

1871.
Nov. 10.

Appeal Suit No. 175.

VIJIA'RANGAM and DA'MODHAR. (*Defendants*) *Appellants.*
LAKSHUMAN and LAKSHMI..... (*Plaintiffs*) *Respondents.*

Hindú Law—Adoption—Giving in Adoption vicariously—A'sura Marriage
—Stridhan—Devolution of Woman's Property.

Where a mother, in pursuance of the promise of her deceased husband, allowed her son to be adopted, but did not herself attend at the adoption ceremonies to give him in adoption, but commissioned her uncle to give the boy on her behalf, it was held that the adoption was not on that account invalid.

Amongst Hindús of the Bhandári and other inferior castes the *A'sura* form of marriage (probably derived from a form in use amongst the inhabitants of Hindustán before the introduction of the Brahmanical religion) is more customary than the four approved forms of marriage.

The principal characteristic of the *A'sura* form is the giving by the bridegroom of *Dez*, or a money payment, to the father of the bride.

The etymological import of the word *Stridhan*, and the different views with which it is regarded in the Eastern and Western schools of Hindu Law, pointed out.

The Mitákshará recognises only one class of *stridhan*, and includes in that class *all* property acquired by a woman by inheritance. According to the last-mentioned authority, a woman's *stridhan*, if she has been married by the *A'sura* form, upon her death childless, goes to her mother, her father, and their kindred—(*i. e.*) to the *sapindás* of her father in the first instance, and, failing them, to her mother's next of kin; but if a woman has been married according to one of the approved forms, her *stridhan* descends, upon her death childless, to her husband and his *sapindás*.

Over *stridhan* acquired by inheritance (so far as it consists of immoveable property) a woman's power of alienation is limited.

The Vyavahára Mayúkha also considers property acquired by a woman by inheritance to be *stridhan*, but classes *stridhan* under two heads—*stridhan* in a narrower sense, embracing particular species, for which a peculiar mode of devolution is prescribed, and *stridhan* generally (including *stridhan* acquired by inheritance), which descends in the same line as if the woman had been a male, *i. e.*, to her sons and the rest, and this notwithstanding her having left daughters.

Authorities bearing upon the subject of *stridhan* considered and commented upon.

THIS was an appeal from the decision of BAYLEY, J., made upon the 29th of September 1870.

As the facts are stated in the judgment of the court of appeal, an outline only of them is here given.

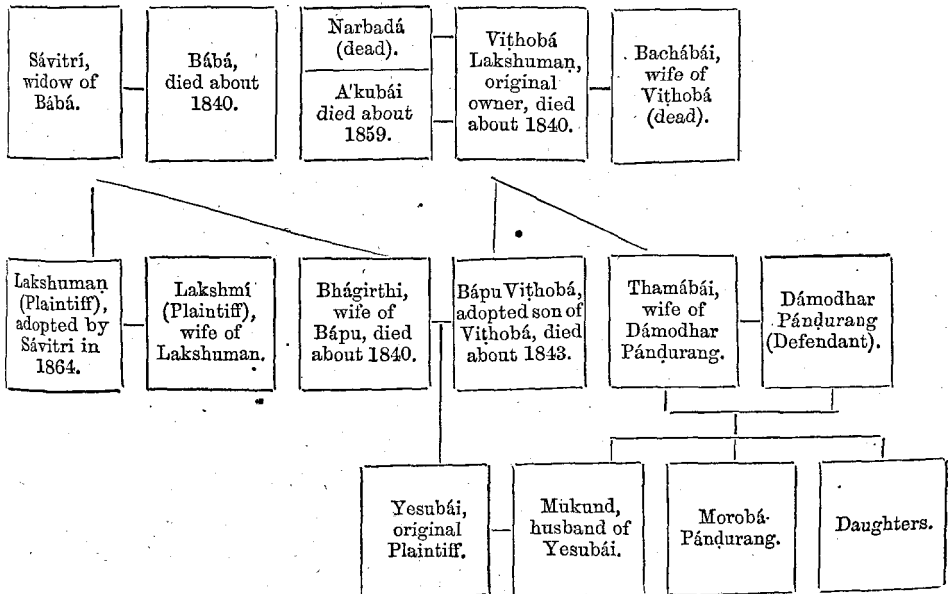
The suit was brought by one Yesubái, daughter of Bápu Vithobá, to recover from the defendant Ráv Bahádur Vijiárangam Mudliár, possession of two houses situate at

Lower Colábá, which had belonged to her grandfather Viṭhobá Lakshuman, and had descended to her by way of inheritance. She also prayed to have an assignment of the houses by her to the defendant Dámodhar Páñdurang and his wife, Thamábái, alleged to have been made on the 21st of September 1860, and a further instrument of conveyance, dated the 5th of October 1860, declared to be null and void, and delivered up to be cancelled, and further to have a conveyance of the premises by the defendant Dámodhar Páñdurang to the defendant Ráv Bahádur Vijiárangam Mudliár, dated the 12th of March 1864, declared null and void as against her.

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Before the suit came on for hearing, Yesubái died, and upon the 10th of February 1870 Lakshuman Bábáji and Lakshmi, his wife, were ordered to be admitted as plaintiffs in lieu of Yesubái, without prejudice to, and reserving, the question whether they, or either of them, were or was the heirs or heir of Yesubái. They were, accordingly, made plaintiffs in the suit.

The following pedigree shows the manner in which the plaintiffs on the one hand, and the defendant Dámodhar Páñdurang and his wife, Thamábái, on the other, were connected with Yesubái, and how she was connected with Viṭhobá Lakshuman, the original owner of the property :—



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Upon the death of Viṭhobá, the property in question descended to his adopted son, Bápu. When Bápu died, his daughter, Yesubái, was an unmarried child about five or six years of age. A'kubái, the widow of Viṭhobá, then came into possession of the property. She died about 1859, having attempted to dispose of the property by her will. An ejectment suit was in 1860 brought against the devisee of A'kubái on behalf of Yesubái, and the property was recovered for her.

The case came on for hearing before BAYLEY, J., on the 21st of July 1870.

The material issues raised were—

I. Whether the plaintiffs were the legal representatives of Yesubái.

II. Whether the agreements or assignments alleged to have been executed by Yesubái were executed by her, and whether they were valid and binding.

III. Whether the defendant Ráv Bahádúr Vijiárangam was entitled to retain the property against the plaintiff.

IV. Whether Yesubái was married to her husband, Mukund Dámódhar, by the Bráhma form of marriage, and if not, by what other form of marriage.

V. Whether the plaintiff Lakshuman was legally adopted by Sávitribái.

The issues were found generally in favour of the plaintiffs, and the court declared that Yesubái had been married by the A'sura form; that the plaintiffs were the heirs and legal representatives of Yesubái; and decreed the pretended assignments by Yesubái to the defendant Dámódhar Pándurang to be null and void as against the plaintiffs, and ordered them to be delivered up to be cancelled, as also the conveyance from the defendant Dámódhar Pándurang to the first defendant. Possession of the premises was ordered to be given up to the plaintiffs.

From the above decree the defendants appealed, on the grounds (1) that the court was in error in holding that

the plaintiffs were the legal representatives of Yesubái; (2) that it was against the weight of evidence to hold that the assignments were not executed by Yesubái, and were not valid and binding; (3) that the court was in error in holding that Yesubái was married to Mukund Dámódhar by the A'sura, and not by the Bráhma form of marriage; (4) that the court was in error in holding that the plaintiff Lakshuman Bábáji was the legally adopted son of Sávitribái.

