came to the Court. It is no doubt true that an executor, when he has assented to a legacy and set aside funds to meet it, becomes a trustee, but, as observed by Mr. Justice Kekewich in *In re Mackay*[1], the exact moment of passage from the character of executor to that of trustee is difficult to define.

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The applicant in this case had not in our opinion become a trustee so as to incur all the liabilities of a trustee. He was still an executor and could as an executor have pleaded limitation against the claims of beneficiaries, and so long as he occupied that position he could not claim the advantages provided for trustees by section 34 of the Indian Trusts Act. His remedy, if he felt any doubt as to the manner in which he should administer the estate come to his hands, was to file an administration suit.

We hold that the opinion of the District Judge was given without jurisdiction, and we therefore direct that the proceedings be set aside.

Proceedings set aside.

G. B. R.

(1) [1906] 1 Ch. 25 at p. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

CHUNILAL PRANSHANKAR (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. SURAJRAM HARIBHAI AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 1), RESPONDENTS.*

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BHOGILAL VALABHRAM (ORIGINAL DEFENDANT NO. 1), APPELLANT, v. SURAJRAM HARIBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Hindu Law—Marriage—Asura form—Brahma form—Construction of texts.

Under Hindu Law, where the paternal or maternal relation of a girl, who is given in marriage, receive money consideration for it, the substance of the

* Second Appeal No. 252 of 1908.

† Second Appeal No. 392 of 1908.

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transaction makes it not a gift but a sale of the girl. The money received is what is called the "bride-price": that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her.

It is a principle enunciated by Vijnaneshvara that where all *smritis* are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes.

SECOND appeals from the decision of Dayaram Gidumal, District Judge of Ahmedabad, confirming the decree passed by Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The material facts are set out in the judgment.

Gokuldas K. Parekh for the defendants:—The finding of the lower Courts that the form of marriage in which Bai Mani was given away was Asura is erroneous. The form of a marriage under Hindu Law is determined by the preliminaries adopted in it. Where, therefore, the preliminaries adopted appertain in fact to the Brahma form of marriage, the marriage is to be taken as performed in the Brahma form, no matter whether the money was paid to the relations of the bride.

In verse 31, chapter 3 of the *Manava Dharma Shástra*, where the essentials of the Asura form of marriage are defined, the word ज्ञातिभ्य: (*jnatibhyah*) means the paternal kindred. In verse 63 of the Achara Kánda of Yajnyavalkya which enumerates the relatives who are competent to give away a girl in marriage, no mention is made of maternal relations.

In this case, the maternal uncle was appointed guardian of the person of the minor girl by the District Court and was authorised to give the girl in marriage. He was in the position of a stranger or neighbour. If he abused his powers and took money secretly for giving the girl in marriage, that would not affect the form of marriage.

Lallubhai A. Shah for the respondents:—According to Yajnyavalkya the test to determine whether a marriage was in the Asura form or not is the payment of money—आसुरो द्रविणा दानात् (*Asuro dravina danat*). In his Sanskara Mayukha, Nilkantha

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describes the Asura form thus: धनेनोपतोष्योपयच्छेत्—(*dhaneno-ptoshyopayachet*) *i.e.*, where one marries after satisfying by means of (paying) money.

The word ज्ञातिभ्यः (*jnatibhayah*) in Manu's verse 31 means no doubt paternal relations. But it is illustrative and not exhaustive. Similarly the text of Yajnyavalkya which enumerates the relatives who are competent to give a girl away in marriage is not exhaustive. See also *Mulchand* v. *Bhudhia*[1].

As money was taken by the maternal uncle for giving the girl in marriage, the marriage assumed the Asura form. The ceremonies gone through may have been pertinent to the Brahma form: that did not change the character of marriage. The test is the payment of money. See *Vijiarangam* v. *Lakshman*[2]; and *Venkatacharyulu* v. *Rangacharyulu*[3].

CHANDAVARKAR, J.—The facts, upon which the questions of law in the two second appeals turn, are shortly these:—

The property in dispute originally belonged to one Dowlatrai Becharlal. He made a will on the 9th of October 1889, and died ten days later, leaving him surviving two daughters, Ladkore and Mani. Mani being a minor, the District Court of Ahmedabad appointed her maternal grandmother Raliata and her maternal uncle Chunilal guardians of her person, and the Názir of the Court guardian of her property, under the Guardians and Wards Act. By the order of appointment the guardians of the person of the minor were enjoined not to give the girl in marriage without the Court's permission. Subsequently Chunilal applied to the Court for permission to betrothe the girl to one Harprasad. The permission was granted, but some disagreement having arisen between Chunilal and Harprasad's grandfather, the former applied to the Court for revocation of the order granting the permission. The Court declined to revoke the order; nevertheless Chunilal gave the girl in marriage to another boy. This was in violation of the Court's order.

