deceased:—

- (i) his or her father;
- (ii) his or her mother;
- (iii) his widow, so long as she does not remarry;
- (iv) his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son, so long as he is a minor: provided and to the extent that he is unable to obtain maintenance, in the case of a grandson from his father's or mother's estate, and in the case of a great-grandson, from the estate of his father or mother or father's father or father's mother;
- (v) his or her unmarried daughter, or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son, so long as she remains unmarried: provided and to the extent that she is unable to obtain maintenance, in the case of a grand-daughter from her father's or mother's estate and in the case of a great-grand-daughter from the estate of her father or mother or father's father or father's mother;
- (vi) his widowed daughter: provided and to the extent that she is unable to obtain maintenance—
 - (a) from the estate of her husband; or
 - (b) from her son or daughter if any, or his or her estate; or
 - (c) from her father-in-law or his father or the estate of either of them;
- (vii) any widow of his son or of a son of his predeceased son, so long as she does not remarry:

provided and to the extent that she is unable to obtain maintenance from her husband's estate, or from her son or daughter, if any, or his or her estate; or in the case of a grandson's widow, also from her father-in-law's estate;

(viii) his or her minor illegitimate son, so long as he remains a minor;

(ix) his or her illegitimate daughter, so long as she remains unmarried.

22. *Maintenance of dependants*

(1) Subject to the provisions of subsection (2), the heirs of a deceased Hindu are bound to maintain the dependants of the deceased out of the estate inherited by them from the deceased.

(2) Where a dependant has not obtained, by testamentary or intestate succession, any share in the estate of a Hindu dying after the commencement of this Act, the dependant shall be entitled, subject to the provisions of this Act, to maintenance from those who take the estate.

(3) The liability of each of the persons who takes¹ the estate shall be in proportion to the value of the share or part of the estate taken by him or her.

(4) Notwithstanding anything contained in subsection (2) or subsection (3), no person who is himself or herself a dependant shall be liable to contribute to the maintenance of others, if he or she has obtained a share or part the value of which is, or would, if the liability to contribute were enforced, become less than what would be awarded to him or her by way of maintenance under this Act.

23. *Amount of maintenance*

(1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in subsection (2) or subsection (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to —

(a) the position and status of the parties;

¹ *Sic*, for 'take'.

- (b) the reasonable wants of the claimant ;
 - (c) if the claimant is living separately, whether the claimant is justified in doing so ;
 - (d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source ;
 - (e) the number of persons entitled to maintenance under this Act.
- (3) In determining the amount of maintenance, if any, to be awarded to a dependant under this Act, regard shall be had to —
- (a) the net value of the estate of the deceased after providing for the payment of his debts ;
 - (b) the provision, if any, made under a will of the deceased in respect of the dependant ;
 - (c) the degree of relationship between the two ;
 - (d) the reasonable wants of the dependant ;
 - (e) the past relations between the dependant and the deceased ;
 - (f) the value of the property of the dependant and any income derived from such property ; or from his or her earnings or from any other source ;
 - (g) the number of dependants entitled to maintenance under this Act.

24. *Claimant to maintenance should be a Hindu*

No person shall be entitled to claim maintenance under this Chapter if he or she has ceased to be a Hindu by conversion to another religion.

25. *Amount of maintenance may be altered on change of circumstances*

The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration.

26. *Debts to have priority*

Subject to the provisions contained in section 27 debts of every description contracted or payable by the deceased shall have priority over the claims of his dependants for maintenance under this Act.

27. *Maintenance when to be a charge*

A dependant's claim for maintenance under this Act shall not be a charge on the estate of the deceased or any portion thereof, unless one has been created by the will of the deceased, by a decree of court, by agreement between the dependant and the owner of the estate or portion, or otherwise.

28. *Effect of transfer of property on right to maintenance*

Where a dependant has a right to receive maintenance out of an estate and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

CHAPTER IV—REPEALS AND SAVINGS

29.¹

30. *Savings*

Nothing contained in this Act shall affect any adoption made before the commencement of this Act, and the validity and effect of any such adoption shall be determined as if this Act had not been passed.

The Dowry Prohibition Act

Act 28 of 1961

[20 May 1961]

*An Act to prohibit the giving or taking of
dowry*

BE it enacted by Parliament in the Twelfth Year of the Republic of India as follows :

¹ This section, the repealing section, was itself repealed by Act 58 of 1960.

1. Short title, extent and commencement

- (1) This Act may be called the Dowry Prohibition Act, 1961.
- (2) It extends to the whole of India except the State of Jammu and Kashmir.
- (3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definition of 'dowry'

In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or *mahr* in the case of persons to whom the Muslim Personal Law (*Shariat*) applies.

Explanation 1. For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.

Explanation 2. The expression 'valuable security' has the same meaning as in s. 30 of the Indian Penal Code.

3. Penalty for giving or taking dowry

If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

4. Penalty for demanding dowry

If any person, after the commencement of this Act, demands, directly or indirectly, from the parents or

guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both ;

Provided that no courts shall take cognizance of any offence under this section except with the previous sanction of the State Government or of such officer as the State Government may, by general or special order, specify in this behalf.

