(7)

A50

PSN

# IN THE SUPREME COURT OF INDIA

## CIVIL APPELLATE JURISDICTION

## CIVIL APPEAL NOS. 10866-10867 OF 2010

**IN THE MATTER OF: -**

M. Siddiq (D) Thr. Lrs. ... Appellant

**VERSUS**

Mahant Suresh Das & Ors. etc. etc. ... Respondents

**AND**
**OTHER CONNECTED CIVIL APPEALS**

**SUBMISSION NO.4**
**BY**
**DR. RAJEEV DHAVAN, SENIOR ADVOCATE**



**COMPILATION OF ESSAYS IN CLASSICAL AND MODERN HINDU LAW BY J. DUNCAN M. DERRETT**

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

# ESSAYS IN CLASSICAL AND MODERN HINDU LAW

BY

J. DUNCAN M. DERRETT

D.C.L. (Oxon.), LL.D., Ph.D. (Lond.), of Gray's Inn, Barrister;
Professor of Oriental Laws in the University of London

VOLUME TWO

## CONSEQUENCES OF THE INTELLECTUAL EXCHANGE WITH THE FOREIGN POWERS




LEIDEN
E. J. BRILL
1977

(1962) 64 *'The development of property in India'*, Z. V. R pgs. 15 – 123.

# The Development of the Concept of Property in India c. A. D. 800—1800 *

Investigations of the concept of Property appear from time to time in the pages of this and other Journals, and form the subject-matter of numerous books[1]). No comprehensive treatment of Property-rights, or of the growth of consciousness of the nature of that entity, Property, can be complete without taking into account Indian material. Sir Henry Maine insisted upon this repeatedly[2]). Kohler was conscious that Indian sources had a peculiar interest[3]), but in his day so little was available to compara-

[1]) F. de Coulanges, *Origin of Private Property;* P. Lafargue, *Evolution of Property,* 5th. edn. (London 1908); C. J. M. Letourneau, *Property, its Origin and Development* (trans.) (London 1892); E. Beaglehole, *Property* (London 1931); P. Jaure, *Propriété* (Paris 1935); V. Kruse, *Right of Property,* trans. Federspiel (Oxford 1939); C. R. Noyes, *Institution of Property* (New York/Toronto 1936). *Z. f. vergl. Rechtsw.*, LX, LXI, LXIII; also E. J. M. Kroker, „Concept of Property in Chinese Customary Law", *Trans. As. Soc. Japan,* 3d. ser., VII, 123—46. See also S. Fuchs, „Property concepts among the Nimar Balahis", *J. B. B. R. A. S. (N. S.),* XVIII, 79 f.

[2]) Derrett, "Sir Henry Maine and law in India", 1959 *Jurid. Rev.,* 40 f., 44.

[3]) J. Kohler, *Altindisches Prozeßrecht.* Mit einem Anhang: *Altindischer Eigenthumserwerb* (Stuttgart 1891), where an account of adverse possession and related matter appears at pp. 53—6; but note that amongst the ancient and primitive systems of law mentioned briefly in F. von Holtzendorff and J. Kohler, *Enzyklopädie der Rechtswissenschaft* (Leipzig-Berlin 1915), i, 17—18, Indian law finds no place. His own contributions by way of articles were not, however, by any means slight: „Das indische Strafrecht", *Z. f. vergl. Rechtsw.* XVI, 1903, 179—202 is a com-

tive lawyers that the Indian system remained virtually unexploited. Not that Kohler did not encourage the discovery of facts from that source: the rather unreliable K. P. Jayaswal, who made more than a mark upon Indian legal studies, acknowledges with gratitude Kohler's support[4]). But until 1930 the materials were so scattered, and appeared so recondite—some moreover were the subject of almost rancorous controversy[5])—that comprehensive study by a non-Sanskritist seemed out of the question, and no Sanskritist had then published any treatment approaching completeness and balance. However, a comparison between the attitude of John. H. Wigmore and those of, for example, E. Benveniste and C. de Dorlodot is illuminating. Wigmore, writing in 1897, long before adequate researches into Indian ideas of Property had been made available, treated a few meagre Sanskrit sources on *ādhi* (pledge, mortgage) with respect, keen appreciation, and critical power[6]); the other two scholars, writing in our own day, show a complete lack of acquaintance with more than the most superficial facts about the Indian scene[7]), and with that lack of acquaintance naturally goes a lack of interest and lack of desire to probe further. The fault, obviously, is attributable to a failure of communication between the Sanskritists writing for lawyers or economic historians on the one hand and the legal historians and comparative lawyers who should read their work on the other. This failure of communication requires the work of an intermediary who has a foot in both worlds, and

mentary on Jolly's „Das altindische Strafrecht nach der Mitākṣarā", ibid., 108—78; while Kohler's „Eine indische Entscheidung über die Beerbung einer unverheirateten Frau", *Z. f. v. R.* XXVII, 1912, 273—7 (a critical presentation of [1911] 15 C. W. N. 1068—9) shows that he intended to maintain an active association with Anglo-Hindu law as well as the śāstra. His interest to collect Indian customary law is evidenced in many articles in this journal.

[4]) Preface to *Manu and Yājñavalkya* ... (Calcutta 1930).

[5]) The question of the king's ownership of the soil. Below, p. 94, n. 318.

[6]) "The Pledge-Idea: A study in comparative legal ideas", (1897—8) 10 *Harv. L. R.* 321—350, 388—417; 11 *Harv. L. R.* 18—39.

[7]) Benveniste, «Don et échange dans le vocabulaire indo-européen», *Année Sociologique*, 3rd. ser., 1948—9 (Paris 1951), 7 f. A reference to the root *arh* and a suggested relation with the Gk. ἀλφάνω occurs at p. 19. Dorlodot, «Le concept de la propriété, dans les droits de l'antiquité», *Rev. de Droit Intern. et de Droit comp.*, 1958, hardly moves beyond the most superficial sources. The neglect of P. N. Sen's lectures (written in 1908, pub. 1918) is extraordinary in view of his width of treatment and enviable clarity of exposition.

this paper is offered in that spirit. It is not intended to be a comparative treatment of Property, nor an English version of a Sanskritic treatise on *svatva:* it is an attempt to communicate what one group have to tell to others who have hitherto been rather unwilling to listen.

Reference will be made in the text and footnotes to Indian terms. It is essential to think (so far as is practicable here) in those terms, and a short select glossary is provided (III). References are frequently made to the work of previous writers, none of whom has attempted to deal completely with the phenomenon of Property in India: a list of abbreviations appropriate to those most commonly cited is provided[8]). Where only one edition exists of a *śāstric* work bibliogra-

---

[8]) Bhāruci. *Manu-śāstra-vivaraṇa* by Bhāruci, or Ṛju-vimala. Cited by pages of the manuscript in the writer's possession.

Bṛ. *Bṛhaspatismṛti (Reconstructed)*, ed. K. V. Rangaswami Aiyangar, Baroda 1941.

*BSOAS.* Kuttā. J. D. M. Derrett, "*Kuttā:* a class of land tenures in South India", *B.S.O.A.S.*, XXI, 1958, 61—81. *

*BSOAS.* Prop. J. D. M. Derrett, "An Indian contribution to the study of Property", *B.S.O.A.S.*, XVIII, 1956, 475—498. *

*Dh.K. Dharma-kośa, Vyavahāra-kāṇḍa*, ed. L. S. Joshi, Wai, 1937—41, 3 vols, paged continuously, in double columns.

J. Jaiminīya-Mīmāṃsā-sūtra, for which see Kevalānandasaraswatī, ed., *Mīmāṃsādarśaṇam*, Wai, 1948, or with Śabara's comm. in the Bibl. Indica series.

Jagannātha. *Vivādabhaṅgārṇava*, Mss. I. O. 1768, 1770; trans. H. T. Colebrooke, *A Digest of Hindu Law on Contracts and Successions*, 3rd., edn., Madras, 2 vols., 1864—5.

*JESHO.* J. D. M. Derrett, "The right to earn in ancient India", *Journal of Economic and Social History of the Orient*, I, 1957, 66—97.

Jhā HLS. *Hindu Law in its Sources* by Gangānātha Jhā, Allahabad, 2 vols., 1930—3.

JhāS. *Shabara-bhāṣya* (trans. of Śabara on Jaimini) by Gaṅgānātha Jhā, Baroda, 3 vols. with index vol., 1933—45, the three vols. paged continuously.

K. *History of Dharmaśāstra* by P. V. Kane, Poona, 5 vols. in 6 pts. already published, 1930—58, cited by volume and page.

Kātyāyana. *Kātyāyanasmṛtisāroddhāra or Kātyāyanasmṛti on Vyavahāra*, ed. P. V. Kane, Bombay 1933. Cited by *śloka*-number.

*KVRA. Introduction to Vyavahārakāṇḍa of Kṛtyakalpataru* by K. V. Raṅgaswāmī Aiyangār, Baroda 1958.

MBh. *Mahābhārata*, Calcutta edition and/or translation unless otherwise specified.

Medh. *Manusmṛti with Manubhāṣya of Medhātithi*, ed. Gaṅgānātha Jhā, Calcuttá, 2 vols., 1932—9; trans. G. Jhā. Calcutta, 5 vols. in 9 pts., 1921—6.

phical particulars are omitted, and to save space the regular references to Indian case-law are given without the name or names of the second party. It will be seen that reference is frequently made to previous publications of the present writer: this does not imply that any of them was definitive—since European studies in this branch of Indian law ceased[8a]) in 1830, and since even by then prac-

---

Mit. *Mitākṣarā. Yādnyavalkyasmṛiti* (sic), ed. W. L. S. Paṇśīkar, Nirṇayasāgar Press, Bombay 1909. Trans. H. T. Colebrooke, *Two Treatises on the Hindu Law of Inheritance*, various editions, cited by paragraphs. Trans. of *Vyavahārādhyāya, Yāj̃ñavalkyasmṛti with Mitākṣarā, Vīramitrodaya and Dīpakalikā*, by J. R. Ghapure, Bombay, 2 pts., 1938.

*MRP.* *Madanaratnapradīpa (Vyavahāraviveḳoddyota)*, ed. P. V. Kane, Bikaner 1948.

N.K. *Nyāya-kośa*, by B. Jhalakīkar, ed. V. S. Abhyankar, Poona 1928.

*NLPD.* *Nyāya-līlāvatī-prakāśa-dīdhitī* by Raghunātha Śiromaṇi, Ms. I. O. 1213 b, cited by fos.

*(N)STV.* *(Nyāya)-siddhānta-tattva-viveka* by Gokulanātha, Ms. I. O. 1436 b, cited by fos.

*PM.* *Padārtha-maṇḍana* by Veṇīdatta, ed. G. S. Nene, Benares 1930.

*PTA.* *Padārtha-tattvāloka* by Viśvanātha Siddhāntapañcānana, Ms. I. O. 1698 c, cited by fos.

*PTN.* *Padārtha-tattva-nirūpaṇam* by Raghunātha Śiromaṇi, ed. K. H. Potter, Cambridge, Mass., 1957.

Sar.Vil. *Sarasvatī-vilāsa* by Pratāpa-rudra (attrib.). *Vyavahārakāṇḍa*, ed. R. Shama Sastry, Mysore 1927, cited by pages. *Hindu Law of Inheritance according to the* ... trans. T. Foulkes, London 1881, cited by sections.

Sen. *General Principles of Hindu Jurisprudence* by Priyanath Sen, Calcutta 1918.

Sen-Gupta. *Evolution of Ancient Indian Law* by N. C. Sen-Gupta, London and Calcutta 1953.

Sm.C. *Smṛticandrikā* by Devaṇṇa-bhaṭṭa, ed. J. R. Gharpure, Bombay, 2 pts. in 1 vol., 1918. Cited by pt., and page.

* *Sv.Rah.* *Svatva-rahasya*, anon., cited by paragraphs of forthcoming edition. For the text see J. D. M. Derrett, "Svatva Rahasyam: a 17th century contribution to logic and law", *Annals of Oriental Research* (Madras), XIII, 1957, 42—8

* *Sv.Vic.* *Svatva-vicāra*, anon., edited in trans. at *BSOAS*. Prop.

*Svatavādārtha.* *Svatavādartha* by Jayarāma, cited by pages of the manuscript in the writer's possession.

*Viv.Can.* *Vivāda-candrikā* by Anantarāma, Ms. I. O. 1530, cited by fos.