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The appeal was argued before WESTROPP, C. J., and WEST, J., on the 28th, 29th, and 30th of September 1871.

The Honorable A. R. Scoble (Acting Advocate General) and *Starling*, for the appellants:—The first question is as to the validity of the adoption of Lakshuman by Sávitribái. We contend that it is invalid. The evidence shows that it took place more than twenty years after the death of Bábá, Sávitribái's husband. Yeshvadá, the natural mother of Lakshuman, was not herself present at the ceremony; she was then sick, and executed a consent-paper addressed to Sávitribái, dated *January 4th, 1864, which ran as follows*:—"You have no male child born of your womb: consequently, my deceased husband, Ganu, determined to place in your lap my son Lakshuman, who is about nine years of age. My husband died in the month of Kártik in the same year, before the boy was placed in your lap, and his promise to you remained unfulfilled. Consequently, of my free will and accord I have placed the above-mentioned boy, Lakshuman, in your lap. Now neither I nor the heirs of my estate, and kinsfolk, have any connection whatsoever with the said boy." This document Yeshvadá gave to her uncle, who took the boy to Sávitri's house, where the adoption ceremonies are said to have been performed, but the essential part of the adoption—the *giving* of the boy by his natural to his adoptive parent—could not have taken place, as the natural parent was not present. The giving and receiving in adoption cannot be dispensed with: *Vyavahára Mayúkha*, Ch. IV., Sec. V., pl. 1, 8, 37, 40, and 41; *Mitákshará*, Ch. I., Sec. XI., pl. 9; *Norton's Leading Cases*, Part I., pp. 62, 63, and 64. In the

1871. case of *Srinarayan Mitter v. Srimati K. Sundari Dasi* (a)
 VIJIA'RANGAM it was held that the execution of deeds without the giving
 et al. and receiving was insufficient. See too *Siddesory Dossee*
 v. and *Doorga Churn Sett* (b). The Hindú authorities in force in
 LAKSHUMAN the Eastern schools are to the same effect: Colebrooke's Di-
 et al. gest, Bk. V., Ch. IV., Sec. 8. The conclusion to be derived
 from all the authorities is that the giver must be present,
 otherwise the adoption is invalid.

The next question (assuming the adoption of the plaintiff Lakshuman to be valid) is, What was the nature of this property in the hands of Yesubái? was it *strídhan* or not? If it was not *strídhan*, the plaintiffs, who are by adoption the maternal uncle and aunt by marriage of Yesubái, cannot claim it until her father's line is exhausted. We contend that it was not *strídhan*, and that nothing inherited is *strídhan*. *Bhugwandeem Doobey v. Myna Bae* (c) shows that property inherited by a woman from her husband is not *strídhan* (p. 513). That case was decided according to Benáres law, where the Mitákshará is of authority. On reference to Manu, we find he reckons as *strídhan* only things given in some form or other to a woman: Ch. IX., Sl. 194, 195. The Dáyabhága is to the same effect: Ch. IV., Sec. I., pl. 1, 7, and 10. So the Dáyakrama Sangraha, Ch. II., S. 2, pl. 12, says that heritable wealth does not form a woman's peculiar property.

The only authority to the contrary is the passage in the Mitákshará. This is apparently founded upon a misconception of the authority upon which the author is commenting—Miták., Ch. II., Sec. XI., pl. 1, 2, and 5. Even that passage is ambiguous, as remarked in the above-cited case by the Lords of the Privy Council. The case of *Sengamalathammal v. Valaynda Mudali* (d) broadly lays down the proposition that property acquired by a woman by inheritance is not to be classed as her *strídhan*. [WESTROPP, C. J., referred to the *Viramitrodáya* as in accordance with the Mitákshará on this

(a) 2 Beng. L. Rep., A. J. 279. (b) 2 Ind. Jur., N. S., 22.

(c) 11 Moo. Ind. App. 487, 505, and 512.

(d) 3 Mad. H. C. Rep. 312, 315.

point.] Property inherited by a mother from her son is not *stridhan*: *P. Bachiraju v. V. Venkatappadu* (e). To hold that property descending to a woman is *stridhan* would be contrary to the principle laid down in *Srinath Gangopadhyaya v. Sarbamanigala Debi* (f), which decides that *stridhan* which has once devolved by succession loses its character of *stridhan*. The same mode of devolution which takes away the character of *stridhan* cannot give it that property: see Macnaghten, H. L., p. 38, and W. & B., H. L. II., 104. Mr. Norton, in his *Leading Cases*, Vol. I., p. 23, adopts the view taken by the Madras Court, and his conclusion is supported by the decision of the Privy Council in *Mussumat Thakoor v. Rai Baluk Ram* (g).

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This question cannot be considered to have been decided in Bombay. The case of *Jamiyatram v. Bai Jamna* (h) has been overruled in *Lakshmi Bai v. Ganpat Moroba* (i), and is inconsistent with the decision in *Bhugwandeon Doobey v. Mayna Bacc* (j). The case of *Navalram A'tmaram v. Nandkishor* (k) was decided in accordance with a special custom. *Bhaskar Trimbak Acharya v. Mahadev Ramji* (l) was only the decision of a single Judge, and is not of much authority. The *Mayukha* does not specially deal with property inherited by a woman: Ch. IV., Sec. X., pl. 1-5.

Although we contend that Yesubai's property was not her *stridhan*, yet it is not necessary for us to go so far, for if property acquired by a woman by inheritance is to be classed as her *stridhan*, it is not her *stridhan* technically so called, but falls under the larger head treated of by Nilkantha as woman's property, and in that case would, according to the doctrine of the *Mayukha*, devolve upon Yesubai's paternal, in preference to her maternal kinsmen: *Vyavahara Mayukha*, Ch. IV., Sec. X., pl. 24, 26. The latter section is explained in West and Bühler's *Digest*, Part I., p. 214.

(e) 2 *Ibid.*, 402, 405.

(f) 2 *Beng.-L. Rep.*, A. J. 144. (g) 11 *Moo. Ind. App.* 139.

(h) 2 *Bom. H. C. Rep.* 11.

(i) 4 *Bom. H. C. Rep.*, O. C. J. 113; 5 *Ibid.* 128.

(j) 11 *Moo. Ind. App.* 487, 505, 512. (k) 1 *Bom. H. C. Rep.* 20.

(l) 6 *Bom. H. C. Rep.*, O. C. J. 1.

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Under the Dáyabhága law the result would be the same : Ch. XI., Sec. I., pl. 58 ; Sec. II., pl. 30 ; and Sec. III. ; and also under the law as laid down in the Dáyakrama Sangraha, Ch. I., Sec. III., pl. 3. The Hindú writers on the different sides of India arrive at the same result, but in a different manner. They also cited Vyavahára Mayúkha, Ch. IV., Sec. VIII., pl. 16 and 19.

Even though the property be held to be *strídhán*, the plaintiff cannot succeed if the evidence, as we contend, shows that Yesubái was married according to the Bráhma, and not the A'sura form of marriage. The latter is one of the unapproved forms : Manu, Ch. III., Sl. 20, 25, 31, 51, and 54 ; and if there is a doubt the court will presume in favour of the more legitimate form of marriage. They also contended that the lower court was in error in holding upon the evidence that the assignments had not been executed by Yesubái.