(1) (1897) 22 Bom. 812.
(2) (1871) 8 Bom. H. C. R. 244 at p. 256 (O. C. J.).
(3) (1890) 14 Mad. 316 at p. 319.

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Some time after that, Mani lost her husband, and she herself died childless on the 22nd of Novemer 1905.

The respondents Nos. 1 and 2 in Second Appeal No. 252 brought the suit claiming in their plaint the property in dispute, which Mani had left at her death, as reversionary heirs of her father Dowlatrai. They alleged that under Dowlatrai's will the property had come to Mani but with only a life interest in it; and that on her death it descended to them as Dowlatrai's heirs.

At the trial of the suit the said respondents prayed for amendment of the plaint to the effect that Mani had taken an absolute estate in the property under her father's will and that on her death they were entitled to it as her heirs. The amendment was allowed and evidence led accordingly.

Both the Courts below have found upon the evidence that Chunilal gave the girl in marriage by receiving money consideration for the gift. Upon that fact they have held that the marriage was in the *Asura* form. The result of that finding being that on Mani's death her stridhan, in default of her issue, must go to her nearest relations on her father's, not her husband's side, the Courts have given the respondents a decree, holding that they are entitled to the property as Mani's heirs.

The first point of law urged in this Second Appeal (No. 252) from that decree is that the amendment of the plaint ought not to have been allowed, since it transformed the nature of the suit into one of a character inconsistent with that originally brought. At first the respondents claimed the property as Dowlatrai's heirs; subsequently they abandoned that position and claimed as heirs to his daughter Mani. There is no inconsistency if we have regard to the substance of the claim. The respondents claimed the property on the strength of Dowlatrai's will. The Court was asked to construe it and to give the respondents a decree for the property. It was competent for them to abandon their first construction and substitute for it another as the basis of their title.

It is next contended that the finding of the Courts below that the marriage of Mani was in *Asura* form is erroneous in law, be-

cause there is no evidence that her maternal uncle, who gave her in marriage as her guardian, received money as consideration for it. The question is one of fact and its determination must depend on the evidence of surrounding circumstances and probabilities, if direct evidence of payment of money is not forthcoming.

Then it is urged that, assuming that money was received by Chunilal as consideration for the gift of the girl in marriage, that fact will not give the marriage an *Asura* form under the Hindu Law, if the marriage itself was solemnised according to the rites prescribed for the *Brahma* form; and that the Court must presume in the first instance in every case that the marriage was in the latter form.

The *primâ facie* presumption no doubt is that every marriage under the Hindu Law is according to the *Brahma* form; but it can be rebutted by evidence. And here, according to the findings of the Courts below, it has been rebutted.

Where the person who gives a girl in marriage receives money consideration for it, the substance of the transaction makes it, according to Hindu Law, not a gift but a sale of the girl. The money received is what is called bride-price; and that is the essential element of the *Asura* form. The fact that the rites prescribed for the *Brahma* form are gone through cannot take it out of that category, if there was pecuniary benefit to the giver of the girl. The Hindu law-givers one and all condemn such benefit and the *Shastras*, regarding it as an ineradicable sin, prescribe no penance for the sale of a bride (see the Agni Puran cited in Shudra Kamalakar, page 108).

Whenever, therefore, it is proved, the Courts must hold the marriage to have been in the *Asura* form, however much it might be disguised by the adoption of the rites of the *Brahma* form. That adoption cannot take away the taint of the lower form.

Under the Hindu law, certain forms are common to both the *Brahma* and the *Asura* form of marriage. Unless those forms are gone through, the relation of husband and wife is not

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brought about in either case and there can be no marriage tie. Those forms consist in the invocation before the sacred fire and the seven steps (Saptapadi) taken before that fire by the bridegroom and the bride jointly. As said in the Madana Parijata (page 157, Bibliotheca Indica Series), "it should not be doubted whether the relation of husband and wife is produced in the *Asura* and other forms of marriage by reason of the absence of the *saptapadi* or seven steps ceremony therein. Even in those forms of marriage the observance of that ceremony is prescribed by way of command after acceptance." Those steps taken, the marriage tie becomes indissoluble. (The Hindu Law of Marriage and Stridhan by Sir Gooroodass Banerjee, 2nd Edition, page 89; Madhavacharya's Parashara Samhita, Bombay Oriental Series, Vol. I, part II, pages 88 and 89).