Viv.Cin. *Vivāda-cintāmaṇi*, cited from the trans. by Gaṅgānātha Jhā, Baroda 1942.

Vy.May. *Vyavahāra-mayūkha*, ed. P. V. Kane (Poona), trans. J. R. Gharpure (Bombay).

[8a]) With the death of Colebrooke who, though he possessed the

ically nothing of what was known was in print, to commence investigations has meant beginning from the beginning, and progress proceeds along with publication. Very sparing reference has been made to English writings on the subject of land-ownership and revenue, of which a veritable flood appeared between c. 1790 and c. 1858. The documentation and analysis of that somewhat peculiar material is a task which logically follows, rather than precedes, this present study. We are concerned with what Indians thought and did and wrote; not with what Europeans thought they were thinking, etc.

## I. The Interest of the Indian Concept of Property

To the political historical or economic historical student of India the nature of Property as understood by the Indian civilisation has immediate interest in several contexts. Agricultural indebtedness, "land reform", the abolition of "casteism", and the future of the Joint Family, are all pressing contemporary problems. The "dowry question" is a pressing social problem[8b]). And the old problem, whether the sovereign was the owner of the soil, had ramifications of significance in the Freedom Movement, and is reflected in, for example, Soviet interpretations of modern Indian history[9]). It is commonly thought that the British did wrong in allowing a middle-class proprietor group to emerge; while the Indian nationalists took the opposite view, contending that the government was never the owner of the soil, and that private prioprietorship of the land as opposed to its produce (or some of it) was well established in India's legal past.

---

*Sv.Vic.* and *Sv.Rah.*, made no deliberate attempt to explain Hindu ideas of Property to legal historians. And see W. H. Macnaghten's attitude, op. cit. inf. n. 21, at p. 1, n. Nothing has been done since from the Anglo-Hindu law side, nor from *śāstric* side since the death of P. N. Sen in 1909.

[8b]) After the passing of a local statute in Jammu and Kashmir, and in an attempt to improve on provisions made in Mysore some years ago, the Indian Parliament passed in 1961 a Dowry Prohibition Act, the practical effect of which it is too early to estimate.

[9]) See for example the various contributions of K. A. Antonowa and G. G. Kotowski to *Die ökonomische und soziale Entwicklung Indiens*, ed. W. Ruben (Berlin 1959), and Kotowski's paper at the XXV Intern. Congr. of Orientalists, Moscow 1960, "Some aspects of the disintegration of village communities in India in the 18th—early 19th century."

But these discussions have far less interest for the comparative lawyer than a reflection which the last controversy arouses. Maine was fully aware that it was fruitless, and practically speaking harmful, to search in India for any counterpart of what was commonly known as Property in England[10]). It is natural to investigate Indian phenomena in terms of criteria developed in the investigator's own background. The somewhat comical results of parallel English and French analyses of Hindu legal institutions illustrate this perfectly[11]). To ask whether the King was "owner" is to subsume what is "ownership". And if one is not aware of what is meant by "ownership" in India the question is self-frustrating.

The great benefit of study of the Indian system is that it forces us out of established ways of thinking: this is equally true for lawyers brought up in the Civil law tradition and in the Common law. In the case of Property, the result is much the same, despite the fact that *dominium, proprietà, propriété, Eigentum*, and related terms have had a far more concrete meaning than the English term "property", which in fact is not a "term of art" as such[12]), but a mere classification of vindicable rights of a particular character. We note that Indians were keen to define Property, whereas we have all preferred not so much to define it as to make remarks about it. Whether we have been more cautious then they were, or more indolent, is open to question. That they made the attempt may serve as a stimulus for us.

It is evident, to anticipate some of the conclusions of this paper, that Indian jurists did not attribute to Property a definite *incidental* content. There might be several Owners of a thing, owning, not merely shares, but coextensive rights of different characters. This is logically, philologically, and legally unobjectionable. We shall chart

[10]) *Village-Communities in the East and West*, 7th edn. (London 1907), 158: "It seems to me that the error of the school which asserts the existence of strong proprietary rights in India lies much less in merely making this assertion than in assuming the existence of a perfect analogy between rights of property as understood in India and as understood in this country. The presumption is strongly against the reality of any such correspondence." See ibid., 73, 159. In fact Maine grossly underestimated the force of private property in Indian legal history.

[11]) Cf. any edition of J. D. Mayne's *Hindu Law and Usage* with L. Sorg, *Traité du Droit Hindou* (Pondichéry 1897) or G. Diagou, *Principes de Droit Hindou* (Pondichéry 1929—32).

[12]) Per Lord Porter in *Nokes* [1940] A. C. 1014.

some of the steps by which they arrived at this result. Its effect on the Romanist is naturally awaited with curiosity. When the gist of the Indian position was contributed by the present writer to the Fifth International Congress of Comparative Law (Brussels, 1958) this was René Dekkers' reaction[13]):

> L'on ne peut espérer trouver, dans les premiers siècles de l'histoire humaine, une notion bien définie de la propriété. La netteté des concepts du droit privé ne date que de l'époque classique romaine, c'est-à-dire des débuts de l'ère chrétienne. Tout ce qui précède cette époque reste partiel et flou, et manque de systématisation ... (On) montre les longues discussions auxquelles se livèrent les juristes et les philosophes hindous. Or, il ne s'en dégage point de terminologie ferme, ni de critères sûrs ... Pourtant, touts les civilisations pré-romaines ont connu des formes de maîtrise humaine des choses ... maîtrise, en tout cas, *préférentielle* et *respectée*. Ce sont toutes ces maîtrises ... que je propose d'appeler, pour les besoins de cet exposé, du nom de propriété.

After reading this study it is possible that the reader may see the concrete quantification or qualification of *dominium* as more of a handicap than an advantage; and the process whereby an institution achieves legal recognition only by attaching to itself a name which originally had a wider, or a specific narrower, meaning may seem clumsy and unintelligent. Precisely the same question might be asked of the Islamic law as of the Roman: what point is there in defining the owner of some rights over a thing as Owner, and the owner of other rights as something other than Owner: particularly when the word for "owner" implies nothing more than "belonging", "mastery", and the like? It is relevant to note here that the "fluid", syncretic, non-disjunctive approach to ideas and phenomena is notoriously characteristic of Hindu thought, gradual merging and broad identities being far more congenial even to their category-minded attitudes than staccato separations of things which share a characteristic.

The adjustment of English legal ideas to Indian incidents is an interesting field of study: the importation of English law into India was subject to many minute qualifications and a keen, though by no means systematic, selection[14]); yet for English, and English-trained, judges to administer Hindu law was an exercise in juridical acrobatics

---

[13]) *Rapports Généraux au V^e Congrès International de Droit Comparé*, ed. J. Limpens, i (Bruxelles 1960), 11—12.

[14]) See a study by the present writer entitled "The administration of Hindu law by the British" in *Comparative Studies in Society and History*.

which tested their grasp of fundamentals thoroughly, and Property provides a field where this test can well be observed[15]).

Interaction between Islamic and Hindu law in India is almost unevidenced. In general it appears that the Hindus learnt little from their Muslim neighbours and rulers (below, IV C V). But to our surprise there appears in the *Fatāwā-i ʿAlamgīrī* a rule that a gift is completed upon the giver saying, "I have given", so far as the giver is concerned, the acceptance of the donee being required only for the purpose of establishing the Property of the donee[16]). *Prima facie* this is Hindu doctrine[17]). In view of the fact that both declaration and acceptance *(ijāb u qubūl)* are the "pillars" of Islamic gift, it seems odd that the acceptance on the donee's part should be stated as unnecessary to terminate the rights of the donor, and indeed acceptance is normally insisted upon before the transfer is complete[18]). The embarrassing statement in the *Fatāwā-i ʿAlamgīrī* can be explained upon the basis that Islamic doctors discussed such institutions of Property with their Hindu counterparts, and that it was possible for what was once a dominant view amongst Hindu jurists of the 17th century and later to become incorporated in an Islamic handbook. Why it appears there is perhaps not so strange as the fact that other correspondences have not been noticed, and it is possible that a qualified Islamist might isolate other passages for scrutiny with hopes of success.

That the actual incidents of Property in India provide materials for comparative study goes without saying.

## II. Scope of this Study: "Incidents" and "Concept"

A detailed discussion of the incidents of Property would be outside the scope of this study. Nevertheless references have been

[15]) The questions of the "property" of idols, the nature of the coparcenary interest, and the right of testamentary disposition provide good examples. See below, pp. 61, 68 n. 211, and 77, n. 243.

[16]) N. B. E. Baillie, *Digest of Moohummudan Law* (London 1865), 507, and see n. 4. It is one thing to say that gift is effective to divest the donor, and another to say that the acceptance merely establishes the Property of the donee. However, it appears clear that the origin of the notion lay outside India.

[17]) See *Sv. Vic.*, V, 2.

[18]) Baillie, op. cit., 512—514. F. B. Tyabji, *Muhammadan Law*, 3rd. edn. (Bombay 1940), 346, 347, 411 f.

given in the footnotes which will enable the reader to inform himself as fully as is now possible as to the institutions of law in question. A brief summary of predominant rules is given in many cases for the purpose of enabling the framework to be understood, within which the discussions continued. Legal texts, however, remain to be published, and inscriptions remain to be edited, translated, and examined, before our knowledge of law in practice in India can approach the degree of completeness which is taken for granted today in continental Europe. The existing references to *svatva* (Property) in India limp for want of a systematic and comprehensive survey of incidents of proprietorial rights. Attempts to discuss Property *in vacuo* are patent failures — consequently we must spend a great part of our space on the rights and other incidents attached to relationships between persons and things as a matter of practical law. And this is necessary for the further reason that it was within such practical contexts that the logicians and jurists worked on the *svatva-svarūpa*, "the nature of Property". They did not deal with the question *in vacuo*.

Indian writers are allusive to an extraordinary degree. Well-known rules of law and customary practices are hinted at under conventional phrases, or texts, or typical heads, and many an apparently theoretical discussion was really intended to clarify questions of practical law which would be referred to those heads by the specialists who had had their training in such schools. We must set the scene as briefly as we may, so that the Sanskrit writers' work can be placed in perspective.

The gaps between references to modern studies will not amaze those who know the deplorable state of neglect into which this classical system of law has fallen: it is deliberately intended by the present writer that they should be utilised by researchers as invitations to proceed and to fill them.

The law c. A. D. 800 was based upon *smṛti* and upon custom, the rules of the latter having been imperfectly incorporated into *smṛti*[19]), or where that had proved impractical, into *purāṇa*[20]) and

---

[19]) For the nature of *smṛti* see J. J. Meyer, *Über das Wesen der altindischen Rechtschriften* ... (Leipzig 1927); K. iii, 827 f.; Derrett, "Hindu law: the Dharmaśāstra and the Anglo-Hindu law ...", *Zeitschr. für vergl. Rechtswiss.*, LVIII, 2, 1956, 199 f., 234—5.

[20]) R. C. Hazra, *Vaishnava Upa-purāṇas* (Calcutta 1958); H. Losch, *Rājadharma* (Bonn 1959).

*tantra* literature[21]). The later part of this process proceeded for at least three centuries more. The customs of Āryans and sub-Āryans were better represented than those of others; and it is clear that the *smṛti*-literature retained traces of customs some of which were obsolescent, and a few already obsolete. *Smṛti* was consulted (i) for positive rules of law, (ii) for analogies, whereby customary rules might be enforced as rules of law, and (iii) for general principles, under the cover of which customary rules unrepresented in the *dharmaśāstra* might be enforced. Vedic material, and material ancillary to Vedic studies, might provide occasional authorities; the Mahābhārata is found cited as a *śāstric* authority[22]) and the Arthaśāstra is sometimes relied upon[23]). The jurists' material, when considering the nature of *svatva*, was thus well mixed. A multiplicity of authorities might be, and in practice was bound to be, consulted; codes, uncodified rules, propositions verging upon superstitious obligation or possessing merely practical, secular, suasive force; they were contradictory in pure verbal terms, spread over many centuries in age, open to interpretation and glossing, and by no means calculated to aid the construction of abstract propositions or logical definitions. The question, "what is Property?", did not occur to the *smṛti*-writers, or, so far as we know, their earlier commentators; so it is doubtful whether an answer would have served them.