Mayhew (with him *Marriott*), for the respondents, contended that Yesubái's property was her *strídhán*, as it had come to her from her father's family. He cited Strange H. L., pp. 30, 31, 129 (ed. 1864) ; Mayúkha, Ch. IV., Sec. X., pl. 3 ; Mitákshará, Ch. II., Sec. XI., pl. 2, 3, 4, 8, 9, 10, and 11 ; West and Bühler, Introduction to Digest, pp. 64, 65 ; *Devkúvarbái's Case* (m), and *Bháskar Trimbak A'charyá v. Mahádev Rámji* (n). All the authorities cited on the other side show that this property was Yesubái's, and goes to her heirs. The question is who are her heirs, she having been married according to the A'sura form. The Judge below relied upon Vyav.M., Ch. IV., Sec. X., pl. 28, and Mit., Ch. II., Sec. XI., pl. 10 and 11, as showing that the husband's heirs should in such a case only be considered when the property has come through the husband. When the contrary is the case, the parents come before the husband, and the husband and his brothers come in only when the parents' line is exhausted. We contend that the mother's line must be exhausted before the father's line comes in : Miták., Ch. II., Sec. XI.,

(m) 1 Bom. H. C. Rep. 130. (n) 6 *Ibid.*, O. C. J. 1.

pl. 8, 10, and 11. [WESTROPP, C. J., referred to Miták., Ch. II., Sec. IV., note 5.] The Mayúkha indicates Lakshmi (the maternal uncle's wife of Yesubái) as the proper heir of her *strídhán* : Ch. IV., Sec. X., pl. 29, 30. He also referred to Dáyakrama Sangraha, Ch. II., Sec. VI., pl. 9; the Dáyabhága, Ch. IV., Sec. III., pl. 6; *Vináyak Anandráv v. Lakshmibái* (o), and Strange's Manual of Hindú Law, p. 75; West and Bühler's Digest, Part II., p. 95.

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Starling replied.

Cur. adv. vult.

WEST, J.:—The original plaintiff in this case, Yesu, widow of Mukund, sought to recover possession of two houses at Colábá. The defendant, Vijiárangam, set up a conveyance to him by the defendant, Dámódhar, who in his turn relied upon an assignment to him alleged to have been made by Yesu of her whole interest in the property. Yesu having died, an application was made for the substitution, as plaintiffs, of one Lakshuman, alleged to have been adopted by her maternal grandmother, Sávitribái, and of Lakshuman's wife, Lakshmi. This application was admitted, subject to such objections as might be taken at the trial. The question of the representative capacity of the substituted plaintiffs, or of either of them, thus became the first issue for decision in disposing of the case. Subsidiary to this were the issues of whether Lakshuman had been legally adopted by Sávitribái, and of whether Yesubái, the original plaintiff, had been married to Mukund by the Bráhma form of marriage, or, if not, by what other form, that might affect the devolution of her estate upon her death. The learned Judge, Mr. Justice Bayley, who tried the case, found that the adoption was proved in fact and was valid in law; that the marriage of Yesubái to Mukund had been celebrated according to the A'sura, not according to the Bráhma rite; and that in these circumstances the plaintiffs were her legal representatives for the purposes of the suit. Then finding that the alleged assignment by Yesu to Dámódhar was not

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proved, he awarded possession of the property to the plaintiffs, subject only to a lien in Dámódhar's favour for sums properly expended by him, and directed that Dámódhar's conveyance to Vijiárangam should be delivered up to be cancelled. An account of mesne profits was ordered as against each of the two defendants.

Against this decree the defendants now appeal, on the grounds substantially (1) that the assignment by Yesubái is proved by the evidence to be a genuine document; (2) that as such it is valid and binding; (3) that the evidence proves a marriage between Mukund and Yesubái according to the Bráhma form of marriage, not according to the A'sura form; and (4) that the plaintiffs, Lakshuman and Lakshmi, are not the legal representatives of the deceased Yesubái. This is not the order in which the objections to the decree are presented in the appeal, but it will be the most convenient one for the disposal of the several questions that arise in the cause. And first we must state our entire concurrence in the view taken by the learned Judge of the alleged assignment by Yesubái to Dámódhar and Thamábái, dated the 21st of September 1860. The account given by Dámódhar himself of the circumstances under which he obtained this assignment, its relation in point of date to the documents of the 25th of September and the 5th of October following, the discrepancies in the statements of the witnesses called to sustain it, and the admittedly tainted character of the chief of these witnesses, Vináyak Sakhárám Dabir, the writer of the document, satisfy us that the balance of probability is greatly against its genuineness. The document of the 5th of October 1860 is of the same character. The learned Judge has pronounced it null and void as against Yesubái, without distinctly stating whether on a ground of fact or of law; but the appeal assumes that the finding was that the document had not been executed by Yesubái, and we think that the proof of it fails. Its writer was the same Vináyak Sakhárám Dabir who wrote the pretended assignment of the 21st of September. He admits that "Mádhavráy Vináyak, attesting witness of the document, is in jail under sentence to seven years (impri-

sonment) for dacoity." These facts are not calculated to strengthen the credit of a document subject on other grounds to grave suspicion. The principal documents relied on for the defence being thus unproved, the question of their validity requires no discussion.

On the third point also we agree with the learned Judge. The witness Dhondū Sadu Pilankar, who is, like Yesu and her husband, Mukund, a Bhandári, and is a *mukádam* of the caste, says: "The Bhandáris use the A'sura form of marriage; I never heard of any Bhandári being married according to the Bráhma form;" and he adds: "We receive *dez* (*i. e.*, money for the bride), and that form is called the A'sura form." Krishna Náráyaṇ deposes that amongst the members of the caste this *dez* "is always paid." He himself paid Rs. 100 for a wife for his son. Similar testimony is given by Yeshvadá, the mother of the plaintiff Lakshuman. She may be regarded as an interested witness; and Krishna Náráyaṇ, to some extent, perhaps, as prejudiced in favour of the plaintiffs, whose cause he is maintaining; but Bháu Govind deposes to the same effect. He asserts both the general practice, and a compliance with it in the case of Yesu's marriage to Mukund, at which he was present, and at which Rs. 75 were paid to Yesu's nearest male relative by Mukund's father. So too Náráyaṇ Bháuji Naik, a witness called for the defendant, admits both that money may have been paid as "*dez*" on the occasion of his own second marriage, and that he was present when the caste agreed that Rs. 60 should be the sum to be paid as "*dez*" by the poorer members in future. Bábá Abbá, another witness on the same side, says that "*dez*" is usually paid if the father of the bride be poor, and that he himself paid, as "*dez*" for his brother's bride, a sum of Rs. 50. On the other hand, the defendant, Dámodhar, who is Mukund's father, says that he paid nothing by way of "*dez*" for Yesu on her marriage to his son. He is supported by the witness Náráyaṇ Bápuji, who was present and saw no money paid. He adds that the giving of "*dez*" is not a custom of the caste. Yet he admits that amongst the poorer members of the caste "*dez*"

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is given, and his testimony to the alleged assignment of the 21st of September 1860 is calculated to raise a suspicion as to the sincerity of his statements. Keshav Vāsudev, another Bhandári, denies the existence of the custom; and Sadáshiv Purshotam Joshi, the family priest of the defendant Dámodhar, deposes that he actually officiated as priest at the marriage of Mukund and Yesu, which, he declares, was celebrated according to the Bráhma form. But as to this last point he admits that he does not know the difference between the Bráhma and the A'sura forms of marriage.