5. *Agreement for giving or taking dowry to be void*

Any agreement for the giving or taking of dowry shall be void.

6. *Dowry to be for the benefit of the wife or her heirs*

(1) Where any dowry is received by any person other than the woman in connexion with whose marriage it is given, that person shall transfer it to the woman—

(a) if the dowry was received before marriage, within one year after the date of marriage ; or

(b) if the dowry was received at the time of or after the marriage, within one year after the date of its receipt ; or

(c) if the dowry was received when the woman was a minor, within one year after she has attained the age of eighteen years ; and pending such transfer, shall hold it in trust for the benefit of the woman.

(2) If any person fails to transfer any property as required by subsection (1) and within the time limited therefor, he shall be punishable with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both ; but such punishment shall not absolve the person from his obligation to transfer the property as required by subsection (1).

(3) Where the woman entitled to any property under subsection (1) dies before receiving it, the heirs of the woman shall be entitled to claim it from the person holding it for the time being.

(4) Nothing contained in this section shall affect the provisions of s. 3 or s. 4.

7. *Cognizance of offences*

Notwithstanding anything contained in the Code of Criminal Procedure, 1898, 5 of 1898,—

(a) no court inferior to that of a Presidency Magistrate or a magistrate of the first class shall try any offence under this Act ;

(b) no court shall take cognizance of any such offence except on a complaint made within one year from the date of the offence ;

(c) it shall be lawful for a Presidency Magistrate or a magistrate of the first class to pass any sentence authorized by this Act on any person convicted of an offence under this Act.

8. *Offences to be non-cognizable, bailable and non-compoundable*
Every offence under this Act shall be non-cognizable, bailable and non-compoundable.

9. *Power to make rules*

(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be, so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

10. *Repeals*

The Andhra Pradesh Dowry Prohibition Act, 1958, Andhra Pradesh Act 1 of 1958, and the Bihar Dowry Restraint Act, 1950, Bihar Act 25 of 1950, are hereby repealed.

APPENDIX II

Extracts from Mysore Act 10 of 1933

Extracts from the Hindu Law Women's Rights Act

Mysore Act 10 of 1933

S. 2

(1) This Act applies to persons who but for the passing of this Act, would have been subject to the law of Mitakshara in respect of the provisions herein enacted.

(2) Save as aforesaid, nothing herein contained shall be deemed to affect any rules or incidents of the Hindu Law which are not inconsistent with the provisions of this Act.

S. 8

(1) (a) At a partition of joint-family property between a person and his son or sons, his mother, his unmarried daughters and the widows and unmarried daughters of his predeceased undivided sons and brothers who have left no male issue shall be entitled to share with them.¹

(b) At a partition of joint-family property among brothers, their mother, their unmarried sisters and the widows and unmarried daughters of their predeceased undivided brothers who have left no male issue shall be entitled to share with them.²

(c) Subsections (a) and (b) shall also apply *mutatis mutandis* to a partition among other coparceners in a joint family.³

(d) Where joint-family property passes to a single coparcener by survivorship, it shall so pass subject to

¹ The widow of a predeceased undivided son is entitled to a share though her husband left a son, who died before partition : *K. Narasimha v. Nanjamma* (1940) 18 Mys. L.J. 461. A division in status will give unmarried daughters a right to a share: they have no rights, whether to share or to impeach alienations prior to this: *Jayalakshmi v. K. Bharamiah* AIR 1952 Mys. 137. Females must wait till the coparceners separate, they cannot sue for partition earlier: *Venkatapathiah v. Saraswathamma* (1938) 16 Mys. L.J. 273. Cf. §675.

² The court cannot grant both maintenance and a share: *Onkaramma v. Karisiddappa* AIR 1956 Mys. 11.

³ Where a nephew and uncle separate the mothers of each are entitled to share: *K. Nagendrasa v. K. Ramakrishnasa* (1941) 19 Mys. L.J. 277.

the rights to shares of the classes of females enumerated in the above subsections.¹

- (2) Such share shall be fixed as follows :
 - (a) in the case of the widow, one-half of what her husband, if he were alive, would receive as his share ;
 - (b) in the case of the mother, one-half of the share of a son if she has a son alive, and, in any other case, one-half of what her husband, if he were alive, would receive as his share ;
 - (c) in the case of every unmarried daughter or sister, one-fourth of the share of a brother if she has a brother alive, and, in any other case, one-fourth of what her father, if he were alive, would receive as his share : provided that the share to which a daughter or sister is entitled under this section shall be inclusive of, and not in addition to, legitimate expenses of her marriage including a reasonable dowry or marriage portion.
- (3) In this section, the term 'widow' includes, where there are more widows than one of the same person, all of them jointly, and the term 'mother' includes a step-mother and, where there are both a mother and a step-mother, all of them jointly and the term 'son' includes a step-son as also a grandson and a great-grandson ; and the provisions of this section relating to the mother shall be applicable *mutatis mutandis* to the paternal grandmother and great-grandmother.
- (4) Fractional shares of the females as fixed above shall relate to the share of the husband, son, father or brother as the case may be and their value shall be ascertained by treating one share as allotted to the male and assigning therefrom the proper fractional shares to the female relatives.
- (5) Each of the female relatives referred to in subsection (1) shall be entitled to have her share separated off and placed in her possession :²

¹ She has a vested, heritable, and transferable interest, which may be sold in execution even if she remains unseparated : *Chikkakempe v. Madaiya* (1947) 29 Mys. L.J. 64.