It is not clear whether any commentatorial legal literature existed before A. D. 800. It is true that the work of Bhāruci may well be as early as A. D. 600, and the commentary on the Nāradīya-Manusaṃhitā has been dated, by a non-jurist Sanskritist of note, about that period[24]). But in choosing 800 we are fairly safely within the range of that great master, Medhātithi, commentator on Manu, and of the authorities to whom he frequently refers anonymously (other than

[21]) For example the material re-codified in the Mahānirvāṇa-tantra (Madras 1929), and cited by a Pandit to W. H. Macnaghten before 1825 (W. H. M., *Principles and Precedents of Moohummudan Law* ... (Calcutta 1825), pp. xvii—xix.

[22]) Not all the verses attributed to Vyāsa in the digests have in fact been traced in the MBh. The Valmiki-Rāmāyaṇa is likewise cited occasionally, notwithstanding its being an epic and not specifically a *smṛti* work.

[23]) This is very rare: an example is in the Vyavahāra-nirṇaya, pp. 284—5 (a citation of Kauṭalya, Mysore edn., p. 186, trans. pp. 210—11; Trivandrum edn., II, 89). L. S. Joshī did not hesitate to include *arthaśāstra* material in his Dharmakośa, Vyavahāra-kāṇḍa.

[24]) T. R. Chintāmaṇi, in *C. Kunhan Raja Presentation Volume.*

Bhāruci himself, his predecessor), and whose ideas were no doubt well represented amongst his contemporaries.

Interest in the nature of Property, in the isolated *concept*, increases rapidly after the 13th century, making big strides after the middle of the 16th century, the critical period of the life-work of that great iconoclast, Raghunātha Śiromaṇi[25]). Views apparently philosophical, as often, emerged because they were relevant to practical problems. Jurists had been defeated when armed by the old techniques, and the New Logic came to their aid in an unexpected fashion. The repercussions in law are part of this study.

The age of the actual rules of law cannot be estimated. Some belong to c. 350 B. C. — 100 A. D., some are undoubtedly centuries older. The shape in which the *smṛti* records the rules varies, perhaps with reference to local differencies, and perhaps to as yet unidentified periods between c. 350 B. C. — 200 A. D. Greater accuracy, often attempted, cannot be attained, because *smṛtis* were continually being brought up to date (a process which has not ceased). Śabarasvāmi, the commentator on Jaimini, to whom frequent reference will be made, is believed to have lived c. A. D. 250 or earlier[26]). He had a juridical mind, and was much beloved by jurists.

## III. Select glossary

A stage appears in the development of Sanskrit legal terms when departures are made from the etymological meaning, sometimes notwithstanding the survival of the etymological meaning also in a legal context. But the derivations of the words, prior to this stage, are of great interest, and comparison with the roots is nearly always enlightening. The non-Sanskritist may find Böthling-Roth's or Monier-Williams' dictionary more immediately helpful than, for example, Macdonnell's. Others are familiar with Manfred Mayrhofer's *Kurzgefaßtes etymologisches Wörterbuch des Altindischen* and W. D. Whitney's *Roots, Verb-forms and Primary Derivatives of the Sanskrit Language* (Leipzig, 1885). Of great general utility is the glossary appended to pts. 1 and 3 of L. S. Joshī's *Dharmakośa, Vyavahārakāṇḍa*. In the following glossary the Roman instead of the Sanskrit alphabetical order is used. In this article the practice is followed of adding the English final *s* for the plural — thus *svatvas* for Skt. *svatvāni*.

[25]) Below, p. 115, n. 377.
[26]) JhāS. iii, p. vi.

| | |
|---|---|
| abhyupagama | finding |
| ādhi | pledge, mortgage[27]) |
| adhikāra; adhikārī | right, authority; possessor of — |
| āgama | acquisition, title[28]) |
| apacaya | loss[29]) |
| āpad | emergency-conditions |
| bandha | hypothec[30]) |
| bhoga | enjoyment, possession[31]) |
| dāna | gift[32]) |
| dāya | interest in family property, inheritance, etc. (see IV C ii) |
| dhana | asset |
| dravya | thing |
| homa | oblation in fire |
| kraya | purchase[32a]) |

[27]) The word mortgage is not used in a technical sense. *ādhi* is the security which induces confidence in the lender: Mit. on Yājñ. II, 58 (proem.). Below, pp. 78—85.

[28]) *Dh.K.* iii, index, 23a. It implies the ability to show whence occupation of the property arose. That may be presumed after a sufficient lapse of time, if title-deeds cannot be produced: Medh. on this is very clear. See n. 126 below.

[29]) Used in contrast to *upacaya*, it implies that a source of income has not produced what it was estimated to produce. Where the capital is diminished, the word *kṣaya* is appropriate, or *vyāya*.

[30]) *bandha: Dh.K.* iii, index, 101 a; *bandhaka*, ibid. Both words signify a "charge", with a suggestion of less formality and complication than full scale loans supported by possessory mortgage or sureties: Bṛ. XIII, 23 (p. 133).

[31]) *Dh.K.* iii, index, 109 a. As in the definition at p. 128 below, the word includes what would be called in English law "constructive" possession. Actual enjoyment, though implied, is in fact not required.

[32]) Definitions of gift fluctuate wildly with the theories upon the necessity or otherwise of acceptance. B. C. Law, *Law of Gift in British India*, 2nd edn. (Calcutta, 1926), 3—9 (he misunderstands the *Mitākṣarā* at p. 1). Jīmūtavāhana and followers take acceptance to be unnecessary, the majority take the reverse view: Medh. on M. VIII, 8; Nandapandita, *Dattaka-mīmāṃsā* IV, 1—8 (G. C. S. Śāstrī, *Hindu Law of Adoption*, 294); Mitramiśra, *Vyav. pra.*, 156. Sen, 66—69. Śab. on Jaim. XII, iv, 7. A dispute of 1730 at K. ii, 972—3. Most definitions agree that cessation of the donor's and creation of the donee's Property are involved: *Sv. Rah.*, VI, 25; Jagannātha, fo. 8b = trans. II, 191; Śrī Kṛṣṇa, comm. on *Śrāddha-viveka* of Śūlapāṇi, 31. Anantarāma, *Viv. Can.*, fo. 3a, attempts to evade the necessity with reference to relinquishment alone. The topic is complex.

[32a]) Sale is defined by (?) Vācaspati-miśra, approved by Anantarāma, Viv.Can. fo. 4b., as mūlya-grahaṇa-prayuktas sva-svatva-dhvaṃsa-para-svatva-janakas tyāgo vikrayaḥ. The Sv.Rah., VI, 26, says, "Saleness is a special generic character, limiting the force of the root *krī* preceeded by *vi*,

| | |
|---|---|
| kuttā | lease (see IV C viii(b)) |
| mūla, mūla-svāmī | true or former owner[33]) |
| nibandha | charge, e. g. annuity[34]) |
| nidhi | buried treasure[35]) |
| nikṣepa | deposit (also property the owner of which cannot be traced?) |
| nīvī | trust (see IV C viii(a)) |
| pātitya | "fall" due to sin |
| pranaṣṭa | lost property |
| pratibandha | "obstruction", encumbrance (?)[36]) |
| pratigraha | acceptance |
| rakṣaṇa | protection, custody |
| ṛktha | ancestral property, inheritance |
| sādhāraṇa | common, joint |
| saṅkalpa | intention |
| sannyāsa | abandonment of the world |
| śrāddha | feast in honour of ancestors |
| śrotriya | Brahman pursuing full *śāstric* sacrificial obligations |
| stoma | rent |
| strīdhana | property of females |
| sva | own |
| svāmī | owner |
| svāmitva; svāmya | ownerness, Ownership |
| svatantra; svātantrya | independent; independence |
| svatva | own-ness, Property |
| svīkāra | appropriation[36a]) |

located in a relinquishment, viz 'This is not mine but his', established by consistingness of saleness of iron, saleness of lac, saleness of salt and so on, and limiting the begetterness of special properties distinct from each other." The difference in the definitions does not imply an unwillingness on the part of jurists to use logical techniques: on the contrary the authors of the first definition are ample proof of the contact that existed. Gokulanātha, *(N)STV.*, fo. 117 b, sees purchase and sale as conjoined intentions (*samūhālambanecchā*), sale itself being merely a variety of exchange.

[33]) On *mūla*, "root", see below, p. 95. *Dh.K.* iii, index, 115 omits the meaning "owner" for *mūla* simpliciter.

[34]) Below, p. 74. The root etymologically implies the binding, or tying down of the Property. *Dh.K.* iii, index, 75 a.

[35]) For a logician's definition see below, p. 112, n. 362. *Dh.K.* iii, index, 74 b, the meaning "deposit" not being envisaged in this study.

[36]) See below, p. 56, n. 170. The meaning "opposition" given in *Dh.K.* iii, index, 95 a, is not relevant to our study.

[36a]) "Making own", and therefore suspected to be identical with the causation of Property. *Sv.Rah.* VI, 30 says that there are only four kinds, acceptance, purchase, exchange, and finding. It is used in the gift-acceptance controversy for "acceptance", in the sense of agreeing to a gift, unlike *pratigraha*, which implies acceptance of a ritual present. Ibid., 31

| | |
|---|---|
| tyāga | relinquishment[36b]) |
| upacaya | profit |
| upanidhi | deposit |
| upekṣā | indifference, renunciation |
| utsarga | release, dedication |
| vikraya | sale |
| vinimaya | exchange[36c]) |
| viniyoga | application, employment |
| vyavahāra | business, legal transactions, practice |
| yāga | sacrifice |
| yajamāna | sacrificer, manager |
| yatheṣṭa-viniyoga (abbreviated yath-) | application, or employment, at pleasure |

## IV. Adhikāra, dhana, dhanādhikāra

A. When does dhanādhikāra exist (dhanādhikāra-bhāva)?

*i. Human beings (including women) are dhanādhikārīs.*

The word *adhikāra* means "right", and it is significant that it applies equally to a right to do something, such as to perform worship, offer sacrifice, and the like, and to a right to receive something, to manipulate something, or to supervise something[37]). The word for "title" (as in English law) is *āgama*, though in fact *āgama* suggests rather acquisition of title than title itself, for which it is commonly used. We have *dravyāgama*, "title to a thing", *dhanāgama*, "title in an asset", and we have *dhanādhikāra*, "right over an asset, proprietary right", the difference being that *adhikāra* is a neutral word with no association with the source of the right, or its character.

Could others than human beings have *adhikāra*? Land, slaves, moveables "belonged" to deities, especially in the conspicuous cases of temple-deities. In *śrāddhas* "offerings" were (and still are) made to deceased ancestors and to gods, as well as to human guests.

---

points out that *svikāra*, since it applies equally to getting by heart the *ṛg-veda*, etc., is not derived from the begetting of Property.

[36b]) See below, p. 37 f.

[36c]) Anantarāma, *Viv.-Can.*, fo. 4 b—5 a: pratirūpa-grahaṇa-prayuktas sva-svatva-dhvaṃsa-pūrvaka-para-svatva-janakas tyāgo vinimayaḥ, citing Miśra (cf. n. 33 above). The *Sv.Rah.*, VI, 29, says, "Exchangeness is a special generic character established by limitorness of begetterness of special Properties, and located in the joint intention as stated ("this is not mine but his"; "that is mine, not his"), having the form of both an extinguisher of Property and a producer of Property." Medh. on Manu, X, 94.

[37]) *N.K.*, s. v.; *Dh.K.* iii, index, p. 6; F. Edgerton, *Mīmāṁsā-nyāya-prakāśa* (New Haven 1929), 278.

Sacrifices, daily and special, saw dedications to gods, often by groups. Animals might be the object of dedications; bulls, horses, elephants had villages assigned to their herds or stables for their maintenance. Phrases such as "god's village", "elephants' village" were current[38]). Birds had, and still have, property dedicated for their support[39]). Do the properties "belong" to the entities to which they are dedicated, and if so are the entities capable of *adhikāra*? If they are not then they are not capable of *svatva*, for *sva*, it seems, must imply some *adhikāra*, however infinitesimal.