Manu (Ch. III., Sec. 20 *et seq.*), after enumerating the eight recognised forms of marriage, says (24): "Some consider the four first only as approved in the case of a priest (Brahman); one, that of Rákshashas, as peculiar to a soldier; and that of A'suras to a mercantile and a servile man (S'údrá)."

In the next paragraph he pronounces a moral condemnation on the A'sura form; yet in para. 31 he recognises it as prevailing in practice, and describes it thus (para. 31):—"When the bridegroom, having given as much wealth as he can afford to the father and paternal kinsmen and to the damsel herself, takes her voluntarily as his bride, that marriage is named A'sura;" while "The gift of a daughter clothed only with a single robe to a man learned in the Veda, whom her father voluntarily invites and respectfully receives, is the nuptial rite called Bráhma" (para. 27).

Yájñavalkya (Bk. I., Sl. 58-61) quoted at Colebrooke's Digest, Bk. V., Text 499, draws a similar distinction: "An A'surá marriage is contracted by receiving property from the bridegroom," and is permitted (or peculiar) to mercantile and servile men (Vaisyas and S'údrás). So also A'pastamba, Pr. II., Pat. 5, Kan. 12.

The different forms of marriage recognised by the Hindú law are probably to be traced historically to the customs of different tribes which afterwards coalesced to form a single community. The very name of the A'sura form indicates it as one derived from the aboriginal inhabitants of this country,

or those occupying it before the Aryan invasion. This would of itself cause the ceremony to be looked on with a degree of loathing by sages of the strict Brahmanical school, however circumstances might compel them to tolerate it for those amongst whom it was an established custom. Manu (III., 51) denounces any father who knows the law and who receives a gratuity, however small, for giving his daughter in marriage; but the custom seems never to have died out amongst the lower castes, if indeed it has not, to some extent, obtained among the Brahmans also. Steele, in his Summary (p. 159), says: "The lower castes often receive money, on the marriage of their females, called Hoonda, which is the characteristic of the fifth (Usoor) variety, and it is suspected that Brahmuns occasionally, in the present avaricious generation, incur sin on this account." The word "sale" as applied to the giving of a girl in marriage, which occurs in some Smritis, may be held indeed to point to an ancient custom of this kind, prevailing even amongst the twice-born; though Apastamba (Dharmasutra, Pr. II., Pat. VI., K. 13, Par. 12) carefully explains this away, and prescribes the return of the presents, which, according to the Veda, the bridegroom must make to the bride's father in order to fulfil the law. The custom of a form of sale having been thus extensively diffused, having been preserved amongst the lower castes generally down to our own day, and suiting the general circumstances of a class of people ranking, like the Bhandáris, very low, as a class, in the scale of wealth and refinement, it is very probable that it should still subsist amongst them. And, if the custom of the caste generally, it is not likely that such a custom, so essential to a form of marriage with which the caste are familiar, should be set aside in particular cases, merely because of the more or less comfortable circumstances of the parents of the bride, a point which itself is in this case involved in some doubt. Practices the offspring of caste tradition commonly prevail over the tastes of individuals.

Of the several Shástris called by the plaintiffs and the defendants in this case, all agree that the giving and receiving of money for the bride is the distinctive mark of the

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A'sura form of marriage. Vishṇu Parashráṃ, called for the defendants, says, however, that the Bráhma and the A'sura forms are used indiscriminately by all castes. Mahádev Balál, on the same side, says the Bráhma form is the most common amongst all Hindús. Both admit that caste custom prevails over the rules of the Shástras. Appá Náráyaṃ, called for the plaintiffs, says, on the contrary, that the Bráhma form of marriage is now confined to Brahman; that the Bhandáris, being S'údrás, "their form of marriage ought to be the A'sura form," and that "it would not be correct, according to religion, for a Brahman priest to marry Bhandáris according to the Bráhma form." In such a conflict of testimony, we are driven to rely in a great measure on the antecedent probabilities of the case. The Bráhma form—a gift of a daughter to a man learned in the Vedas—was obviously not intended or viewed by Manu as appropriate to any class of S'údrás. The text of A'pastamba also (Pr. II., Pat. 5, Kand 12, Par. 17) points clearly the same way. The learned Judge has implicitly found as a fact that in this instance money was paid for the bride by the husband's father. That finding is supported by *à priori* probability, as well as by a great preponderance of testimony, and the payment of money, as is said by all the Shástris, is sufficient to mark the marriage as one in the A'sura form.

The question then next arises of whether, under the circumstances of Yesu having been married to Mukund according to the A'sura ceremony, the plaintiffs are her legal representatives for the purposes of the present suit. Their claim to this position depends in the first place on the fact and the validity of the adoption of Lakshuman by Sávitribái. As to the fact of a ceremony intended to be one of adoption having been gone through, there seems to be no room for reasonable doubt. The evidence of Yeshvadábái, Lakshuman's mother, proves that she, in accordance with her deceased husband's promise, gave the boy to Sávitri by a written document. The gift and acceptance in such a case must, as Sir T. Strange (L., 95) has observed, be manifested by some overt act; and here Yeshvadábái did not in person hand over her son to

Sávitri. But she commissioned her uncle to do this, being at the time too unwell to attend the ceremony herself. The Hindú law recognises the vicarious performance of most legal acts; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebr. Dig., Bk. V., T. 273, Commentary), and Yeshvadá's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect. We hold, therefore, with the learned Judge, that the adoption is proved and effectual.

By this adoption Lakshuman has come into the position of brother to the (deceased) mother (Bhágirthi) of Yesubái. Bhágirthi's husband, Bápu, was the adopted son of Viṭhobá, the original owner of the property in dispute, through whose widow, A'kubái, who vainly attempted to dispose of it by will, it descended—the intervening heir, Bápu, and his wife, Bhágirthi, being dead—to Yesubái, their only child. Viṭhobá left a daughter, Thamábái, the wife of the defendant Dámodhar. Their son Mukund, Yesubái's husband, was dead before the descent to her of the property. The question then is, who (she having been married by the A'sura form and having died childless) represents her in estate?

The principal authorities on the Hindú law of this Presidency are the Mitákshará and the Vyavahára Mayúkha. Each of these declares (Miták., Ch. II., Sec. XI., pl. 11; Mayúkha, Ch. IV., Sec. X., pl. 28) that on the death, childless, of a woman married by the A'sura ceremony, the *stridhan* owned by her descends to her mother, her father, and their kindred. Etymologically the word *stridhan*—that is, woman's property—would include property of every kind possessed by a woman. Its second intention or precise comprehension in the Hindú law has been a subject of contention for centuries, and has been determined in the most various ways by the commentators and the courts. In the dim twilight of the early Vedic period, it is possible to discern some indications of a theory of perfect equality once subsisting between the parties to a marriage. These