But what distinguishes the one form from the other is that, in a *Brahma* marriage it is a gift of the girl pure and simple; in the *Asura*, it is the sale of the bride for pecuniary consideration. If the sale exists, its effects cannot be undone by the form of a gift being gone through.

It is contended by Mr. Gokuldas for the appellant that the true test of the *Asura* form of marriage is the taking of the bride-price by none but the father of the girl, or, in default of him, by any of her paternal kindred giving her in marriage. In support of this argument the following Smriti of Manu(1) is relied upon:—

"When (the bridegroom) receives a maiden, after having given as much wealth as he can afford, to the kinsmen and to the bride herself, according to his own will, that is called the *Asura* rite."

The original in this text for "kinsmen" is *jnati*, which, Mr. Gokuldas argues, means "paternal kindred." That no doubt is the meaning, according to certain scholiasts(2). So also in his gloss on the third verse of Yajnyavalkya in the Chapter on "Impurity," where the word *jnati* occurs, Vijananeshwara in

(1) Sacred Books of the East, Vol. XXV, page 81, Section 31.

(2) See the St. Petersburgh Sanskrit Dictionary under the word *Jnati*.

the Mitakshara[1] explains the word as meaning *samana gotraja sapindas* and *samanodakas.*

But the question is whether this text of Manu uses the word *jnati* as exhaustive, confining the right to receive the bride-price to paternal relations in the absence of the father, or as illustrative, extending it to all who have the right to give the girl in marriage.

The answer to that question must depend upon whether the duty of giving a girl in marriage devolves in the first instance upon her father, and in default of him, on any of her paternal relations only, or extends to all relations, paternal or maternal.

A text of Yajnyavalkya[2] mentions the paternal relations as being charged with the duty. But Narada[3] and Vishnu[4] include the maternal relations also. The former specifically mentions the girl's maternal uncle. Nilakantha in his Sanskara Mayukha quotes as authorities both the text of Yajnyavalkya and of Narada. Madhavacharya in his Commentary on Parashara Samhita quotes as authority the text of Narada.

No doubt Vijnaneshwara in the Mitakshara quotes only Yajnyavalkya's text and makes no reference either to Narada's or Vishnu's. But no importance attaches to that circumstance. The Mitakshara purports to be a commentary on Yajanyavalkya, and Vijnaneshwara[5] himself enunciates the principle that where all Smritis are of equal importance, and where there is conflict between two or more Smriti writers, we are free to choose any we like. Nilakantha in the Vyvahara Mayukha cites Yajnyavalkya's text that where there is a conflict between two or more Smritis that one should be accepted which is conformable to equity[6].

The rule of the Hindu Shastras that a girl must be given in marriage as far as possible and that she cannot give herself

(1) Moghe's Third Edition, page 274.

(2) Mandlik's Hindu Law, page 169, Sections 63 and 64.

(3) Sacred Books of the East, Vol. XXXIII, part I, page 169.

(4) Sacred Books of the East, Vol. VII, page 109.

(5) विरोधे तु विकल्पः: Moghe's Edition (3rd) of the Mitakshara, page 8.

(6) Mandlik's Hindu Law, page 5, lines 17 to 20.

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unless there is no relation to give her is founded upon the theory that women have no independence. Her father, or, in his absence, any relation who, as guardian standing in the father's place, has supported and protected her during her virginhood, is charged with the duty. This is pointed out in the Mitakshara[1], where it is said :—"The gift is enjoined only in the case of a virgin who has been protected by her father and others." The word "others" being construed *ejusdem generis* with the word "father"—a construction of which several illustrations are to be found in the writings of the Nibandhakaras or Commentators on Hindu Law—the passage means that, where there is no father, the duty of giving a girl in a marriage devolves on a relation of hers who stands in his place as her legal guardian and has as such protected her.