It is established in the Mīmāṃsā-sūtra of Jaimini that the *adhikāra* to perfom a sacrificial act is not possessed by animals, gods, etc.[40]). *Adhikāra* is closely bound up with ownership of *sva*, for without *sva* you cannot make an offering or dedication. The twin conclusions, that animals and gods cannot own, and that they have no *adhikāra* over property whether to benefit or to give, are not controverted in our literature[41]). The god's *adhikāra* in respect of the offering to him is of a special character, dependent upon the relationship set up by the proper dedication or offering, and circumscribed entirely by special texts from the Veda having an "unseen" force[42]). The gods and animals do not *accept* what is dedicated to or for them, nor have they knowledge (in a strict sense) that a dedication, etc., has been made[43]). The expression *deva-grāma*, "god's village", and the like, do not mean that a village is the determinor of Property described by a *deva* (to use the *nyāya* terminology), but "a village dedicated to a *deva*, managed for the purposes of worship of the *deva* by managers" (below IV C [a]; VII iv).

There is no proposition that minors and lunatics lack *adhikāra*. They lack *vyavahāra-yogyatva*, or *vyavahārārhatva*, "fitness for legal transactions", their transactions, if made, may be *asiddha*, "infirm,

---

[38]) *devagrāma, devakṣetra, hastigrāma, ṛṣabhasya grāma.* Śab. on J. VI, i, 4—5 (trans. pp. 973—4); IX, i, 7 (trans. 1430—1). Śūlapāṇi, Śrāddhaviveka, p. 56, comm. of Śrī Kṛṣṇa at p. 58. *Sv.Rah.* V, 11; VI, 22. Jātaka VI, 489; 138 (cited by D e v R a j, *L'esclavage dans l'Inde ancienne* ... Pordichéry 1957, 50) mentions humans belonging to animals.

[39]) For example at Tirukkalukunram in Madras State.

[40]) Śab. on J. VI, i, 5 (trans. p. 974).

[41]) With the peculiar exception of Rāmajaya Tarkālaṅkāra, on whom see below, p. 125. K. ii, ch. XX. J. IX, iii, 35—40. *Sv.Vic. V*, 3.

[42]) *Sv.Vic.* V, 3.

[43]) *(N)STV*, 117 a.

voidable"[44]); but their enjoyment of their *adhikāra* proceeds through the instrumentality of others.

For centuries it was seriously open to question whether females could be *adhikārīs*, possessors of *adhikāra*. Their unfitness for some sacrifices was certain, but in general it was, and is, admitted that they are entitled to be managers of worship of a deity, and to share in the profits, if any, of such worship[45]). In practice females actually worship only household deities and deities of certain special cults; otherwise the actual offering is made on their behalf by a male (usually a Brahman). That females could not be *adhikārīs* was not precisely the same as contending that they had no *sva*. Because of their lack of fitness to partake in sacrificial ritual upon an equal basis with men, because they lacked the *indriya* or vital potency which was thought to be necessary for dealings with Indra and other *devas*, it was asserted in a late Vedic text that they were *adāyādas*, i. e. non-sharers[46]). This was interpreted to mean that they could neither inherit nor take property at a partition of the family's wealth[47]). Later commentators reasonably point out that they lack potency and therefore lack a share in *Soma*-juice, not property in general[48]).

To this the orthodox replied that women were themselves the objects of Property, for their husbands owned them: whence could they be owners themselves? The obvious parallel of slaves (see V ii) was not cited in reply. Instead it was pointed out that although the special relation between husband and wife (ibid.) was one involving *svatva*, for the wife, *patnī*, is *sva-patnī* of her husband, the *svatva* was not comparable with that present when a cow was the *sva* of her Owner[49]). To this apparently obvious remark the incontrovertible reply appeared, namely that wives were in fact bought, received in gift, sold, transferred like land, and even lent on hire. Nevertheless the very old expression *strī-dhana*, "female's asset", proved that women could have *adhikāra*, even if they might not be *svatantra*, "independent", in exercising it (on which see further, V ii)[50]).

---

[44]) Below, pp. 96—7.

[45]) B. K. Mukherjea, *Hindu Law of Religious and Charitable Trust* (Calcutta 1952), 200 f., 317 f.; *Shirur Mutt Case* [1954] S.C.R. 1005.

[46]) K. iii, 606, 712—3.

[47]) K. iii, 605—6.

[48]) Mādhava on Parāśara, iii, 536, cited in K. iii, 712—3.

[49]) Below, p. 99, n. 334.

[50]) J. VI, i, 10—16, and Sab. thereon. *Dh.K.* 1424—5. Nirukta, iii, 4.

### ii. *The scope of the word d h a n a*

At the outset it must be recognised (though we need not attach over-great importance to the fact) that *dhana*, "asset", included *dharma*, "spiritual or transcendental merit", and that this peculiarly Indian entity could be hypothecated or exchanged or sold or gifted away[51]). The concept, not altogether unlike the concept "self-respect", was sufficiently concrete and real in the eyes of some classes that it was as valuable to them as any wealth.

Unlike western systems which speak of *res*, Hindu law speaks of *dhana*, "a *res* having a value", in connexion with Property. Other words implying "wealth", "estate", "substance", "means", existed from Vedic times, such as *sampatti, vittam, vasu, vibhava, ṛktham, rā, magha*[52]) but *dhana* implied originally movables such as one might capture as booty[53]). Contrasted with *dravya*, which means *res*, without implications of value, *dhana* exactly equals "property" in English (with a small p). Conveniently, as we shall see (VI iii), it is in logic the thing in which certain other categories, such as *svatva* itself, "occur" or inhere[54]). It is a substratum, or material vehicle, for the Property of someone, though it can exist without that "occurrence" or inherence. In classical Sanskrit *dhana* is often used to cover all types of property, as in *strī-dhana*[55]), which may be immovable; but it is correct to contrast *dhana* with *sthāvara*, "immoveable property", and *dvipada*,

---

Bhavadeva cited in *Vyav.Ci.* 122, 307. A perverse view appears at *Sv.Vi.* IV, 5.

[51]) See an explanation of *caritrabandhaka* at K. iii, 435. The expression *tapo-dhana*, as a description of an ascetic is evidence of this notion. See also Nārada, IV, 9; K. iii, 416—7: the deceased indebted ascetic's (etc.) merit becomes his creditor's *dhana*.

[52]) The frequency of these in the Ṛg-veda, for example, can be observed in the Poona edn., vol. 5 (indices, 1951). *Vasu* was obviously very much nearer to the classical sense of *dhana* than *dhanam*, which occurs less frequently. *ṛktham* already has the sense of paternal wealth: cf. *ṛg.* III, 31. 2. *svam* appears, but the parallel form in classical Skt., *ātmīyam*, "own", does not appear. K. iii, 574—5.

[53]) M o n i e r - W i l l i a m s gives "prize in a contest" as the earliest meaning, with "booty" and "prey", as well as "wealth", as additional Vedic meanings.

[54]) On the concept of *vṛttitva* see D. H. H. I n g a l l s, *Materials for the Study of Navya-nyāya Logic* (Cambridge, Mass., 1951), p. 45.

[55]) On this institution see K. iii, 770—802. It is evident from its title that property of women was of relatively recent growth in Āryan practice, and that females' right to own different types of property, classified by source and justification, was established gradually. Sen-Gupta agrees.

"slaves"[56]). Nowadays the word *dhan* implies, more often than not, "money". However, the general sense is required for the purposes of this study.

*Dhana* includes *income*, and "incorporeal rights" of the wide range of types which existed in mediaeval India and to some extent still exist. For *nibandha* see below (IV C viii [e]). It is important to see that to a Hindu a debt, or what in English law is called a "chose in action", is just as much an asset, *dhana*, as a thing in possession; consequently a creditor is called *(inter alia) dhanika*[57]). Monopolies, rights to perform ceremonies, rights to manage the property of *devas (shebaitī* in modern usage)[58]) and various other sources of income, such as the right to take fees from pilgrims requiring spiritual guidance at a place of pilgrimage[59]), all alike are *dhana*. Whether they are partible *dhana* is another question, but they often are[60]).

---

[56]) The use of *dvipada*, as in Gautama, XXVIII, 13 (Maskarī, Haradatta, XXVIII, 11) = *Dh.K.* 1183 a; Śaṅkha-Likhita in *Dh.K.* 1166 b; etc., is to indicate "two-footed" movables, as contrasted with four-footed. For some purposes slaves and land were treated similarly.

[57]) *Dh.K.* iii, index, p. 70.

[58]) From *seva*, "worship". An early use of the name is found in 1296: *J.A.S.B.*, LXV, 1896, pt. 1, pp. 229 f. For the general position of *shebaits* see Mukherjea, op. cit., ch. 5. The *shebaitī* is a right of property: *Monohar* A.I.R. 1932 Cal. 791; *Raikishori* A.I.R. 1960 Cal. 235. There is a discussion of a Supreme Court case on the point (A.I.R. 1954 S.C. 282) in R. N. Sarkar, "Has a sebayet ... proprietary right in endowment?", A.I.R. 1954 Journal 91—4. The right of property is not alienable by will, nor can rights of worship and/or management of temples be sold, except by custom (which has very rarely been proved): but in ancient times such alienations occurred: *Kōyilolugu* (History of Temple at Srirangam), p. 83. The curious relationship between the sacrificer, the *deva*, and the *shebait* is already understood by Śab. on J. IX, i, 6—9, IX, iii, 36; and is discussed with references in the excellent S. C. Bagchi, *Juristic Personality of Hindu Deities* (Calcutta 1933), 54 f. See also Durgacharan 4 C. L. J. 469, where the right to flesh of sacrificed goats was held actionable. That villages are in fact enjoyed by priests though dedicated to *devas* is remarked by the author of the *Rājataraṅgiṇī*, II, 132. See also Medhātithi, on M. II, 189; IX, 26.

[59]) *Murari Lal* A.I.R. 1956 Patna 345 (Gayawali gaddi); contrast customary offerings, as in *Maharaj* (1958) 60 Bom. L. R. 926; *Jogendra* A.I.R. 1958 Orissa 160 (dedication to Rājguru). In A.I.R. 1958 Patna 647 the partition of pilgrim-books between Gayawal Pandas is discussed, and the right of pilgrims not to accept Pandas' services. Until 1926 Bombay Presidency retained a legal institution discarded in other parts of India, namely the right of priests and astrologers (upadhyayas and joshis) who held hereditary offices with lands attached, or who had a hereditary

iii. *Means whereby one may become a dhanādhikārī*

"May": on the conflict between morality and law, see below (IV B i).

Discriminatory rules prevented the acquisition of property (or of a particular *adhikāra*) by "disqualified" persons, who were on moral or physical grounds, insanity, etc., prohibited from taking a share at partition and from inheriting[61]). Rules giving a right of preemption (IV C vi) discriminated against persons not allowed to preempt, or in an inferior position relative to the preemptor. Prestigeless persons were prohibited from acquiring some property in sales[62]),

---

connexion with the family, to sue for the fees they would have been paid if they had served, when their services were discarded and those of others utilised: K. iii, 973; the *śāstric* background of the hereditary connexion is seen in texts cited ibid., 469; *Vithal* 11 Bom. H. C. R. 6; *Dinanath* (1878) 3 Bomb. 9. See also L. T. Kikani, *Caste in Courts* ... (Rajkot, 1912), at pp. 60—69, 77 f. Until 1857 the traditional right appears to have been respected in Bengal and elsewhere (ibid. 60), see 11 Beng.S.D.A. Rep. 292. The office of family priests was analogous to immovable property in Bombay until the statute of 1926: *Krishnabhat* 6 Bom.H.C.R., ACJ, 137. *Yajamānavṛtti* is in fact a *nibandha: Ghelabhai* 13 Bom. L. R. 1171. Ancient rules regarding sharing between *purohits* (priests) apply: *Jowahir* (1857) Cal. S.D.A. 362. Goodwill of hereditary purohitship is partible property: *Gobind* (1877) P.R. no. 7; cf. 6 N.W.P.H.C R. 189; 5 Mad. 313. Right to administer *purohitam* to pilgrims at Rameshwaram can be sued for: *Ramasawmy* (1863) 9 M.I.A. 348. It is of interest to note that the former Bombay position survives in Oudh and (pre-reorganisation) Madhya Bharat: in Oudh a hereditary Mahābrāhmaṇa-vṛtti (cf. 2 *Macn. Princ. and Prec.*, 225) is a partible incorporeal right (said to be like a right of fishery or ferry in English law): *Gur Prasad* A.I.R. 1944 Oudh 321; in Madhya Bharat the permanent relationship between *yajamāna* and *purohit* is still legally actionable: *Ghisibai* A. I. R. M. I. D. Sep./Oct. 1952, p. 63 a — C. S. A. 1 of 1949, dec. 14 March 1952. East India Company courts recognised numerous caste monopolies, some of which were abolished by statute. See *Kalachund* (1809) 1 S. D. A. Sel. Rep. 374; *Behoree* (1816) 2 S. D. A. Sel. Rep. 210; cases 64 of 1844 and 71 of 1844 in Branson's *Vakil's Digest*, p. 33; cf. Beng. Reg. XXVII of 1793. Hereditary offices of an apparently flimsy nature might be sued for as property: *Babun* (1841) 2 M. I. A. 479. The priest's right to a cake on condition of reciting hymns could be sued for: *Narasimmachariar* (1871) 6 M. H. C. R. 449, and gradually the right to worship in a temple has become a quasi-proprietary right in Anglo-Hindu practice.