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indications are not by any means uniform; but the prevailing notion appears to have been that of a free choice of her husband by the damsel, who was even dowered by her father. The married couple were enjoined to pass their lives in union and content. Yet by the time of the actual composition of the Vedas a text could be introduced, which, according to the interpretation of Baudháyana (Pr. II., Kanda II., 27) and A'pastamba (Aph., Pr. II, Pat. 6., K. 14,) declared that "women are not entitled to use the sacred texts or to inherit." Thus the traces of generous respect were partly lost in the overgrowth of another stage in the national existence; and by the time when the Code of Manu was drawn up, the sex had fallen to a distinctly lower position. A woman is never to seek independence; no religious rite is allowed to her apart from her husband; she must revere him as a god (Manu V., 148, 154, 155). To the same set of doctrines must be assigned such texts as Manu IX., 185, 187, which, taken without the gloss of Kulluka Bhaṭ, exclude wives and daughters from the line of inheritance. S'lōka 212 in the same chapter points the same way; but S'lōka 217, even if taken in its original form, is at least inconsistent with an entire incapacity for property; and the controverted passage quoted both by Jimutávāhana (Dáyabhāga Ch. XI., Sec. I., pl. 7), and by Vijñānes'vara (Mitāk., Ch. II., Sec. I., pl. 6), in establishing their several theories, says that "a chaste widow shall obtain her husband's entire share" or "entire estate." Women may also tend the sacred fire (Manu II., 67), and take part in the rites prescribed to the husband by the Veda (Manu IX., 96). A'pastamba* lays down the rites proper to a *grihastā* or householder as to be celebrated by him and his wife conjointly: her importance in this respect is recognised in several passages of the Aphorisms. The close connection between the right to perform sacred ceremonies and the capacity for property is familiar to every student of the Hindú law. Brhaspati recognises it in the passage (Colebrooke's Digest, Bk. V., T. 399) in which he declares

* Aphorisms, Pr. II., Pat. I., Kan. I., page 115, of the forthcoming edition by my learned friend Dr. Bühler, to which several other references are made.

that the wife is half the body of her husband, and in that right takes his property during her widowhood in preference to any other claimant.

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It is thus possible to trace throughout the principal sources of the Hindú law two entirely different, if not inconsistent, lines of thought on the subject of the position and legal capacities of women. In the more modern developments of that law, these opposite views have given rise to directly contrary theories on the subject of woman's property. The widow's right to take her husband's estate or his share having been established, the questions became, under what circumstances did this occur? and what was the nature of her rights? The text of Manu (IX., 194) which defines or enumerates the sixfold property of a woman is immediately followed by one (195) which apparently recognises two kinds of such property not included in the preceding enumeration. The lawyers of the Bengal school, though not without a great many variances of opinion, have resolved that the enumeration of the six kinds is intended by Manu to be exhaustive. This may be seen in Jagannátha's Comments on Text 402 and on Text 465 of Bk. V. of Colebrooke's Digest, while his remarks under Text 477 show the difficulties which this restrictive interpretation involves. Thus the doctrine of a general incapacity, qualified by a special capacity for property of particular kinds, and generally of no great value, forms the groundwork of the whole of the Bengal law of woman's property. It is necessary on this theory to exclude property acquired by inheritance from the class of *strídhán*, though women are allowed to enjoy such property for their lives. The recognised *strídhán* is, by the Bengal lawyers, divided into Yautaka and Ayautaka (Dáyabhága, Ch. IV., Sec. II., pl. 14), and different rules of descent are prescribed for each, which, with the distinction of the two kinds, give occasion to a long and intricate disquisition by Jagannátha in Ch. IX. of Bk. V. of Colebrooke's Digest. As to the descent of each kind the schools of Benáres, of Bengal, and of the South differ. The Mitákshará, which is the chief authority in this Presidency, deals with the whole subject in a quite different and much

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simpler manner. Relying on Yájñaválkya (II., 143) and Gautama (Adhyáya 28, Sl. 18, 21), its author defines *strídhan*, according to its etymological import, as including every kind of property owned by a woman and obtained by any of the recognised modes of acquisition. Amongst these inheritance is one; and thus, according to the Mitákshará doctrine, the property in this case must rank as *strídhan*. Vijnánés'vara contends strongly against the limitation of *strídhan* to the six kinds specified in the text of Manu, and in this he is supported by the Vírāmitrodaya, by the Viváda Chintāmaṇi, which says (Translation, p. 256): "Six kinds of property means that there cannot be a less number," implying that there may be a greater, and by the Smṛiti Chandriká, Ch. IX., Sec. I., pl. 3, which says: "It is not to be taken as a restriction of a greater number, but as a denial of a less." The Vyavahára Mayúkha (Ch. IV., Sec. X., 2) also denies the restriction. Thus there is a great mass of authority, in all the schools except that of Bengal, supporting Vijnánés'vara to this extent at least, that *strídhan* includes other property besides the six kinds specified by Manu, while Nilkanṭha, the author of the Mayúkha, the next weightiest authority in this Presidency, fully accepts the doctrine that property inherited by a woman is *strídhan* (Vyavahára Mayúkha *loc. cit.*), though he prescribes a mode of devolution for it different from that laid down in the Mitákshará. Inherited property, Nilkanṭha says, though it is *strídhan*, not being one of those kinds of *strídhan* for which express texts prescribe exceptional modes of descent, goes, on the woman's death, to her sons and the rest, as if she were a male, and this too notwithstanding her having left daughters (Vyav. May., Ch. IV., Sec. X., pl. 26). The passage which sets forth this doctrine being somewhat obscure in Mr. Borradaile's translation, it may be as well to say that its true purport is this: "It is clear that although there be daughters, the sons or other heirs still succeed to the mother's estate, so far as it is distinct from the part already described (as subject to peculiar devolution under texts applicable to particular species of *strídhan*)." According to this law of *strídhan*, the property inherited by Yesu would, in the absence of

descendants, go to her parents, just as if she had been their only son, and, failing them, to the paternal grandmother and the *sapindás* of the father, the *gotrajas* taking precedence of the *bhinnagotras*. Nilkantha's view of what constitutes a *gotraja sapindá* is shown by the Vyavahára Mayúkha, Ch. IV., Sec. VIII., 19. He regards this relationship as constituted by birth in the family, and for this reason assigns to a man's sister the first place amongst his *sapindás*. Thamábái, therefore, the adoptive sister of Yesu's father, Bápu, ranks, according to this authority, amongst the *gotrajas*, as having been born in the family of Yesubái. So long as she exists, *the inheritance of relatives to Yesu through her mother, Bhágirthi, and her maternal grandfather, is barred.* Lakshuman ranks as Yesubái's maternal uncle. His rank even as one of the *bandhus* might, according to some decisions, be controverted, but does not admit of serious dispute when the enumeration given in the Mitákshará and the Mayúkha is read by the light of the Víraṃitrodaya. "In the passage of Yogís'vara (Yájñaválkyá) also the word '*bandhu*' indicates the maternal uncle. Otherwise, if the maternal uncles were not included, there would be a great impropriety, their sons being entitled to inherit, while they themselves, who are more nearly related, would not be entitled" (Víram., f. 209, p. 2, l. 6). The same view of the capacity of such relatives as maternal uncles is taken by the Smṛiti Chandriká, though that work propounds a different doctrine as to their place in the line of succession (Smr. Chan. C. XI., Sec. 5, pl. 14, 15). It must be admitted, then, that the maternal uncle is not excluded from the line of heirs; but he comes in after the *sapindás, ex parte paterná*, amongst whom, as we have seen in this case, Thamábái is included.