² Female relatives do not become divided automatically if a partition takes place between coparceners. They have a title to a share : it is up to them to enforce their right or to remain joint. Where a woman lives and dies joint no share passes by succession to her heirs. *Singriah v. Ramanuja* AIR 1959 Mys. 239, 243. It is submitted that this ruling is no longer good law after the passing of the HSA : see § 675 above.

Provisos. Provided always as follows :

- (1) No female relative shall be entitled to a share in property acquired by a person and referred to in Section 6,¹ so long as he is alive ;
- (2) No female whose husband or father is alive shall be entitled to demand a partition as against such husband or father, as the case may be ;
- (3) A female entitled to a share in any property in one capacity of relationship shall not be entitled to claim a further or additional share in the same property in any other capacity.

Illustration. A and his son B effect a partition of their family property. A has a mother and two unmarried daughters. Their shares will be as follows :

Father	..	1
Son	..	1
Mother	..	$\frac{1}{2}$
Two daughters		$\frac{1}{4}$ each

The property will be divided in the above proportion, the father getting $\frac{1}{3}$, the son $\frac{1}{3}$, the mother $\frac{1}{6}$ and each daughter $\frac{1}{12}$.

S. 10

- (2) *Stridhana* includes :

(f) property obtained by a female as her share at a partition . . .

S. 11

(1) A female owning *stridhana* property shall have over it absolute and unrestricted powers both of enjoyment and of disposition *inter vivos* and by will, subject only to the general law relating to guardianship during minority.

(2) Except when acting as the lawful guardian of his wife, a husband shall have no right to or interest in any portion of his wife's *stridhana* during her life, nor shall he be entitled to control the exercise of any of her powers in relation thereto.

S. 22

(1) In addition to any others legally entitled to maintenance, a Hindu male, provided he is possessed of

¹ The 'gains of learning' section, replaced and repealed by Act 48 of 1959, Sched. II.

sufficient means, shall be bound to maintain the following female relatives ; namely :

- (a) his step-mother ; and
 - (b) his unmarried full sister until she attains majority.
- (2) Every person, male or female, who inherits the property of a Hindu male shall, to the extent of the property inherited, be bound to maintain the female relatives entitled to maintenance from such Hindu.¹
- (3) The manager of a joint Hindu family shall, to the extent of the property of the joint family in his possession or control, be bound to maintain the female relatives of every member thereof entitled to maintenance from such member :

Provisos. Provided that no female relative who is entitled to a share under Section 8 and who has obtained such share shall be entitled to claim maintenance.

S. 25

(1) In determining the amount of maintenance to which a female is entitled, regard shall be had :

firstly, to the means of the person, if any, liable to the claim, and . . . to the value of such property from the point of view of income ;

secondly, to the claims of other persons . . .

thirdly, to the position in life of the female . . . and

fourthly, to the reasonable wants of the female.

(2) Regard shall also be had to any independent and assured means of support possessed by the female, provided such means are derived from property of a productive character, or from sources not dependent on the will of a third person.

Illustration. Jewels, vessels, furniture and apparel, since they are not property of a productive character, are not to be taken into account.

(3) The expression 'reasonable wants' in this section includes, not only the ordinary expenses of living, such as food, raiment and residence, but also provision for such religious and educational requirements as are incidental to the station in life of the female entitled to maintenance.

¹ See now the provisions of HAMA, ss. 22, 23, which render this subsection obsolete.

APPENDIX III

Selected Indian Statutes
(as Amended)
Prior to the 'Hindu Code'

- Caste Disabilities Removal Act, 1850
- Hindu Widows' Remarriage Act, 1856
- Hindu Inheritance (Removal of Disabilities) Act, 1928
- Hindu Law of Inheritance (Amendment) Act, 1929
- Hindu Gains of Learning Act, 1930
- Hindu Women's Rights to Property Act, 1937
- Arya Marriage Validation Act, 1937
- Hindu Married Women's Right to Separate Residence and
Maintenance Act, 1946
- Hindu Marriage Disabilities Removal Act, 1946
- Hindu Marriages Validity Act, 1949

The Caste Disabilities Removal Act

Act 21 of 1850

*An Act for extending the principle of
Section 9, Regulation VII, 1832, of the
Bengal Code throughout the Territories
subject to the Government of the East India
Company*

Preamble. Whereas it is enacted . . . that ' whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled ; ' and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company : It is enacted as follows :

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

The Hindu Widows' Remarriage Act

Act 15 of 1856

[25 July 1856]

*An Act to remove all legal obstacles to the
marriage of Hindu widows*

Preamble. Whereas it is known that, by the law as administered in the civil courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and

Whereas . . . , and

Whereas . . . ; It is enacted as follows :

1. *Marriage of Hindu widows legalized*

No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

2. *Rights of widow in deceased husband's property to cease on her remarriage*

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, 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 cease and determine as if she had then died; and the next heirs of her deceased husband or other person entitled to the property on her death, shall thereupon succeed to the same.