[60]) See *Gur Prasad* (last note); *Ramanujacharyulu* A. I. R. 1957 An. Pra. 272.

[61]) K. iii, 808—816. Jhā *HLS*, ii, 84—108.

[62]) Śūdras, *patitas*, *caṇḍālas*, and "desperados" cannot be allowed to

and we can be sure that rules of caste discipline, recognised by the state, would effectively prevent a Śūdra, however rich, from buying a house in a Brahman street, or an artisan settling in a village where there were already sufficient artisans of that trade and a custom limited competitive immigration.

An early lexicographical list of means by which one may become Owner is not exhaustive[63]). Two well-known lists by jurists indicate the climate of opinion when the nature of acquisition was first discussed. Gautama says[64]):

An Owner occurs in cases of inheritance, purchase, partition, garnering and finding. For the Brahman acquisition is an additional mode; for the Kṣatriya conquest; for the Vaiśya and the Śūdra wages. For the Vaiśya additional modes are agriculture, trading, tending cattle, and money-lending.

Manu says[65]):

* Seven acquisitions of wealth are consistent with *dharma: dāya* [advancement parentally, acquisition of joint family property by membership, or inheritance], presents, purchase, conquest, lending at interest, employment in labour, and acceptance from a virtuous person.

Further he says[66]):

Learning, arts and crafts, employment for wages, service, tending cattle, business, agriculture, "constancy", alms, and usury, are the ten means of subsistence.

---

possess the lands of a Brāhmaṇa by sale, partition, or by way of wages (or ? maintenance): texts cited by K. iii, 496.

[63]) "Purchase, getting, begging, exchange": Patañjali, *Mahābhāṣya* on Pāṇini, II, 3, 50.

[64]) Gautama, X, 38—41, 48 = *Dh.K.* 1122 a = Jhā *HLS*, ii, 3 f. * *parigraha*, "*garnering*" is glossed *svīkāra*, appropriation, of *ananyapūrva* ("not anyone's before") water, grass, sticks, etc. Maskarī however, true to South Indian usage as reflected in numerous inscriptions, glosses *parigraha* as * *strīdhana* in the sense "dowry". Haradatta suggests lost property and *nidhi. adhigama*, "finding", in case of *nidhi*, etc., but Maskarī says "as of jewels, etc. in mines". Haradatta uses the word *pūrvasvīkāra* exactly as the Latin *occupatio*.

[65]) Manusmṛti, X, 115 = *Dh.K.* 1126 b—1127 a = Jhā *HLS*, ii, 1—2. The commentators (see Jhā) differ in their interpretations of *prayoga* "lending at interest" and *karmayoga* "employment in labour". Nandana, an eccentric, thinking the words apply only to Brahmans renders "teaching", "officiating at sacrifices". In the last Hemādri, *Dānak.*, p. 41 and the *Vir.Mit.*, pp. 537—8, follow him. For the related Manu IV, 2—10, 15, 17 see n. 104 a below.

[66]) Ibid., X, 116 = *Dh.K.* 1127 a—b. These are means available to

Whatever the original meaning of the stanzas, in the views of the commentators certain castes were allowed to earn in certain ways, while the ten were available to all promiscuously in *āpad*, i. e. emergency conditions[67]). "Finding" applies to lost property and treasure-trove, subject to the king's rights (IV A v). "Acquisition" meant fees for sacrificing and teaching (where allowable) and acceptance of gifts for *dharma*. In times of distress *(āpadi)* Manu himself tells us, lending at low rates of interest was allowable even to Brahmans and Kṣatriyas[68]).

The absence of exchange from the lists, perhaps explicable by reason of the ubiquity of purchase, is atoned for by the late *smṛti* authority Bharadvāja[69]). Bṛhaspati similarly adds common means of acquisition, mortgage (foreclosed), booty, and dowry[69a]). Mortgage would come under the "conditional transfer" which medieval commentators add, saying that by the operation of *saṅkalpa*, "intention", a person may become Owner[70]). Gautama is alleged to have laid

all in the absence of the specified means. "Constancy" probably meant "asceticism", but as this was not open to Śūdras "contentment", though manifestly absurd, is understood by all commentators: the earliest (Bhāruci, p. 369) records the view that "contentment" or "restraint" was to be observed in connexion with all the other means.

[67]) Sen, 53—64. A comprehensive regulation of *svatvahetu* or *āgama* (see Mit. on Yājñ. II, 27) must take into account the presence or absence of *āpad* (which should be of a general and not merely personal character, cf. Mit. on Yājñ. II, 114, prooem., where admittedly the context is that of the family). The subject of *āpad-dharma* is vast, a sect. of the Śāntip. of the MBh. being devoted to it. In our connexion see K. ii, 118 f., 129—30. A somewhat late *smṛti* cited in Mādhava on Parāśara (Jhā, *HLS*, i, 249) gives as *dharmya* means of acquisition *dāna, kraya, śaurya* ("valour", i. e. booty), *audhvāhika* (dowry or wedding presents), *dāya*. This evidently is nearer to the Patañjali-type of list (see n. 63), and has nothing to do with our present classification: the rare citation of the text is understandable. The belief that acquisition acc. to *varṇāśrama-dharma* is essential to good lives in a caste-ridden community is still alive: see remarks of H. H. Sri Sankaracharya, Feb. 17, 1958 ("Hindu", Feb. 23, 1958, p. 10).

[68]) X, 117.

[69]) Or Bhāradvāja. Cited in Sar. Vil. 163, 314, 319. *BSOAS* Kuttā, 74, n. 3. Vyāsa (*Dh. K.* 899 a — also cited in *Vyav. mālā*, p. 60) certainly knew what exchange was.

[69a]) N. 70 below.

[70]) Mit. on Yājñ. II, 58, p. 159; Sm. C. 141; Sar. Vil. 241—3, 321, 324 f. Evidence that this notion existed in the later *smṛti* period: Bṛ. VII, 23, p. 72 (mortgage, as well as "valour" and dowry, is a means of acquisition). *BSOAS* Kuttā, 76, nn. 2, 3; *JESHO*, 73 n. 1. Our logicians approach the

down that *utpatti*, "birth", without further qualification, was a means of becoming Owner[71]): this led to endless discussions, since it cut across *dāya* and *ṛktha*. On the implications of this dubious rule see below (IV C ii).

The Owner of land (in this case the occupier, tenant from the crown of the occupancy-right) acquired the materials of any building left on his land by a trespasser[72]).

Acquisition of *adhikāra* from one who had no *adhikāra* himself created, as everywhere else, difficulties. The fundamental right of recovery of stolen property from the purchaser, etc., if the latter could not produce the vendor[73]), is partly lost where the sale is openly in the market and the vendor cannot practicably be traced[74]). It seems it was formerly totally lost where the sale was openly in the market in the presence of disinterested witnesses[75]), but here, as in the case of acquisition by adverse possession (IV B ii), commentators attempted to dilute the rules in the interest of what they thought was justice[75a]).

---

matter from a different angle. When they list the instances of *svīkāra* (as *Sv.Rah.* ch. VI: acceptance, finding, purchase, exchange; Jagannātha, following Vācaspatibhaṭṭācārya, I. O. 1768 fo. 4 b, trans. p. 187, *arjanam* the only cause, and that *kāyika* (physical), *vācika* (verbal), or *mānasa* (mental)) they are agreed, whatever their scheme, that *saṅkalpa* is only a stage in the destruction of the *svatva* of the *pūrvādhikārī* (prior owner), and cannot in itself be a cause of the *svātva* of the *uttarādhikārī* (successor in title).

[71]) K. iii, 546 f. Sen, ch. 2. The way out of the embarrassment for Bengali jurists was three-fold: (i) the birth was effective as an element in selecting the heir when property ceased by death, etc.; (ii) the birth was that of animals and children of slaves; (iii) the "birth" was of profits of all sorts out of property already owned. Jhā *HLS*, ii, 6; *Sv.Vic.*, IV, 1—4; *Sv.Rah.*, ch. II.

[72]) Nārada cited K. iii, 480—1.

[73]) *Asvāmi-vikraya* is the title under which these rules are found. K. iii, 462—5. Jhā *HLS*, i, 241—250. Right of recovery: Nārada in Sm. C. p. 213 = *Dh.K.* 763 a. Production of vendor: Yājñ. II, 168 a = *Dh.K.* 760 b; Vyāsa in Sm. C. p. 215 = *Dh.K.* 768 b.

[74]) Owner and vendee share the loss: Br. XII, 10—11 = *Dh.K.* 766 a.

[75]) Manusmṛti, VIII, 201 = *Dh.K.* 759 a, cf. Medh. thereon. *nyāyato* means "rightfully", "legally", and *kula* probably means market-officials or "aldermen" (cf. *pañcakula*) on duty in the market rather than "group of merchants or people doing business" as the comm. think (cf. Bṛ. *rāja-puruṣaiḥ*, "by royal officers"). Marīci in Sm. C. p. 216 = *Dh.K.* 769 a—b.

[75a]) Bhāruci, p. 171, is a prominent exception. He appears to stand,

iv. *Means whereby one ceases to be dhanādhikārī*

No list corresponding to those of Gautama or Manu exists, though the author of the Svatva-vicāra gives the following[76]): death, embracing an order of ascetics *(sannyāsa)*, "fall", destruction of the object, relinquishment *(tyāga)*, sale, lapse of time. The Svatva-rahasya, insisting that sale is a form of relinquishment, spends effort in refuting Vācaspati-miśra's seven-fold categorisation of relinquishment[77]). While the causes of Property are called *svatva-janakas*, "P-begetters", the opposites are called *svatva-dhvaṃsakas*, "P-destroyers". Making our own list we find the following means of destruction of *adhikāra:* death, *sannyāsa*, and the controversial heading "fall" *(pātitya)*, which form one group; fine, confiscation, gift, mortgage, sale and exchange (which may form another); renunciation and distribution or sharing (a highly controversial head), which may form a third; and sacrifice, oblation, and "release" *(utsarga)*, which form the last group. "Lapse of time" may well have been a cause of loss of *adhikāra* in the two contexts of *naṣṭa* or *pranaṣṭa* (sometimes also in practice *nikṣepa*)[78]), "lost property" (IV A v), and adverse possession. The latter was open to question during the golden period of commentatorial literature, since the jurists were intent upon construing all instances of adverse possession as actual or constructive *upekṣā* ("abandonment", "renunciation", a sub-class of *tyāga*) on the part of the former owner.

---

after all, at the turning point in commentatorial exegesis. Often anticipating Medh. and the rest, he is occasionally more faithful to his source's historical intention.

[76]) VI. *BSOAS* Prop., 495—6.

[77]) VI, 5 f.; at 38 Vācaspati is refuted. Sale is not allowed to be distinct from *tyāga*. *Tyāga* has the interesting definition, pātitya-maraṇādy-ajanya-svatva-nāśa-janakatāvacchedkatayā siddo "na madedam" iti saṅkalpa-niṣṭho dharma-viśeṣaḥ: "Relinquishmentness is a special property residing in an intention, viz 'this is not mine', established by limitorness of begetterness of an extinction of Property unbegotten by 'fall', death, and so on." On limitorness see Ingalls, op. cit., 50—52; Annaṃ-bhaṭṭa, *Tarka-saṅgraha*, ed. Y. V. Athalye, 2nd. edn, (Poona, Bombay Skt. Ser., 1930), 373 f.