The law of devolution provided by the Mitákshará is different from that laid down in the Mayúkha. Having swept away the subtleties of the Bengal school as to the comprehension of the term "*strídhán*," Vijñánes'vara lays down the simple rule of succession in the case of a childless woman, that if she was married according to one of the approved rites, the property descends to her husband and

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his *sapindás*; if according to a disapproved rite, as the A'sura, to her parents and their next of kin (Miták., Ch. II., Sec. XI., pl. 11). No express provision is made for the succession of the mother's blood relations; and though this silence does not altogether exclude them from the line of inheritance, yet, according to the ordinary principle of interpretation applicable to the Hindú law referred to at Vyav. May., Ch. IV., Sec. VIII., 18, it postpones them to the heirs expressly mentioned. The doctrine is not peculiar to any one school. It is recognised, for instance, by the Smṛiti Chandriká. (See Ch. XI., pl. 10 *et seq.*) The "next of kin" mentioned at the end of the passage to which we have just referred in the Mitákshará means primarily the father's next of kin. According to Vijñāneś'vara's theory, a woman, being by her marriage born again in her husband's family, becomes a *sapindá* of all her husband's *sapindás*, and loses her intimate connexion with her father's family until the extinction of that of her husband. "Sapindá relationship," he says (A'chára Kāṇḍa, f. 6, p. 1, l. 15 *et seq.*), "arises between two people through their being connected by particles of one body. * * * The wife and the husband (are sapindá relations), because they together beget one body (the son). In like manner, brothers' wives also (are sapindá relations to each other), because they (severally) produce a body (by union) with those who have sprung from one body," &c., &c. It is clear, therefore, that he regards the wife of a descendant as holding *sapindá* relationship like her husband to another descendant as far as six degrees from a common ancestor. (*Ibid.*, f. 7, p. 1, l. 7). The Vírāmitrodaya (f. 219, p. 1, l. 3) on the subject of inheritance to *strīdhan* in ordinary cases says: "On failure of [the husband], the succession devolves on the husband's nearest *sapindás*," which rule would apply even if Bhágirthi, having survived to inherit from her daughter Yesubái, had died in possession of the estate. The Dharmasindhu III., Uttarárdha, f. 6, p. 1, l. 10, prescribes that a woman's funeral rites are to be performed by the husband's brother and nephew, if they exist, in preference to her own father. It is indeed on this very principle that the rule of "*niyoga*," or appointment to raise up seed, was

rested by the earliest sages, and though A'pastamba (Pr. II., Pat. X., K. XXVII., 2 *et seq.*) repudiates the rule itself, he implicitly recognises the principle from which it was, as he thinks, improperly deduced. So also Manu, Ch. IX., Sl. 57-68.

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When, therefore, we say that the next of kin, *i.e.*, the *sapindás* of Bhágirthi and her husband, Bápu, are Yesubái's heirs, that means in the first instance Bápu's blood relations, not Bhágirthi's. That such a line of succession is conformable to the general rule of the Hindú law is evident, if indeed further demonstration be necessary, from what is said by Bálam Bhatta in the remark under Mitákshará, Ch. II., Sec. IV., pl. 5, that "amongst the more distant kindred the paternal line has invariably the preference before the maternal." Now Thamábái being descended from a common ancestor (Viñobá) with Bápu, is, according to Vijñanes'vará's doctrine, a *sapindá*, though, on account of her marriage, not a *gotraja sapindá* to him. As such she must inherit before Bhágirthibái's blood relations, who only come in when her husband's line is exhausted. This would be so even if the property had been that of Bhágirthi herself, and the rule is conclusive against the plaintiff's representative character in this suit while Thamábái is in existence.

This examination of the doctrine of the Mitákshará on the subject of *stridhan*—detailed, and even tedious, as it has been—was in a manner forced on us by the confusion that has prevailed on this important subject. Even the professional exponents of the Hindú law, the Shástris of the courts, have in most instances obtained but a glimpse of the true theory, and have then immediately lost sight of it.* The investigation we have made might be sufficient for the disposal, on the text itself, of the case now before us. But for the correct appreciation of the cases that have been cited in argument, it will be necessary to pursue this investigation somewhat further. We have seen that Vijñanes'vara includes all property inherited by a woman in her *stridhan*. In the same chapter (Miták., Ch. II., Sec. I., pl. 39) he had

* See the answers in West and Bühler's Digest, I., 239-242.

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previously arrived, through an elaborate course of argument at the conclusion that a widow takes the whole estate of her deceased husband separated in interest from his brethren. This doctrine, therefore, must have been fully present to his mind when he developed his theory of *strīdhan* in Sec. XI. He makes no distinction between the inheritance of a woman from her husband and her inheritance from any other person. The right which he thus confers on her is balanced by a corresponding right which he allows to the husband and his *sapindās*. That inheritance from a member of her own family, which on a woman's death would, according to the Bengal school, revert to the next heirs of him from whom she inherited (Colebrooke's Dig., Bk. V., T. 399, 477), and which, according to the Vyavahāra Mayūkha, would go to her heirs as though she had been a male, is assigned by Vijñānes'vara (Mitāk., Ch. II., Sec. XI., pl. 9, 12, 25) to her daughters, her sons, and after them to her husband and his *sapindās*. The two rules spring from the same source—a higher conception of a woman's capacity for property, and of her complete identification by marriage with her husband's family, than the Bengal lawyers would entertain; while the limiting of the widow's rights as an heir to the case of her husband's having been separated in interest from his brethren, harmonises more with the Hindú theory of the united family than the opposite doctrine of her taking his share equally, whether the family have been divided or not.

Vijñānes'vara, like all the Hindú lawyers, denounces the appropriation of a woman's property by her husband, except in cases of great pressure, and by the other kinsmen under any circumstances (Mitāk., Ch. II., Sec. XI., pl. 32, 33). But he lays down no rule as to the extent of the woman's own power over the property. The natural conclusion would seem to be that he considered this already sufficiently provided for as to his immediate subject, inheritance, by other lawyers, and by the analogies to be drawn from his rules as to the estate of a male proprietor. Now in Ch. I., Sec. I., pl. 27, 28, it is laid down that a man is "subject to

the control of his sons and the rest (of those interested) in regard to the immoveable estate, whether acquired by himself or inherited," though he may make a gift or sale of it for the relief of family necessities or for pious purposes.* It is clear, therefore, that a right of absolute disposal did not enter into Vijñānes'vara's conception of the essentials of ownership. He admits (Mitāk., Ch. II., Sec. I., pl. 25) the genuineness and the authority of the text of Nārada, which, with so many others, proclaims the dependence of women, which he says does not disqualify them for proprietorship. He allows a husband, as we have seen, in some cases to dispose of his wife's property. The inference to be gathered from these passages is strengthened if we look into his chief authorities. Manu allows women no independence. The verse denying it occurs in Yājñavalkya also (Ch. I.). Kātyāyana so frequently quoted in the Mitāksharā, says that the widow is to enjoy the estate frugally till she die, and after her the heirs (Colebrooke's Digest, Bk. V., T. 477), consistently with that passage of the Mahābhārata (T. 402) which limits the widow to simple enjoyment. Jagannātha (T. 402), referring to texts 476 and 477, observes that as a woman is not allowed to make away with immoveable property given to her by her husband, much less can she dispose at her will of such property inherited from him. Even Bṛhaspati, who, as we have seen, insists emphatically on a widow's right of inheritance, is equally emphatic in restraining her power of dealing with it (Vyāv. M., Ch. IV., Sec. VIII., pl. 3). His somewhat ambiguous expression cannot at any rate mean less than this. It seems a reasonable inference from these and other authorities that, as to immoveable property at any rate—and with immoveable property, according to the Hindú law, is classed every kind of property producing a periodical income—the woman's ownership is subject

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* If he reserve enough for the support of the family, however, the father is allowed to deal free from interference with what he has himself acquired. Such is the effect of the passage referred to when taken with Ch. I., Sec. V., pl. 10, unless the latter is to be referred—as perhaps on correct principles of interpretation, it ought to be referred—solely to moveable property.