3. *Guardian of children of deceased husband on the remarriage of his widow*

On the remarriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be, by the laws and the rules in force touching the guardianship of children who have neither father nor mother:

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

4. *Nothing in this Act to render any childless widow capable of inheriting*

Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act she would have been incapable of inheriting the same by reason of her being a childless widow.

5. *Saving of rights of widow remarrying, except as provided in ss. 2 to 4*

Except as in the three preceding sections is provided, a widow shall not by reason of her remarriage forfeit

any property or any right to which she would otherwise be entitled; and every widow who has remarried shall have the same rights of inheritance as she would have had had such marriage been her first marriage.

6. *Ceremonies constituting valid marriage to have effect on widow's remarriage*

Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

7. *Consent to remarriage of minor widow*

If the widow remarrying is a minor whose marriage has not been consummated, she shall not 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 brothers, of her next male relative. *Punishment for abetting marriage made contrary to this section.* All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Effect of such marriage: proviso. And all marriages made contrary to the provisions of this section may be declared void by a court of law: provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.

Consent to remarriage of major widow. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her remarriage lawful and valid.

The Hindu Inheritance (Removal of Disabilities) Act

Act 12 of 1928

[20 September 1928]

An Act to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts

WHEREAS it is expedient to amend the Hindu law relating to exclusion from inheritance of certain classes of heirs, and to remove certain doubts ; It is hereby enacted as follows :

1. *Short title, extent and application*

- (1) This Act may be called the Hindu Inheritance (Removal of Disabilities) Act, 1928.
- (2) It extends to the whole of India, except Part B States.
- (3) It shall not apply to any person governed by the Dayabhaga School of Hindu Law.

2. *Persons not to be excluded from inheritance or rights in joint-family property*

Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law, other than a person who is and has been from birth a lunatic or an idiot, shall be excluded from inheritance, or from any right or a share in joint-family property by reason only of any disease, deformity, or physical or mental defect.

3. *Saving and exception*

Nothing contained in this Act shall affect any right which has accrued or any liability which has been incurred before the commencement thereof, or shall be deemed to confer upon any person any right in respect of any religious office or service, or of the management of any religious or charitable trust which he would not have had if this Act had not been passed.

The Hindu Law of Inheritance (Amendment) Act

Act 2 of 1929

[1 October 1929]

WHEREAS it is expedient to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate; It is hereby enacted as follows :

1. *Short title, extent and application*

(1) This act may be called the Hindu Law of Inheritance (Amendment) Act, 1929.

(2) It extends to the whole of India, except Part B States, but it applies to persons who, but for the passing of this Act, would have been subject to the law of Mitakshara in respect of provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will.

2. *Order of succession of certain heirs*

A son's daughter, daughter's daughter, sister, and sister's son shall, in the order so specified, be entitled to rank in the order of succession next after father's father and before a father's brother :

Provided that a sister's son shall not include a son adopted after the sister's death.

3. *Savings*

Nothing in this Act shall :

(a) affect any special family or local custom having the force of law, or

(b) vest in a son's daughter, daughter's daughter or sister an estate larger than, or different in kind from, that possessed by a female in property inherited by her from a male according to the school of Mitakshara law by which the male was governed, or

(c) enable more than one person to succeed by inheritance to the estate of a deceased Hindu male which by a customary or other rule of succession descends to a single heir.

The Hindu Gains of Learning Act

Act 30 of 1930

[25 July 1930]

An Act to remove doubt as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning

WHEREAS it is expedient to remove doubt, and to provide an uniform rule, as to the rights of a member of a Hindu undivided family in property acquired by him by means of his learning; It is hereby enacted as follows:

1. *Short title and extent*

- (1) This Act may be called the Hindu Gains of Learning Act, 1930.
- (2) It extends to the whole of India except Part B States.

2. *Definitions*

In this Act, unless there is anything repugnant in the subject or context,

- (a) 'acquirer' means member of a Hindu undivided family who acquires gains of learning;
- (b) 'gains of learning' means all acquisitions of property made substantially by means of learning, whether such acquisitions be made before or after the commencement of this Act and whether such acquisitions be the ordinary or the extraordinary result of such learning; and
- (c) 'learning' means education, whether elementary, technical, scientific, special or general, and training of every kind which is usually intended to enable a person to pursue any trade, industry, profession or avocation in life.

3. *Gains of learning not to be held not to be separate property of acquirer merely for certain reasons*

Notwithstanding any custom, rule or interpretation of the Hindu law, no gains of learning shall be held not to be the exclusive and separate property of the acquirer merely by reason of—

(a) his learning having been, in whole or in part, imparted to him by any member, living or deceased, of his family, or with the aid of the joint funds of his family or with the aid of the funds of any member thereof or

(b) himself or his family having, while he was acquiring his learning, been maintained or supported, wholly or in part, by the joint funds of his family, or by the funds of any member thereof.