[78]) In the very numerous grants of *nidhi* and *nikṣepa*, etc., to landholders (zamīndārs in modern usage) in mediaeval times the word *nikṣepa* cannot mean deposit, as in the *dharmaśāstra*, and must be either (i) mineral deposits, or (ii) property put down, or deposited, and afterwards unclaimed or unclaimable, i. e. *naṣṭa* or *pranaṣṭa*. Since the grants in question often refer to minerals and jewels separately (*pāṣāṇa*, "rock", "stone", e. g.) it seems unlikely that the first meaning is correct. For *vinikṣepa* as "trust" see below, p. 125.

For this subject see below (IV B ii). Classical sub-divisions of *tyāga* are into *yāga*, "sacrifice"; *homa*, "oblation in fire"; *dāna*, "gift" (normally the *śāstric* gift for purposes of religious merit, while gift generally is termed *laukika-dāna*, "popular gift"); *vikraya*, "sale"; *vinimaya*, "exchange", and *upekṣā*. *Utsarga*, "release", occurring in the two main contexts of *vṛṣotsarga*, "bull-release"[79]), and *taḍāgotsarga*, etc., "release of tanks, ponds, etc.", comes within *yāga* and in part within *dāna;* there is however no moment when the entire *adhikāra* of the Owner is extinguished — a situation which requires further discussion (IV C x).

The whole question of how Property ceases will be considered further in a later section. The loss of *adhikāra* upon *sannyāsa* and *pātitya*, however, deserves preliminary explanation at this stage. The first presents few problems. Upon becoming a *sannyāsī* (an event invariably attended with ceremonies expressive of the civil death of the man thus renouncing the world)[80]) all *adhikāra* ceased: no further sacrifices could be offered, the relationship with the wife ceased, and property passed as on a natural death to the heirs or *dāyādas* (IV C ii). Naturally the capacity to own did not entirely lapse. The remnants of clothing, books, water-pot, and so on, and food received from charitable donors must have been within the *sannyāsī's* ownership, and the texts admit this necessary anomaly[81]). If any considerable property was accumulated, and our texts[82]) forbid more than essential accumulations (but were not obeyed in practice), then on eventual

[79]) P. N. Saraswati, *Hindu Law of Endowments* (Calcutta, 1897), ch. X, esp. pp. 256 f. Important in popular usage, it was a test for jurists and logicians. K. iv, 539—542, *BSOAS*. Prop., 493. n. 1. Release of bulls was done at certain *śrāddhas* (see Viṣṇusmṛti LXXXVI), and at the *pañcaṣāradīya* sacrifice (Śab. on J. XI, ii, 52—4). At certain festivals or ceremonies in honour of Indra cows were liberated (see refs. at *B:S.O.A.S.*, XXII, i, 1959, 111, n, 1) and apparently in other connexions: see Mit. on Yājñ. II, 163. In the light of Raghunandana's and Śrī Kṛṣṇa's discussions (for the latter see Śrāddha-viveka, 38 f. and Jagannātha, I. O. 1768, fo. 26, trans. II, 86—7) of the residual rights and duties of the owner who has released the animals (see also *Sv.Rah.* VI, 33 f.) it is of great interest that the modern Śukranīti recommends that the releasers should be obliged to control and feed them (cited by K. iii, 100). In Anglo-Indian case-law the institution appears at 17 Cal. 852; 8 All. 51; 9 All. 348.

[80]) K. ii, 930 f., especially 951—2, on loss of civil rights.

[81]) Mit. on Yājñ. II, 137, p. 225: a *saṃbandha* (see below, p. 102) remains with clothing, books, etc. K. ii, 948 f.

[82]) Cited in K. ii, 934, 935—6, and see Mit. cit. sup.

death it passed to spiritual relations and not blood relations unless these also were spriritually related (which was unusual)[83]). In modern times the profession of *sannyāsa*, which was the prototype of the Buddhist monk's status, has proved profitable to many, and the British Indian courts have merely followed public usage in not disallowing the *sannyāsī*, or *vairāgī*, from owning property[84]). That females could become *vairāgiṇīs*, and so be divested of property on renouncing the world, was admitted in the early British period and seems to have been consistent with usage; it is now rarely found[85]).

*Pātitya*, "fall", or the state of being a *patita*, "one who has fallen", a state reached immediately upon committing a *pātaka*[86]), "cause of fall, sin", seems originally to have involved automatic loss of Property, though it did not terminate the relationship between husband and wife. The original notion appears to have been that society withdrew its protection pending the performance of *prāyaścitta*, "penance"; though this notion seems not to have been explicitly stated in our surviving texts. Upon failure or refusal to perform *prāyaścitta* the offender was excommunicated *(bahiṣkṛta)*, whereupon all rights of functional earning and common enjoyment in Hindu society ceased. When *bahiṣkṛta* the *patita* was civilly dead, though he could resume civil rights upon reinstatement after penance. Whether he could thereupon reenter property he had vacated by his *pātitya* remained open to question[87]). As the centuries advanced *prāyaścittas* more and more frequently took the form of caste feasts or commutations therefor, which were indistinguishable from fines. If the *patita* had no Property it was impossible for him to pay. Jurists who retained the ancient notion supposed that he must earn sufficient for his *prāyaścitta* by begging[88]). Others, and their view predominates, redefined *pātitya* in this context as "settled intention not to perform *prāyaścitta*"[89]). The usefulness of the original doctrine is apparent

[83]) K. iii, 764—5. Jhā *HLS*, ii, 512 f.

[84]) Raghbir A.I.R. 1943 P.C. 7.

[85]) K. ii, 945. Buddhist nuns were, of course, common so long as Buddhism flourished in India, and Jaina nuns are heard of. In modern law the notion is heard of in Amirtolall (1875) 23 W.R. 214, 219; Nobokishoro (1884) 10 Cal. 1102, 1108; Hem (1894) 22 Cal. 354, 361.

[86]) K. iv, 1—40.

[87]) The subject is treated at length in the *Sv.Rah.*

[88]) See refs. at *BSOAS* Prop. 487, n. 4.

[89]) The definition given by Mitra-miśra, see ref. in previous note.

when we consider the vast amounts of property which were under the control of, or actually owned by, persons whose orthodoxy (from the point of view of the relevant sect or society) was essential to their carrying out the functions, for the maintenance of which the property was originally transferred or dedicated. Misbehaviour would cause the *adhikāra* to lapse *ipso facto*, and the question whether the offender should be reinstated would not be complicated by the pressures which he could bring to bear as the result of possession of wealth.

*Adhikāra* could cease by an additional mode, which the Sanskrit jurists perhaps intend to be covered by *upekṣā*, but which deserves special mention. The *dharmaśāstra* requires that persons in certain situations should "pay" a debt, or divest themselves of property, by abandoning it ritually, as for example by throwing it into water[90]). The intention is merely to put an end to one's own *adhikāra* without *uddeśa*, that is to say without designation of a transferee or beneficiary[91]).

v. *Dhana without an adhikārī, and ultimate dhanādhikāritva*

There is a difference between *anādhikārika-dhana*, or property in repect of which no one has an *adhikāra*, and *asvāmika-dhana*, or unowned property, though the words do not reveal the difference, and the difference does not seem to have been pointed out by Sanskrit jurists. *Asvāmika-dhana* deserves special treatment: in religion as well as law it played important rôles (IV C i). The river-bank was, and remained, *asvāmika*; birds and fish if wild or taken in a river or public tank were *asvāmika* until taken[92]). *Anādhikārika-dhana* is not necessarily *asvāmika*. The notable instances are all examples of a potential right (which cannot be classed as an *adhikāra*, whereas it may well be *svatva*), the best being the rights of the king in respect of *nidhi* and *naṣṭa*. Even before the law commenced to define the respective rights of claimant, finder, and king in such properties, the king was potentially entitled to his proportion. *Nidhi* belonged po-

Jagannātha differed here from Vācaspati-bhaṭṭācārya: trans., II, 432—3. See also Gokulanātha *(N)STV*, fo. 115 a—116 b.

90) Texts cited at K. iii, 435. The sacred thread is disposed of by throwing into water in Mit. on Yājñ. III, 58; a duty is fulfilled similarly, e. g. Manusmṛti, IX, 244. Cf. texts cited in *BSOAS*. Prop., 493, n. 4, and Medh. on Manusmṛti, XI, 193, where various methods of disposal (including water) are mentioned.

91) On divesting without *uddeśa* see below, p. 91, n. 314.

92) See below, p. 52, n. 146.

tentially to the king as to 5/6ths and to the finder as to the remainder, unless he happened to be a learned Brahman in which case he retained the whole[92a]). *Naṣṭa,* after a stipulated period of time, passed partly to the king and partly to the finder[93]). These *adhikāras* in respect of *anādhikārika-dhana,* materialising only after the property had been found and duly reported, were valuable and could be assigned, like fines and land revenue[94]).

The king's ultimate rights over "unowned" property were pervasive, though commonly assigned. Unappropriated land, resumable tenures, and heirless inheritances *(dāya),* the last far more profitable than the terms of the *dharmaśāstra* would suggest[95]), were part of the king's alienable *svatvas.*

It is very difficult to say whether the following are true examples of *anādhikārika-dhana:* property abandoned in the following circumstances, namely penance, performance of a vow, "payment" of a debt (IV A iv), *ātma-śrāddha* ("śrāddha for one's self")[96]), or offerings to birds and animals.

The king's rights in respect of mines and minerals come in a distinct category. Because of his "lordship" of the soil (V i) he was considered entitled to a proportion of the product of all mines[97]),

---

[92a]) K. ii, 146; iii, 175. Jhā *HLS,* i, 87. Mit. on Yājñ. II, 34—5 = Ghar. 757 f. = *Dh.K.* 1960 a. When the king himself found a treasure ½ was to go to Brahmans. Medh. on Manusmṛti, VIII, 35 = *Dh.K.* 1955 a—b insists that only the loser or his descendant can claim the sixth, since Gautama X, 42 = *Dh.K.* 1948 a gave all *nidhi* to the king.

[93]) Finder entitled to ¼ of the king's ultimate share: Mit. on Yājñ. II, 33 = *Dh.K.* 1958 a = Ghar. 755. The claimant is called *nāṣṭika,* "he to whom the *naṣṭa* belongs". K. iii, 175—6; 464—5. *pranaṣṭa* and *asvāmika* are distinguished by Gautama X, 36 = *Dh.K.* 1947 a. The period is one year acc. to Yājñ. II, 173, etc., three acc. to Manu, etc. After one year a charge may be made for custody and the owner reclaims. Here again the commentator (Vijñāneśvara) allows, contrary to the *smṛtis,* that the owner may claim (subject to the deduction) the property or its value *after* the three years: Ghar. 756. The king was entitled to all wrecks and their cargos, and might gain popularity with international traders by conceding the right.

[94]) See above, p. 37, n. 78.

[95]) D e r r e t t, *Z. f. vergl. Rechtsw.,* LVIII, 2, p. 220, n. 104. Also Br. XXVI, 119 *(Dāyabhāga* XI, i, 49); *Ep. Ind.* XXX, p. 163 f. (i); *Ep. Indo-Mos.* 1933—4, p. 9 f.; A. K. M a j u m d a r, op. cit., 247.

[96]) See refs. at *BSOAS.* Prop., 495, n. 2.

[97]) K. iii, 196. Manusmṛti, VIII, 39 = *Dh.K.* 1957 a. The king is entitled to half the produce of mines: Medh. says, ibid., "½" means "a

and there is reason to believe that in practice a royal monopoly of some minerals and of some sources of gems and of other products was exercised[97a]). Here the *adhikāra* exists rather actually than potentially, and it is not merely an *ultimate adhikāritva*.

### B. Morality, Law and dhanādhikāra-bhāva

#### i. *The basis of authority*

*Dhana* could be "pure", "impure", and "varigated"[98]); and there were means of "purifying" wealth[99]). The basis of these concepts was religious and/or moral, and they must have been important even for secular purposes in the pre-legal periods; in historical times their significance existed until the Mīmāṃsā discussions to which we come immediately.

Hindu law observed the difference between what was morally prohibited and what was legally void. English observers in the 18th century were quick to identify a rule comparable with *quod fieri non debuit factum valet*[99a]). The rule was slow to emerge, however, because of the long régime of the caste-tribunal, which, depending upon emergent circumstances, might give to moral lapses an importance indistinguishable from crimes, while a breach of a moral command could lead to the nullity of the act. Courts of such a description would be slow to draw such distinctions as the jurists afterwards insisted upon. From the 11th century at the latest commentators and others admitted that any rule was capable of classification into one

---

share", i. e. one-sixth or one-twelfth. The king remains, however, master of the soil.