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to the control of her husband, and of the other persons interested in the preservation of the estate, and that it cannot be needlessly dissipated at her mere caprice. Kátyáyana, indeed, as quoted by Nilkantha (Vyav. May., Ch. IV., Sec. VIII., pl. 4), says expressly "she has not property therein to the extent of gift, mortgage, or sale," except, as Nilkantha adds, for appropriate purposes. A widow may dispose as she pleases of property as to which this power is expressly conferred, but to recognise inherited property as part of her *stridhan* by no means involves the consequence that she can alien it without good reason. The argument in support of this consequence put forward by Jagannátha in his comments on Colebrooke's Digest, Bk. V., T. 399,* involves a very obvious fallacy.

Now the law of the Mitákshará applicable to this case being such as I have described, what is the bearing upon it of the principal cases that have been cited in argument? In the case of *Jamíyatrám v. Báí Janná (a)* Sir Joseph Arnould says: "The Mitákshará, Ch. II., Sec. II., Cl. 2, undoubtedly classes 'property acquired by inheritance' under the widow's *stridhan*, but (as pointed out in *Devkúvarbái's Case*) cl. 4 of the same chapter and section conclusively shows that the words 'property acquired by inheritance,' as used in cl. 2, relate only to what has 'been received by the widow from her brother, her mother, or her father,' *i.e.*, from her own family." On referring to the report of *Devkúvarbái's Case (b)* we have not been able to discover any such construction of the passages in the Mitákshará as that relied on by the learned Judge. Sir M. Sausse does, however, say (p. 133): "In regard to immoveable property [a widow's] estate is in the nature of that of a tenant for life;" and following this, Sir J. Arnould says: "When a separated Hindú dies leaving landed property and no sons, or sons' sons, his widow on his death takes for her life; and the daughters, subject to the widow's life-estate take an estate in remainder, vested immediately in interest, but not coming into the possession of themselves or their

* Vol. II., p. 527, of the Madras edn.

(a) 2 Bom. II. C. Rep. 11. (b) 1 Bom. II. C. Rep. 130.

sons, as the case may be, until after the death of the widow." Immediately afterwards the learned Judge quotes from Sir T. Strange a doctrine as to the right of inheritance in such cases which that author sets forth as the Bengal law in contrast with that of the Mitákshará (1 Strange, H. L. 248). In a somewhat similar case, *The Collector of Masulipatam v. Cavalry Vencata Narayanapah (c)*, their Lordships of the Judicial Committee remarked: "It was justly observed in the course of the argument, with reference to those authorities which speak of the widow's interest as a life-estate, that great confusion arises from applying analogies derived from the English law of real property to the Hindu law of inheritance; and that when so applied the terms by which we describe estates in land under the English law are more likely to mislead than to direct the judgment aright."

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"It is clear that under the Hindu law, the widow, though she takes as heir, takes a special and qualified estate. Compared with any estate that passes under the English law by inheritance, it is an anomalous estate. It is a qualified proprietorship, and it is only by the principles of the Hindu law that the extent and nature of the qualification can be determined." The same question has lately been very fully gone into in this court in the cases of *Lálchand* and of *Ghelá Pemá* against *Gumbái (d)*, in which the same view of the nature of a widow's estate has been taken.

In the case of *Lakshmibái v. Morobá (e)* the case of *Jamiyatráam v. Báí Jamná* was directly overruled, and in *Bháskar Trimbak A'charya v. Mahádev Rámji (f)*, the learned Judge (p. 14) distinctly, though not in terms, abandons the view taken by him in the earlier case. It cannot, therefore, be considered as of any authority.

In the case of *Navatrám A'tmárám v. Nandkishor Náráyan (f)* it was laid down (p. 216) "that property inherited by a married woman from her father, whether or not it be

(c) 8 Moo. Ind. App. 550.

(d) 8 Bom. H. C. Rep., O. C. J. 140.

(e) 4 Bom. H. C. Rep., O. C. J. 163; 5 *Ibid.* 139.

(f) 6 Bom. H. C. Rep., O. C. J. 1. (f) 1 Bom. H. C. Rep. 210.

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strictly entitled to the name of *strīdhan*, descends on her death to her own, and not to her father's heirs:" that is, it descends like *strīdhan*, or, as it is put in the head-note, "class- es as *strīdhan* and descends accordingly." In the case of *Bhāskar v. Mahādev*, already cited, Sir J. Arnould says (p. 18): "Lakshmi taking by inheritance from her brother would take his estate as woman's property." In the same case the learned Judge expresses an opinion (p. 17) that the only exception to the rule that a woman's inherited property is *strīdhan*, arises in the case of property inherited from her husband. In *Narsāppū v. Sakhārām (g)*, Gibbs, J., on the other hand, says (p. 218) that "the rule under which the widow succeeds to her son's separated property is the same under which she succeeds to her husband's in a divided family." If a son's property inherited by his mother is sub- ject to limitations that deprive it in her hands of the charac- ter of *strīdhan*, much more should this be the case with property so taken by the more distant paternal grandmother. Yet in the latter case it is assumed by both Vis'ves'vara and Lakshmidēvi in their commentaries that the estate of course becomes *strīdhan* (Mitāk., Ch. II., Sec. IV., pl. 2, second note). Thus while the parallel drawn by our learned brother Gibbs between property inherited from a husband and from a son is perfectly correct, it is so only on this condition, always to be remembered, that the Mitāksharā ranks property inherited from a husband as *strīdhan*. The position is con- firmed by this very comparison. The Mayūkha places the sister at the head of the *sapindās*; the Mitāksharā provides expressly for inheritance from a husband and from a son; but in neither is any hint to be found that the interest in property thus taken differs in any way from that in property inherited from other relations. The doctrines of the two works, though different on some points, are entirely self- consistent. So, too, in a manner are the doctrines of the Bengal school, though not without some exceptions. But a general right to take inherited property as *strīdhan*, qualified as to property descending from a husband or a son by rights

deduced from the Bengal law, is consistent with neither the one system nor the other.

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Of the Madras cases that of *Kullammāl v. Kuppu Pillai* (*h*) lays down that a Hindū wife or widow may alienate her *strīdhan*, whether it be moveable or immoveable, except perhaps land given to her by her husband. The judgment of Sir C. Scotland, C. J., admits that property inherited from a husband is subject to restrictions on alienation. The *Mitāksharā*, as we have seen, blends such property with the other *strīdhan*. If then the one portion is subject to a restriction, so also is the rest, which is in fact substantially the result I have already arrived at with respect to such property classed as immoveable. In *Bachiraju v. Venkatapadu* (*i*) it was ruled that a mother inheriting from a son has not an absolute property in the estate, but merely a life-interest without power of alienation. In what sense this rule must be taken we have already endeavoured to show. At page 403 the learned Judges (Frere and Innes) say that the effect of the *Mitāksharā* doctrine is "of course to give [a woman] absolute property in it (an estate devolving by inheritance), and to change the line of descent." If by "absolute" we are here to understand "free from all restraints on disposal," no such consequence as "absolute property" according to our view can be said necessarily to follow, in this Presidency at any rate, from the premises. The authority of the *Mayūkhā* fortifying the *Mitāksharā* is too strongly against it, and while it establishes a complete property, at the same time prevents capricious dealing with the estate. At page 405, again, the learned Judges ground themselves upon *Vijñānes'vara's* omission in Ch. II., Sec. XI., to enlarge upon the proof that inherited property may be *strīdhan*, as an argument against the soundness of his theory. But then it must be borne in mind that he had earlier in the same chapter dealt elaborately with the very topic of women's inheritance, especially a widow's inheritance from her husband. To go further into the subject in Sec. XI. would have been quite superfluous. While, therefore, I adopt generally the conclusion

(*h*) 1 Mad. H. C. Rep. 85.