If, then, the Smritis of Narada and of Vishnu are as authoritative as the Smriti of Yajnyavalkya, the maternal relations of a girl are among the kindred whose duty it is to give her in marriage. And the text of Manu, on which Mr. Gokuldas strongly relies, must be construed as being descriptive, not enumerative, according to the canon of interpretation in Hindu Law, known as *nyaya samyatwa* or *samana nyayatwa*, that a rule, which in terms applies to one individual, who is a member of a class composed of many persons, all possessing the same property or attribute, must be held to apply not only to that individual but also to all the other members of the same class in matters relating to that property, because all of them stand in respect of it on the same footing[2]".

An instance of the application of this rule of interpretation is to be found in the portions of the Mitakshara and of the Vyavahara Mayukha which deal with partition. There Vijnaneshwara and Nilakantha respectively refer to a text of Manu, which says that if at a partition in a joint familly, consisting of two or more brothers, the elder or eldest deceive the younger

(1) Moghe's Third Edition, page 265. पित्रादिरक्षितायाः कन्याया एव दानोपदेशात्.

(2) बहूनामेकधर्माणामेकस्यापि यदुच्यते । सर्वेषामेव तत्कार्यमेकरूपा हि ते स्मृताः

The Mitakshara, Moghe's 3rd Edition, page 397. The rule is quoted there as Ushanas's. In the Vira Mitrodaya it is quoted as Baudhyayana's, page 25 : Shastri Gholap C. Sarkar's Edition.

brother or brothers by concealing any part of the joint wealth, he (the elder or eldest) shall be punished by the king and deprived of his share. Vijnaneshwara explains that though Manu mentions only the elder brother, the text applies to the younger equally, if the latter be guilty of similar fraud. Nilakantha too says the same.

If, then, the maternal relations of a girl are like the paternal relations in the category of those charged with the duty of giving her in marriage, what Manu says in the text relied upon by Mr. Gokuldas about the paternal relations must apply to the maternal relations also on the rule of interpretation just mentioned. The receipt of bride-price is no doubt condemned by Manu as a sin: but he allows as lawful a marriage in which such receipt enters as consideration for the sale of the girl; and it is difficult to understand why the marriage should be *Asura*, if the girl happens to be given by one of her paternal relations by receiving a gratuity, whereas it should not be that if the party giving her and receiving the gratuity happens to be one of her maternal relations.

In the present case Chunilal (defendant No. 2), who gave Mani in marriage, was her maternal uncle; and a maternal uncle is mentioned among the guardians competent to give a girl in marriage. Besides, by reason of that relationship he was at the time of the marriage the legal guardian of her person duly appointed by a Court of Law. He supplied to her the place of her father. It is true that his power to give her in marriage was subject to the condition of the Court's consent; and he infringed it. But that circumstance cannot affect the question as to the form of marriage, if he was, according to law, her relation and guardian, and as such was competent to receive the bride-price and give the marriage the *Asura* form.

We are not to be understood as deciding that the conclusion above stated would apply to the marriage of a girl who has been sold in marriage by a person who was neither her paternal nor maternal relation. According to the Shastras, the giving of a girl in marriage is a pious act, and even a person who is in no way related to her may so give her, if she has no relations, or, if there being relations, they are unwilling to discharge that duty.

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In Madan Ratna Skandha quoted in the Nirnaya Sindhu (page 245, Jnana Sagar Edition) it is said that "it is proper (for a man) to give in marriage according to the (prescribed) religious rites the unmarried daughter of another person, even if she is not of the same *gotra* as himself, after making her his own (daughter) and by (presenting) her (with ornaments) of gold." Such a case, when it arises, will have to be determined on its own merits.

Lastly, it remains to notice Mr. Gokuldas's argument that Mani's marriage should not be held to have been in the *Asura* form, because there is no evidence and no finding that Mani received any money for herself as bride from the bride-groom before marriage, whereas the text of Manu, which defines that form, requires that payment of money as consideration for the gift of the girl in marriage shall be not only to her relations (*jnati*) giving her but it must be also to the girl. But, as Nilakantha points out in his Sanskara Mayukha[1] on the authority of another text of Manu, the taint of the *Asura* form lies in the gratuity paid to the giver of the bride for his benefit, not in anything paid to her; and it is the taint which determines the form.

On these grounds the decree of the Court below must be confirmed with costs.

Decree confirmed.

R. R.

(1) एवंचात्मार्थं धनग्रहणे कन्यार्थेतुन दोषः [Samskara Mayukha: Amarapurkar's Edition, page 45.]