[97a]) K. iii, 197. *Arthaśāstra* (Mysore edn.) 47, trans. Shamasastry, 47. Hides: *Ep. Ind.* XV, p. 42.

[98]) K. ii, 130. Lakṣmīdhara, *Kṛtyakalpataru*, ii, *Gṛhasthak.*, ed. K. V. R. Aiyangar (Baroda 1944), intro. pp. 54, 63, 87—8. Lakṣm. uses the expression *dharmādharma-svatvāni*, "Properties, righteous and unrighteous" (p. 259). *JESHO*, 71, n. 2. *Ep. Ind.* I, 271—287.

[99]) By the water used in the "coronation" ceremony, for example. See expression used in the Da Cunha Copper-plate in the P. W. Museum, Bombay cited by A. S. Altekar, *Rashtrakutas and their Times*, 108. 109, n. 68. But is the notion to be taken literally? The notion "pure" in relation to property offered in charity is established, and cf. *viśuddham* (? "purified") in Manusmṛti, VIII, 201.

[99a]) It must be remarked that very few *smṛtis* tell us precisely whether the doing of a prohibited act fails to accomplish its purpose, or whether that purpose must be undone by the judicial authority. For an example see Saṅkha cited in *Sar. Vil.* 251. Derrett, "Factum Valet: the adventures of a maxim", *Intern. and Comp. L. Quart.*, VII, 1958, 280 f.

which affected the individual (by way of sin) and one which, whatever its relevance to the individual, affected the act itself, so as to produce a nullity[100]). In one view only rules which were part of the *vyavahāra* section of the *dharmaśāstra* could lead to nullity of the act, if they were broken[101]): other rules, which were intended to operate in conscience and in the ambit of social jurisprudence might be broken without affecting the validity of the transaction. Following this rational explanation, however, a disagreement occurred between leading jurists as to the effect of a breach of a *vyavahāra* rule. The Bengal school, upon the whole[102]), took the view that many such rules could be broken, without endangering the validity of the transaction, since the legal effects of transactions with Property could not be governed by prohibitions unless these were explicitly to that effect.

The British were greatly impressed by this school of thought[103]), and it has unduly influenced Indian case-law. Even for our present purposes the authoritativeness of the Veda or *smṛti* is of little significance if breach of the rules in question would not in practice lead to a nullity. However the background of the system and the concept of Property, and its uses, cannot be understood without some knowledge of the problem.

ii. *Regulation of acquisition: dhanārjana-niyama.*

Brahmans, more than any other caste, needed to consider the rules of Gautama and Manu seriously (IV A iii). Their ritual austerity and "purity" was essential as a prerequisite for their selection as donees of religious gifts, and appointment to influential posts in the

---

[100]) Derrett, "Prohibition and Nullity ..." *B.S.O.A.S.*, XX, 1957, 203 f.

[101]) This is the view of Saṅkara-bhaṭṭa, *(Dharma-)dvaitā-nirṇaya*, ed. Gharpure (Bombay 1943), 123—4. Ct. Sm. C. II, 190. The same conclusion occurs in the special connexion of gifts of property promised to third parties in the *Sar. Vil.*, 277 f., where the comment is made that *para-svatvāpatti-paryantā svatva-nivṛttir nāsti*, "there is no cessation of Property leading up to (or enduring until) the production of the Property of the other party", i. e. whatever the donor's capacity to alienate, he cannot complete a transfer to another. Thus the restrictive rules apply in a *vyavahāra* section with a secular effect.

[102]) *B.S.O.A.S.*, XX, 215, n. 2. But note that Raghunātha Śiromaṇi himself took the opposite view: *NLPD*, fo. 12 b. Sen, 83—94.

[103]) Anglo-Indian references cited in Derrett, ref. in n. 99 a above.

administration. The narrow path was insisted upon in *śāstric* texts for their, and their patrons', guidance[104]).

Manu says[104a]):

He may subsist by *ṛta*, and *amṛta*, or by *mṛta* and by *pramṛta;* or even by what is called *satyānṛta*, but never by *śvavṛtti*. By *ṛta* must be understood the gleaning of corn; by *amṛta*, what is given unasked; by *mṛta*, food obtained by begging; and agriculture is declared to be *pramṛta*. But trade and the like are *satyānṛta:* even by that one may subsist. Service is called *śvavṛtti*; therefore one should avoid it.

It would take inordinate space to attempt to explain some of the prohibitions, but their nature and effect is important for our purposes. A Brahman was prohibited from accepting a ewe[105]), from accepting anything on the banks of a river[106]), from accepting anything from a *caṇḍāla* ("untouchable")[107]), and from accepting anything ritually from a person who was *asat*[108]), literally "non-good" or "who is disabled by unexpiated sins". All classes were prohibited from acquiring anything from a thief[109]). Hindrances such as these might affect considerable sums of money, or tracts of land. Certain objects were prohibited from certain transactions. The horse, for example, was the object of restrictive rules[110]). Trade in sesame and a wide range of commodities

---

[104]) Manusmṛti, I, 88; X, 76; cf. III, 64—5; 150—68; Mit. on Yājñ., pp. 197—8 (prooem. to II, 114) = *Dh.K.* 1132—3 cf. Nārada, XVII, 43. *JESHO*, 70—1, 92. Jhā, *HLS*, ii, 4—5.

[104a]) IV, 4—6, the heart of 2—10, 15, 17, a long passage intended to keep Brahmans to livelihoods suitable to a sacerdotal way of life. The whole is worthy of study. The passage cited utilises some rather heavy punning, turning upon the word *mṛta* (literally, 'dead'), *anṛta* (literally, 'falsehood'), and *śva-vṛtti* ('dogs' livelihood').

[105]) *BSOAS*, XX, 205, n. 8.

[106]) Ibid., n. 7. In fact many texts expatiate on the virtues of gifts made at *tirthas* many of which were in fact river-banks. And on the banks of the Ganges *sannyāsis* might lawfully dwell. Discussion at Raghunātha Śiromaṇi, *NLPD*, 11 b; Jagannātha, fo. 9 b—10 a, trans. p. 193.

[107]) Manusmṛti X, 109; XI, 176 with Medh. Mit. on Yājñ. III, 290. *Sv.Rah.*, ch. V.

[108]) N. 104 above, also Manusmṛti XI, 70; cf. Yājñ. III, 41; Viṣṇu, XLVIII, 1.

[109]) Manusmṛti, VIII, 340 = *Dh.K.* 1397, with Medhātithi.

[110]) J. III, iv, 28—9 with Śab. JhāS. 515—7; J. VI, vii, 4—5 with Śab. JhāS. 1179—80; J. X, iii, 47 with Śab. JhāS. 1772. Yet cf. the affirmative rule regarding gift of a horse in Manusmṛti XI, 38; Gautama XIX, 16: K. iv, 51.

was forbidden to some classes in some situations[111]). While savouries ought to be *exchanged* for savouries salt was an exception (no one knows why) and sesame must always be exchanged for an equal volume of corn irrespective of price![111a])

The special topic of usury provides a valuable illustration of juridical technique, which may be summarised here. Anciently lending money, etc., at interest had been a forbidden profession to all but the special class which apparently developed out of the need for it. Later odium attached only to those who lent outside the provisions of the *śāstra* on the subject[112]). Usury was controlled by (i) fixing maxima available by way of interest on coin, and, respectively, on various classes of loans in specie[113]); and (ii) permitted rates of interest classified according to the caste and occupation of the borrower, and the presence or otherwise of security or surety[114]). The co-effectiveness of these rules seems not to have been laid down with much clarity, or if such texts existed they have been eliminated in the process of transmission. Commentators interpreted the texts to mean that the allowed rates could be charged at any time, thus diminishing the force of the enlarged maxima in respect of loans of commodities[115]). Changes in practice, especially widespread neglect of rules restrictive of the *rate* of interest (and emasculation of the rules relating to the

[111]) K. ii, 127, 129. *BSOAS* Kuttā, 76, n. 3. A progress from absolute prohibition of dealing towards dealing under legal fictions is observable in the texts cited by K a n e, ubi cit. That early *smṛti* writers distinguished between sale and barter for these purposes is highly curious and awaits explanation: Manusmṛti X, 90, 91, 94; Yājñ. III, 36—40 with the gloss of Vijñāneśvara (Mit.) makes very strange reading. That some castes prided themselves on not dealing in some items is clear. The British however, true to their policy of not enforcing precepts of merely 'moral' force, allowed Brahmans to recover profits of forbidden trades: J y e N a r a i n (1825) 4 Sel. Rep. (S.D.A., Cal.) 107 = 7 Ind. Dec. (o. s.) 79.

[111a]) Manusmṛti, X, 94 with Medhātithi.

[112]) "Righteous" interest on loans was 15 % per annum. Usury was on the whole reprobated: K. ii, 124, n. 269; iii, 417—423.

[113]) The basic maximum was, for coin, the amount of the principal. According to the likelihood of adulteration or incurable deterioration the maxima for commodities went to as much as 8-fold. The subject is complex. See K. iii, 423—4. Viv. Cin., 3—17.

[114]) Such classification by castes had regard to their general economic position. With Manu VIII, 142 see R. S. Sharma, *Śūdras in Ancient India* (Delhi, 1958), chh. 7, 8.

[115]) See the result in Jagannātha, trans. i, 78—90.

maxima)[116]), seem to have enabled the commentators to perform yet again their function of redirecting the *śāstra*. In this connexion it is desirable to add that a great difference exists between rates of interest levied from borrowers by lenders, especially professional money-lenders, and rates of interest paid on deposits by guilds acting as bankers[117]). Gains made in business, especially in expanding markets, might well include loan-transactions, but it is not necessarily correct to assume that when a rate of 75 % or 100 % per annum was paid by a "bank" the depositary was obtaining legally and morally more than that proportion of interest from persons or corporations to whom he had lent the same money. In fact nearly all "banks" were traders, and in modern times these tended to be gold- and jewel-merchants or goldsmiths and jewellers.

Another form of regulation was provided by the state. Prices were certainly at some times, and perhaps at all times in some connexions, regulated by royal authority[118]). Conditions of purchase of land sold for default of revenue, for example, would be laid down by the state[119]). Breach of these regulations would involve penalties, such as confiscation of all property, unless the offender had some means of evading them: but whether the transactions were nullities seems not to have been discussed in our texts.

To earn a living by prohibited means was to lay oneself open to *pātaka* and, in extreme cases, to excommunication. It was essential

[116]) K. iii, 423—4. Jhā *HLS*, i, 139 f. If the original agreement was departed from however slightly the advantage of the limit did not apply; and there were *smṛtis* which allowed some districts (and therefore any districts) to set the limit higher than 100 %.

[117]) In numerous inscriptions, including those concerning *nīvīs*, the rate of interest payable by the "bankers" is stated, and it frequently exceeds the "righteous" levels allowed by the *śāstra*. In such cases we meet the curious provision that any rate of interest is allowable if the borrower is in difficulties (Bṛ. and/or Kātyāyana in Jhā *HLS*, i, 144—5). K. iii, 421—2. For rates of interest commercially available in mediaeval times see Derrett, *Hoysalas* (O.U.P., 1957), 231.

[118]) Manusmṛti VIII, 401—2. Arthaśāstra, Mys. edn., p. 206, trans. Shamasastry, 233. A *samudāya-tirumugam* ("general proclamation") of the 4th year of the Cōla king Rājarāja II regulated the prices of land sales in a whole district, superseding the conditions obtaining until the 15th year of his predecessor: no. 103 of 1931—2, *Annual Rep. of Epigr. (Madras)*, 1931—2, II, 16.

[119]) See last note. Where the sale was at an under-value we presume a right of "redemption" remained with the expropriated family: see n. 242.

to know whether the taking itself was effective in law, and whether the successors by inheritance, sale, etc., would be tainted by the original taker's fault. If he were unable or unwilling to perform penance this problem might arise in an acute form.

The causes of Property being established[120]), the question was whether it was itself secular or *śāstric*. If the *śāstra* alone determined what Property was, then the effect of the *niyamas* would be to prevent Property passing in prohibited or regulated cases where the *niyama* was transgressed. A considerable body of juristic opinion considered Property *śāstraikādhigamya*, "ascertainable exclusively from the *śāstra*"[121]). The *śāstra* did in fact prescribe earning, and earning for religious and social purposes, and such rules would be superfluous if Property were secular in character. Moreover the very concept of Property, which implies law, was due to "law and order" and was one of the gifts of *dharmaśāstra* and the king's performance of his own special *dharma* towards the public[122]). Non-*śāstric* sources could hardly be of assistance in determining the character of a technical concept.