(*i*) 2 Mad. H. C. Rep. 402.

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arrived at in this case, I do not regard myself as bound by all the dicta thrown out in the course of the judgment.

In *Sengamalathammal v. Valaynda Mudali* (j) it was ruled broadly that property acquired by a woman by inheritance is not to be classed as *stridhan*. We have seen how in this Presidency the doctrine, thus logically carried out to its proper consequences, has yet had to be gradually abandoned, in consequence of the recurring difficulties occasioned by its real inconsistency with Vijnānes'vara's consistent theory. In this judgment the learned Judges (Sir A. Bittleston, C. J., and Ellis, J.) suggest a fresh interpretation of the doctrine of the Mitāksharā, grounded on a comparison of it with a passage in the Smṛiti Chandrikā. This interpretation is that "though in the Mitāksharā, property acquired by inheritance is in general terms classed with the other description of woman's separate property, no more is meant than that some property acquired by women by inheritance will follow the rule of descent applicable to *stridhan*, though not falling strictly under any of the descriptions of such property" (p. 314). If the term "some" is to be thus applied to inherited property, it may with equal reason be attached to any other term in Vijnānes'vara's enumeration. His whole argument is to our minds convincing proof that he did not intend the ordinary sense of the words to be explained away in any case whatever.

Of the cases in the Judicial Committee of the Privy Council it is necessary to refer only to three. In that already cited, Lord Justice Turner says (p. 551) that, "according to the principles of the Hindoo law, the proper state of every woman is one of tutelage; they always require protection, and are never fit for independence," and "the restrictions on a Hindoo widow's power of alienation are inseparable from her estate." But she is not more dependent than a spinster or a *feme covert*. The condition of tutelage does not prevent any one of them from taking property as *stridhan*, yet none of the three therefore becomes, except under particular texts, "com-

pletely emancipated, perfectly uncontrolled in the disposal of her property." The limitations imposed on a widow by law, whatever her moral obligations may be, are less stringent than upon other women; see Jagannátha's comment under Bk. V., T. 477, of Colebrooke's Digest; so that she should, if there be any difference, be more, rather than less, capable than others of taking property absolutely. In *Mussamat Thakur Deyhee v. Rai Balak Ram (k)* it was decided that a widow cannot dispose of immoveable property inherited from her husband. Their Lordships did not find it necessary (p. 175) to determine whether the property was *strídhán* or not. In *Bhagwandeén Doobey v. Myna Baeé (l)*, their Lordships say: "It is settled beyond all question that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *strídhán*. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband forms part of a woman's *peculium* or *strídhán*." The two kinds of property, moveable and immoveable, doubtless fall under the same category, but that is *strídhán*. The restrictions on their alienation do not, as we have seen, prevent this; and as to the descent of the property, no case has been pointed out to us in which, after the doctrine of the Mitákshará had been fairly presented in argument, the devolution which it prescribes was held contrary to the law of this Presidency. If property inherited from a husband is to be excluded from the provision of the Mitákshará, then all inherited property must logically follow it: the rule laid down is the same for all; and all those decisions which recognise inherited estates as *strídhán* rest on a false principle. At page 512 their Lordships say: "Both the Viváda Chintámani and the Mayúkha confine *strídhán* within the definitions of Manu and Kátyáyana," and exclude from it property inherited by a woman from her husband. We have seen that the Viváda Chintámani impliedly recognises more than the six kinds of *strídhán*, and that the Mayúkha expressly adopts Vijñánes'vara's explanation. Immediately

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afterwards their Lordships say : " Another argument against including the wealth inherited from her husband in a woman's *strīdhan*, as defined by the 2nd clause of the 11th section of the 2nd chapter of the *Mitāksharā*, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to ' the whole property as before described, cl. 11.' This is intelligible if the words ' property which she may have acquired by inheritance,' in the second clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him." Here the word " whole" is interpolated from *Bālam Bhaṭṭa*. The husband is declared the heir " in the first place," and provision is made for the succession of his *sapindās*. His mention as a possible heir no more implies that he must necessarily survive his wife than the mention of other possible heirs implies the contrary. If these considerations should be presented to their Lordships in an appeal from this Presidency, it is reasonable to suppose that they would have much weight. Unreservedly accepting their Lordships' determinations as conclusive in all similar cases arising under the same laws, it is not inconsistent with this principle that, without in any way questioning the correctness of the result arrived at in the case under consideration, which indeed for the purposes of the one we have to dispose of may be adopted as it stands, I should not feel bound by the reasoning on which it is founded to the inference that for Hindūs in Bombay the doctrine holds good that a husband's property inherited by his widow is not *strīdhan*, with the logical consequence, drawn by the Eastern lawyers, that no inherited property is *strīdhan*. In that case the *Mitāksharā* provides absolutely no rule for the devolution of the property, which, indeed, is another strong reason for adhering to its inclusive definition, and we must fall back either on the *Mayūkha*, which is equally inconsistent with a current of decisions derived from the analogies of the Bengal law, or else on the Bengal law itself. But in any of these cases *Thamābai*, as in the paternal line, and of the family from which the property in dispute descended to *Yesubāi*, is still her representative in relation to

that property. The plaintiffs, Lakshuman and Lakshmi, are by her excluded, and on this ground the decision of the court below should, I think, be reversed.

WESTROPP, C. J. :—The plaint in the suit was originally filed by Yesubái for the purpose of setting aside certain assignments alleged to have been made by her to the defendant Dámódhar and his wife, Thamábái. Yesubái having died before the suit was heard, an application was made before me to have the present plaintiffs' names substituted for that of Yesubái, and for leave for them to carry on the suit. That application was granted; the question of law and fact, as to whether they represented Yesubái or not, being reserved for consideration at the hearing. The learned Judge has found that Lakshuman and Lakshmi are the representatives of Yesubái. We agree with the learned Judge in his estimate of the evidence, and implicitly accept all the facts as found by him. The question of Hindú law arising from these facts is a difficult one, but looking (as I think we are in this island bound to do) to the Mayúkha, for the law to regulate this case, Thamábái must be regarded as the legal representative of Yesubái in respect of the property in question in this suit, and not the plaintiffs. Having regard to the reprehensible conduct of the principal defendant, Dámódhar, with reference to the alleged assignments by Yesubái, and to the fact that the defendant, Vijiárangam Mudliár, has not shown himself to be an innocent and *boná fide* purchaser of the property, we do not think we ought to give the defendant costs as against the plaintiffs. Each party must, therefore, bear their own costs throughout the case.

The decree of the Division Court will be reversed, but without costs.

Decree reversed.

Attorneys for the appellants : *Dallas & Lynch.*

Attorneys for the respondents : *Keir, Prescott, & Winter.*

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