4. *Savings*

This Act shall not be deemed in any way to affect—

(a) the terms or incidents of any transfer of property made or effected before the commencement of this Act,

(b) the validity, invalidity, effect or consequences of anything already suffered or done before the commencement of this Act,

(c) any right or liability created under a partition, or an agreement for a partition, of joint-family property made before the commencement of this Act, or

(d) any remedy or proceeding in respect of such right or liability;

or to render invalid or in any way affect anything done before the commencement of this Act in any proceeding in a Court at such commencement; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed.

The Hindu Women's Rights to Property Act

Act 18 of 1937, as Amended by Act 11
of 1938

[14 April 1937]

*An Act to amend the Hindu law governing
Hindu women's rights to property*

WHEREAS it is expedient to amend the Hindu Law to give better rights to women in respect of property; It is hereby enacted as follows:

1. *Short title and extent*

- (1) This Act may be called the Hindu Women's Rights to Property Act, 1937.
- (2) It extends to the whole of India, except Part B States.

2. *Application*

Notwithstanding any rule of Hindu Law or custom to the contrary, the provisions of section 3 shall apply where a Hindu dies intestate.

3. *Devolution of property*

(1) When a Hindu governed by the Dayabhaga school of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there are more than one widow all his widows together, shall, subject to the provisions of subsection (3), be entitled in respect of property of which he dies intestate to the same share as a son;

Provided that the widow of a predeceased son shall inherit in like manner as a son if there is no son surviving of such predeceased son, and shall inherit in like manner as a son's son if there is surviving a son or son's son of such predeceased son;

Provided further that the same provision shall apply *mutatis mutandis* to the widow of a predeceased son of a predeceased son.

(2) When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint-family property, his widow shall, subject to the provisions of subsection (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession descends to a single heir or to any property to which the Indian Succession Act, 1925,¹ applies.

¹ 39 of 1925.

4. *Saving*

Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act.

5. *Meaning of the expression 'die intestate'*

For the purposes of this Act, a person shall be deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

The Arya Marriage Validation Act

Act 19 of 1937

[14 April 1937]

*An Act to recognize and remove doubts as to
the validity of intermarriages current among
Arya Samajists*

WHEREAS it is expedient to recognize and place beyond doubt the validity of intermarriages of a class of Hindus known as Arya Samajists; It is hereby enacted as follows:

1. *Short title and extent*

(1) The Act may be called the Arya Marriage Validation Act, 1937.

(2) It extends to the whole of India except Part B States and applies also to citizens of India wherever they may be.

2. *Marriage between Arya Samajists not to be invalid*

Notwithstanding any provisions of Hindu Law, usage or custom to the contrary, no marriage contracted whether before or after the commencement of this Act between two persons being at the time of the marriage Arya Samajists shall be invalid or shall be deemed ever to have been invalid by reason only of the fact that the parties at any time belonged to different castes or different sub-castes of Hindus, or that either or both of the parties, at any time before marriage, belonged to a religion other than Hinduism.

The Hindu Married Women's Right to Separate Residence and Maintenance Act

Act 19 of 1946

[23 April 1946]

An Act to give Hindu married women a right to separate residence and maintenance under certain circumstances

WHEREAS it is expedient to provide for the right to separate residence and maintenance under certain circumstances in the case of Hindu married women ; It is hereby enacted as follows :

1. *Short title and extent*

- (1) This Act may be called the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.
- (2) It applies to the whole of India except Part B States.

2. *Grounds for claiming separate residence and maintenance*

Notwithstanding any custom or law to the contrary, a Hindu married woman shall be entitled to separate residence and maintenance from her husband on one or more of the following grounds, namely,—

- (1) if he is suffering from any loathsome disease not contracted from her ;
- (2) if he is guilty of such cruelty towards her as renders it unsafe or undesirable for her to live with him ;
- (3) if he is guilty of desertion, that is to say, of abandoning her without her consent or against her wish ;
- (4) if he marries again ;
- (5) if he ceases to be a Hindu by conversion to another religion ;
- (6) if he keeps a concubine in the house or habitually resides with a concubine ;
- (7) for any other justifiable cause ;

Provided that a Hindu married woman shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu

by change to another religion or fails without sufficient cause to comply with a decree of a competent Court for the restitution of conjugal rights.

3. *Amount of maintenance*

When allowing a claim for separate residence and maintenance under section 2, the Court shall determine the amount to be paid by the husband to the wife therefor, and in so doing shall have regard to the social standing of the parties and the extent of the husband's means.

The Hindu Marriage Disabilities Removal Act

Act 27 of 1946

[22 November 1946]

An Act to remove certain disabilities and doubts under Hindu law in respect of marriages between Hindus

WHEREAS it is expedient to remove certain disabilities and doubts under the Hindu Law in respect of marriages between Hindus; It is hereby enacted as follows :

1. *Short title and extent*

(1) This Act may be called the Hindu Marriage Disabilities Removal Act, 1946.

(2) It extends to the whole of India except Part B States.

2. *Marriages between persons of same gotra or pravara or of different subdivisions of the same caste*

Notwithstanding any text, rule or interpretation of the Hindu Law or any custom or usage, a marriage between Hindus, which is otherwise valid, shall not be invalid by reason only of the fact that the parties thereto

(a) belong to the same gotra or pravara, or

(b) belong to different subdivisions of the same caste.

The Hindu Marriages Validity Act

Act 21 of 1949

[15 April 1949]

An Act to provide for the validity of marriages between Hindus, Sikhs and Jains, and their different castes, sub-castes and sects

WHEREAS it is expedient to provide that marriages between Hindus, Sikhs and Jains, and their different castes, sub-castes and sects are valid; It is hereby enacted as follows :

1. *Short title and extent*

(1) This Act may be called the Hindu Marriages Validity Act, 1949.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. *Definition*

In this Act, the word 'Hindus' includes persons professing the Sikh or Jain religion.

3. *Validity of marriages between Hindus*

Notwithstanding anything contained in any other law for the time being in force, or in any text, rule or interpretation of Hindu law, or in any custom or usage, no marriage between Hindus shall be deemed to be invalid or ever to have been invalid by reason only of the fact that the parties thereto belonged to different religions, castes, sub-castes or sects.

APPENDIX IV

Kenya Statutes

Hindu Marriage and Divorce Ordinance, 1960
Summary of the Provisions of the Subordinate Courts
(Separation and Maintenance) Ordinance, 1929

Colony and Protectorate of Kenya
The Hindu Marriage and Divorce
Ordinance, 1960

No. 28 of 1960

[19 July 1960]

*An Ordinance to regulate the marriage
of and provide for matrimonial causes
between Hindus and persons of allied
religions*

ENACTED by the Legislature of the Colony and Protectorate of Kenya, as follows :

PART I—PRELIMINARY

1. *Short title*

This Ordinance may be cited as the Hindu Marriage and Divorce Ordinance, 1960.

2. *Interpretation*

(1) In this Ordinance, unless the context otherwise requires —

‘ court ’ means the Supreme Court of Kenya ;

‘ custom ’ means a rule which, having been continuously observed for a long time, has attained the force of law among a community, group, or family, being a rule that is certain and not unreasonable or opposed to public policy ; and, in the case of a rule applicable only to a family, has not been discontinued by the family ;

‘ Hindu ’ means a person who is a Hindu by religion in any form (including a Virashaiva, a Lingayat and a follower of the Brahmo, Prarthana or Arya Samaj) or a person who is a Buddhist of Indian origin, a Jain or a Sikh by religion ;

'marriage' means a marriage between Hindus and either —

(a) solemnized after the commencement of this Ordinance, or

(b) a marriage which, immediately before the commencement of this Ordinance, was deemed, under section 3 of the Hindu Marriage, Divorce and Succession Ordinance,¹ to be a valid marriage or which would have been so deemed if it had been solemnized in the Colony, or

(c) a marriage solemnized under the provisions of the Special Marriage Act, 1954,² or the Hindu Marriage Act, 1955,³ of India as amended from time to time and any enactment substituted therefor;

'of the full blood' means descended from a common ancestor by the same wife;

'of the half blood' means descended from a common ancestor but by different wives;

'of uterine blood' means descended from a common ancestress but by different husbands.

(2) For the purposes of this Ordinance, the following persons are Hindus, Buddhists, Jains or Sikhs, as the case may be —

(a) a person, legitimate or illegitimate, both of whose parents are or were Hindus, Buddhists, Jains or Sikhs by religion;

(b) a person, legitimate or illegitimate, one of whose parents is or was a Hindu, a Buddhist, a Jain or a Sikh by religion and who has been brought up as a member of the community, group or family to which such parent belongs or belonged;

(c) any person who is a convert or re-convert to the Hindu, the Buddhist, Jain or Sikh religion.

PART II — HINDU MARRIAGES

3. *Conditions for Hindu marriages*

(1) A marriage may be solemnized if the following conditions are fulfilled —

(a) neither party has a spouse living at the time of the marriage;

¹ Cap. 149.

² 43 of 1954.

³ 25 of 1955.

- (b) both parties are of sound mind at the time of the marriage;
 - (c) the bridegroom has attained the age of eighteen years and the bride the age of sixteen years at the time of the marriage;
 - (d) where the bride has not attained the age of eighteen years, the consent of her guardian in marriage, if any, has been obtained for the marriage;
 - (e) the parties are not within the prohibited degrees of consanguinity, unless the custom governing each of them permits of a marriage between them.
- (2) For the purposes of this section two persons are within the prohibited degrees of consanguinity if —
- (a) one is a lineal ancestor of the other;
 - (b) one was the wife or husband of a lineal ancestor or descendant of the other;
 - (c) one was the wife of the father's or mother's brother or of the grandfather's or grandmother's brother of the other;
 - (d) one was the husband of the father's or mother's sister or of the grandfather's or grandmother's sister of the other;
 - (e) they are brother and sister, uncle and niece, aunt and nephew or children of brother and sister or of brothers or sisters; or
 - (f) they have a common ancestor not more than two generations distant (if ancestry is traced through the mother of the descendant) or four generations distant (if ancestry is traced through the father of the descendant).
- (3) The relationships referred to in subsection (2) of this section shall include those of the half blood and of uterine blood as well as those of the full blood, and the illegitimate child and adopted child of any person shall be deemed to be respectively the legitimate child and the child of the marriage of such person.

4. *Guardianship in marriage*

- (1) Wherever the consent of a guardian in marriage is necessary for a bride under this Ordinance the guardian in marriage shall be —
- (a) the father; whom failing
 - (b) the mother; whom failing

- (c) the paternal grandfather ; whom failing
- (d) the paternal grandmother ; whom failing
- (e) the brother of the full blood, as between brothers the elder being preferred ; whom failing
- (f) the brother of the half blood, as between brothers of the half blood the elder being preferred, if the bride is living with him and is being brought up by him ; whom failing
- (g) the paternal uncle of the full blood, as between paternal uncles the elder being preferred ; whom failing
- (h) the paternal uncle of the half blood, as between paternal uncles of the half blood the elder being preferred, if the bride is living with him and is being brought up by him ; whom failing
- (i) the maternal grandfather ; whom failing
- (j) the maternal grandmother ; whom failing
- (k) the maternal uncle of the full blood, as between maternal uncles the elder being preferred, if the bride is living with him and is being brought up by him.
- (2) No person shall be entitled to act as guardian in marriage under the provisions of this section unless such person has himself attained the age of twenty-one years.
- (3) Where the person entitled to be the guardian in marriage refuses, or is for any cause unable or unfit, to act, the person next in order shall be entitled to be the guardian.
- (4) If there is no such person as is referred to in subsection (1) of this section, the consent of a guardian in marriage shall not be necessary.

5. *Ceremonies for Hindu marriages*

- (1) A marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.
- (2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step has been taken.
- (3) Where the marriage is solemnized in the form of *Anand Karaj* (that is, the going round the Granth Sahib by the bride and bridegroom together), the marriage becomes complete and binding as soon as the fourth round has been completed.

6. *Registration of Hindu marriages*

(1) The Minister may from time to time make rules requiring and prescribing the manner of registration of all or any marriages solemnized in the Colony.

(2) Separate or different rules may be made with respect to the marriage of Hindus belonging to different castes or communities.

(3) Without prejudice to the generality of the foregoing provisions, any such rules may —

(a) require marriages to be compulsorily registered;

(b) require the priest or other person performing the marriage ceremony to issue a certificate of marriage in the prescribed form;

(c) require any marriage to be registered within the period prescribed by the rules;

(d) impose fees for the issue of certificates of marriage and for the issue of copies or translations of certificates of marriage;

(e) impose penalties of imprisonment for a term not exceeding six months or a fine of not more than six thousand shillings or both for the breach thereof;

(f) provide for the receiving in evidence of entries in the register and marriage certificates and of certified copies thereof.

(4) Notwithstanding anything contained in this section, the validity of a marriage shall in no way be affected by the omission to make an entry in any marriage register nor shall registration render valid any marriage which would otherwise be invalid.

7. *Provisions as to Hindu marriages*

(1) A marriage, whether solemnized before or after the commencement of this Ordinance, shall not be capable of being dissolved during the joint lives of the parties otherwise than in accordance with the provisions of this Ordinance.

(2) A marriage solemnized under this Ordinance shall be a marriage within the meaning of the Matrimonial Causes Ordinance.¹

(3) A marriage solemnized after the commencement of this Ordinance shall be void if the former husband or wife

¹ Cap. 145.

of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force; and the provisions of section 165 of the Penal Code¹ shall apply in such a case.

(4) Notwithstanding the provisions of section 15 of the Subordinate Courts (Separation and Maintenance) Ordinance,² the provisions of that Ordinance shall apply in respect of any husband and wife whose marriage at the commencement of this Ordinance is deemed under section 3 (hereby repealed) of the Hindu Marriage, Divorce and Succession Ordinance³ to be a valid marriage or would be so deemed if it had been solemnized in the Colony.

(5) Notwithstanding the provisions of section 15 of the Subordinate Courts (Separation and Maintenance) Ordinance, the provisions of that Ordinance shall apply to the husband and wife of every marriage.

8. *Offences*

Whoever solemnizes or procures to be solemnized a marriage in respect of which any of the conditions specified in paragraphs (c), (d) and (e) of subsection (1) of section 3 of this Ordinance has not at the time of the marriage been fulfilled shall be liable —

(a) in the case of the condition specified in the said paragraph (c) to imprisonment for a term not exceeding fourteen days or to a fine not exceeding five hundred shillings or to both such imprisonment and such fine;

(b) in the case of the condition specified in the said paragraph (d) to a fine not exceeding one thousand shillings; and

(c) in the case of the condition specified in the said paragraph (e) to imprisonment for a term not exceeding one month or to a fine not exceeding one thousand shillings or to both such imprisonment and such fine.

PART III—MATRIMONIAL CAUSES

9. *Matrimonial causes*

Except where and to the extent that other provision is made in this Ordinance, the provisions of the Matrimonial Causes Ordinance shall apply to matrimonial

¹ Cap. 24.

² Cap. 6.

³ Cap. 149.

causes relating to marriages, and the Matrimonial Causes Ordinance shall, in relation to marriages, be subject to the provisions of this Part of this Ordinance.

10. *Grounds of petition for divorce*

(1) A petition for divorce may be presented to the court by either party to a marriage whether solemnized before or after the commencement of this Ordinance on the ground that—

(a) the respondent has since the celebration of the marriage committed adultery, or

(b) the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) the respondent has since the celebration of the marriage treated the petitioner with cruelty; or

(d) the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition; or

(e) the respondent has ceased to be a Hindu by reason of conversion to another religion; or

(f) the respondent has renounced the world by entering a religious order and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition; or

(g) a decree of judicial separation has been in force between the parties for a period of at least two years immediately preceding the presentation of the petition, and the parties have not cohabited since the date of the decree:

and by the wife on the ground that her husband—

(f) has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality; or

(g) in the case of a marriage solemnized before the commencement of this Ordinance—

(i) at the time of the marriage was already married; or

(ii) married again before such commencement, the other wife being in either case alive at the date of presentation of the petition.

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment

while he is detained, whether in the Colony or elsewhere, in an institution duly recognized by the Government as an institution for the care and treatment of insane persons, lunatics, or mental defectives, or is detained as a criminal lunatic under any law for the time being in force in the Colony. A certificate under the hand of the Minister that any place is a duly recognized institution for the purpose of this section shall be receivable in all courts as conclusive evidence of that fact.

II. *Grounds for decree of nullity*

(1) The following are the grounds on which a decree of nullity of marriage may be made—

(a) in the case of a marriage solemnized after the commencement of this Ordinance—

(i) that either party had a spouse living at the time of the marriage, and the marriage with such spouse was then in force; or

(ii) that the parties are within the prohibited degrees of consanguinity, unless the custom governing each of them permits of a marriage between them;

(b) in the case of any marriage, whether solemnized before or after the commencement of this Ordinance—

(i) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or

(ii) that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy; or

(iii) that the consent of either party to the marriage or of the guardian in marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or

(iv) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or

(v) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

Provided that, in the cases specified in subparagraphs (ii), (iv) and (v) of paragraph (b) of this subsection, the court shall not grant a decree unless it is satisfied—

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

- (ii) that proceedings were instituted, in the case of a marriage solemnized before the commencement of this Ordinance, within one year after such commencement, and, in the case of any other marriage, within one year after the date of the marriage; and
 - (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree.
- (2) (a) Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.
- (b) Paragraph (a) of this subsection shall not operate so as to confer on a child any rights in the property of any person other than its parents in any case where, but for this section, such child would have been incapable of acquiring or possessing such rights by reason of its illegitimacy.
- (3) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

12. *Judicial separation*

A petition for judicial separation may be presented to the court by either the husband or the wife on any of the following grounds—

- (a) on any of the grounds on which a petition for divorce might be presented by that party; or
- (b) that the respondent has deserted the petitioner without cause for a period of at least two years immediately preceding the presentation of the petition; or
- (c) that the respondent has since the celebration of the marriage treated the petitioner with cruelty; or
- (d) that the respondent has failed to comply with a decree for restitution of conjugal rights.

PART IV—REPEAL

13. *Repeal*

Sections 3 to 8 (inclusive) and section 12 of the Hindu Marriage, Divorce and Succession Ordinance are hereby repealed.

The Subordinate Courts (Separation and Maintenance) Ordinance, 1929

Laws of Kenya, Cap. 6, summarized

Under s. 3 (1) a woman may apply for an order under this Ordinance on the following grounds:—(a) that the husband committed offences against her under certain sections of the Kenya Penal Code; (b) that he had deserted her; (c) that he had been guilty of cruelty to her or her children, or had wilfully neglected to maintain her or them; (d) that he had insisted upon sexual intercourse with her knowing that he was suffering from venereal disease; (e) that he had compelled her to practise prostitution; or (f) that he was a habitual drunkard or habitual drug-taker (terms defined in s. 2 of the Ordinance). Under s. 3 (4) children within the meaning of the section include those born before the marriage whether legitimate or illegitimate.

Under s. 4 the order may contain provisions that the spouses are no longer bound to cohabit; for the custody of children under 16; for maintenance; and for costs. If a married woman commits adultery she cannot obtain an order (s. 5) unless the husband had condoned or connived at or acted in a manner conducive to that adultery. The court has power to vary orders (s. 6); resumption of cohabitation vacates orders; and rights to maintenance are terminated by the applicant's adultery. If the parties reside together the order cannot be enforced (s. 8). Pending a decision of an application the court may award interim maintenance (s. 10). The sum awarded in each case may be recovered as if it were a civil debt (s. 11). Where the woman is dead, has committed adultery, or is absent from the Colony the Attorney General may apply on behalf of children entitled to an order (s. 12 (1)). Apart from the last provision no application may be made except by women resident in the Colony.

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