While an ancient view insisted that the *śāstra* itself merely recorded practice, the Mīmāṃsakas decided that Property was secular, and was to be ascertained principally from popular recognition. The reasons, quite understandable in the situation of the Mīmāṃsā, do not concern us here[123]). The *smṛti* in this context, they said, took its authority from its codification of pre-existing practice, similarly with grammar, whose *smṛtis* (they alleged) codified speech[124]). The particular usefulness of this decision cannot be denied, though its general implications leave something to be desired (VI ii). As an

[120]) Property is *klpta-kāraṇa* according to the author of the *Smṛti-sāra*. *BSOAS*, XX, 214, n. 1. Nīlakaṇṭha-bhaṭṭa, cited below.

[121]) *Smṛti-saṅgraha* (cited Jhā *HLS*, ii, 6): "A man is not necessarily *svāmī* of all that is in his hands; do we not see *sva* belonging to *A* in the hands of *B* as a result of theft, etc.? Hence *svāmya* exists on *śāstric* authority only and not from practical experience." Madanaratnapradīpa, 323. Jīmūtyāhana, *Dāyabhāga*, 19—20 (Col. I, 19). Cf. *Sar. Vil.* 347.

[122]) Manusmṛti VII, 21; MBh. cited by U. N. Ghoshal, *History of Indian Political Institutions* (O. U. P., 1959), 210. J. N. C. Ganguly, "Hindu theory of Property", *Ind. Hist. Quart.*, I, 1925, 265—79.

[123]) *JESHO*, 68 f., 75 f. Add Medh. on Manu, X, 93.

[124]) Bhavanātha in the Nayaviveka: "Or acquisition, birth and the like, is secularly established; whence the *smṛti* serves to digest (as does the *smṛti* relating to grammar and the like) rules the content being determined by its being the subject of pre-existent popular concepts." *JESHO*,

immediate result however, the rules regulating acquisition of Property were held to be ineffective to prevent acquisition, unless they related, as in the case of theft, to popular recognition[125]).

A very vexed question was acquisition by adverse possession. Possession could never be adverse to co-owners, persons by whose permission one held, the king, females, minors, and *śrotriya* Brahmans[126]). To be adverse, possession must be open and known to the legal owner[127]). Texts which allowed acquisition by adverse possession for a relatively short time[128]) were emasculated by commentators who, with the aid of ambiguous later *smṛtis*, managed so to bring about the law, that acquisition by *bhoga, bhukti*, "enjoyment, possession", could happen only when the legal owner had actually or virtually abandoned his property[129]). The immorality of acquisition by merely occupying property which another owned struck them forcibly, and indeed the point of view is understandable in a society where the administration of justice is uneven, dilatory, and not always impartial. Moreover, as logicians in later times insisted, Property inhered in the *dhana*, and while one Property (i. e. the *svatva* of one person) was inhering it "obstructed" the inherence of another, just as subsisting blueness in a pot prevents the pot from subsequently acquiring a blue character[130]).

---

81 n. 1. For the celebrated proof that Property is based on popular recognition and not on the *śāstra* see ibid., 85 f. Benedetto Croce once suggested a similarity between law and grammar, but it is not close.

[125]) The Mit. discussion recorded in *JESHO*, 92, para. 11.

[126]) The subject is dealt with in references given in *JESHO*, 74, n. 3, and in Sen, 103—124; *KVRA*, 27 f.; A. Thakur, *Hindu Law of Evidence* (Calcutta 1933) 240—263; id., "Proof of possession under the Smṛtis", *A.B.O.R.I.* XI, 302 f. Sen-Gupta, 74—6. L. Rocher, "Possession held for three generations...", *Adyar Lib. Bulletin*, XVII, 171 f.; the same, "Bhavadeva's Vyavahāratilaka", *Annals of Or. Res.* (Madras) XIII, 1957, 19 at 33—5. On *svatva* and *bhoga* see Mit. on Yājñ. II, 27 a = Dh.K. 397 b. K. iii, 317—329. Jhā, *HLS*, i, 79—83, 120—131. *Lalubhai* 2 Bom. 299, 304 f.

[127]) Jhā, *HLS*, i, 80, sec. 143.

[128]) The irreconcilable difficulties in the texts appear to be due to attempts to eliminate old rules providing for short periods of prescription. Does Kane put the cart before the horse in giving greater credence to late rules at pp. 325 f.? The Vyavahāra-tattva and Vivādacandra seem alone in upholding long possession as such as leading to Property.

[129]) See n. 126. The *Sv.Vic.* however admits, *BSOAS*. Prop., 496—7, that lapse of time can destroy Property. Jolly. *Hindu L. and C.* (1928), 198—202.

[130]) The theory of *pratibandhakatva*. *Sv.Vic.* III, *BSOAS*. Prop., 488,

promised to a third party was prohibited from being given[141]); ancestral or common property might be prohibited from being transferred without certain authorisation[142]); property which was the object of a bailment might not be transferred without the owner's consent[143]). Certain of these rules were inoperative to impede legal transfer, under the Mīmāṃsā rule (IV B ii). Dealings with ancestral or common property caused difficulty. The father of a family was prohibited from alienating the entire estate in prejudice of his dependants' rights to maintenance (IV C iii, vii). The widow was prohibited from alienating her late husband's estate except with the advice and consent of her protector[144]). The upshot of endless controversies was that whereas the widow's alienation in defiance of the prohibition was voidable, the prohibition of the father's activity was for practical purposes ineffective unless the property had come to him already burdened with maintenance-rights — but the matter remains somewhat obscure[145]).

### C. Enjoyment of dhanādhikāra: dhana-bhoga

#### i. *"Ownerless" dhana: asvāmika-dhana*

A person performing with relation to *asvāmika-dhana* an act which, if it were within his *adhikāra*, would be a natural expression

---

[141]) Note Kātyāyana, ubi cit., 642, 643. *BSOAS*, XX, 205, n. 10, 209 f. *Sar. Vil.* 277 f. The Smṛtisāra and the Vivāda-cintāmaṇi upheld the view that an owner could transfer, notwithstanding prior promises. *BSOAS*, XX, 213, n. 9. Law, op. cit. n. 32 sup., pp. 21, 25—6.

[142]) Bṛ. XIV, 5—6 = *Dh.K.* 803 a—b; Yājñ. II, 179 (*Bālakrīḍā* only) and other refs. at *BSOAS*, XX, 205, n. 12. For inhibition of alienation by prostitutes see *Arthaśāstra* (Triv.) I, 302—3, trans. Shamasastry, 137.

[143]) Nārada V, 4 = *Dh.K.* 798 b; Dakṣa cited by Lakṣmīdhara, *Kṛtyakalpataru, Dānak.*, 17 = *Dh.K.* 807 a.

[144]) N. 135 above.

[145]) Jīmūtavāhana, op. cit. (Cal., 1930) pp. 53—4, Col. II, 28, 30. The difficulty lies in the contrast between this and the passage in the same author's *Vyavahāra-mātṛkā*, where it is laid down that the son can have an action against the father for alienating the whole ancestral estate. It seems, in view of ibid., 26, that J. understood the power of the father to extend to the whole property, unless maintenance rights were jeopardised. The rule against the alienation of all the family property, though frequently cited, had little meaning under Mitākṣarā law, acc. to which the sons' consent was normally needed to every transfer except in a case of emergency (the case of gifts for *dharma* perhaps providing the loophole, which required this special provision). Kātyāyana, ubi cit., 638—640. Lakṣmīdhara, ubi cit. sup., 16. Jagannātha, trans. i, 410.

of that *adhikāra*, could acquire it and become *svāmī* in respect of it[146]). *Bhoga* in fact leads to *adhikāra* in such cases.

The *adhikāras* of the public in respect of "public property" are distinguishable (IV C x).

There is an exception to the first proposition above in regard to a class of *asvāmika-dhana* already mentioned (IV A v). We know that *sva* is necessary for sacrifices (VI ii); what is also imperative is that sacrifices, śrāddhas, and worship generally cannot effectively be offered on the land of a stranger. "The person who has not obtained by lawful means the earth whereon he makes the sacrificial altar, earns not the merit of the sacrifice he performs[147])." "When a man performs a *śrāddha* in honour of the *pitṛs* (ancestors) on earth belonging to another, the *pitṛs* render both the gift of that earth and the *śrāddha* itself futile . . .[148])." Forests, holy mountains, *tirthas* ("fords", "places of pilgrimage"), and temples (see IV C viii [a]) are all *asvāmika;* so are the banks of rivers[149]). No earth requires to be purchased there for the sake of performing religious rites. In fact to this day the notion survives in India that the owner of the soil must give permission for religious worship to be done on his ground, and he will naturally stipulate for some of the merit; permission is asked for the rite to be performed, and a fee, called significantly *rāja-varaṇa*, is sometimes exacted[150]). This is the basis of the report made in the early days of British rule that the poor Indian peasant had to pay even for the right of offering prayers to God[151]). The prevalence of pilgrimage and performance of *śrāddhas* at places like Gayā may

---

[146]) For finding, above n. 93. Manusmṛti IX, 44 = *Dh.K.* 1072. No word for owner appears, but the genitive case only is used. "The field belongs to him who cleared away the jungle, and a deer to him who (first) wounded it." Ghoshal, op. cit., 175, 426—7. There is not in fact the inconsistency he fears. The occupier's right in formerly uncultivated lands does not exclude the king's: revenue is payable!

[147]) MBh. Anuśāsanap. LXVI, Roy's trans., new edn., X, p. 83.

[148]) Ibid., p. 84. MBh., Madras edn., XVI, p. 532, *śl.* 32—4.

[149]) K. iv, 377.

[150]) P. C. Roy's note to his trans., p. 84 (n. 148 above). The expression *rāja-varaṇa*, "king's tribute, or favour", relates directly, perhaps by coincidence, to the question of the king's lordship of the soil. In fact the king's assignee or tenant is receiving this "tribute".

[151]) C. Grant, *Gazetteer of the Central Provinces* (1870), pp. xcix-ci, quoted by L. S. S. O'Malley, *Modern India and the West* (O. U. P., 1941), 38.

not be unconnected with this notion of the necessity of the *yajamāna's* owning the land in question, or at least not using without permission soil belonging to another.

ii. *Dāya.*

In older authors *dāya* covers both spiritual and secular inheritance[152]), which is divisible between sons, or their male lineal representatives at a division of the patrilineal joint family whether during the lifetime, or after the death of the senior male ancestor[153]). Attempts to define the term fail to satisfy, and the divergencies between the Mitākṣarā and the Dāyabhāga schools cannot be reconciled. An altogether inordinate amount of space is given to this problem, while texts are verbally homologated without any apparent attempt to understand the fundamental issue (if it is understood the convention of juristic writing prevents its emergence in so many words). *Dāya* originally comes from the root *dā*, "to divide", and not, as Jīmūtavāhana would have us believe, the root *dā*, "to give"[154]). Hence from the commencement the view existed that *dāyādas*, i. e. sons and other "takers of dāya", had some sort of *adhikāra* by relationship alone, arising at their birth (cf. the text of Gautama above, IV A iii), and enabling them to take at partition property in which a preexisting right justified their participation. The implications of this, however, tended to curtail the ancestor's discretion when a division was to be made in his lifetime, and even to curtail his powers of disposition long prior to any question of division[155]). Since, as we shall see, South India and the Deccan were familiar with joint households in which as a matter of practice the manager's freedom was regulated by the rights of his own issue, and perhaps other *dāyādas* as well, the controversy as to the definition of *dāya* was far from unrealistic.

Definitions may be classified:—

(1) early definitions—

---

[152]) Sar. Vil. p. 345 cites Viṣṇu to this effect (*Dh.K.* 1125 a) and so also does the late work *Dāyabhāgabiṃba.* Jhā, HLS. II, pp. 25—7. K. iii, 544, 572.

[153]) K. iii, 567 f. Gautama and Nārada are cited and explained in Jhā, *HLS*, ii, 14—16.

[154]) K. iii, 543—4. Ibid., p. 546 Kane seems to swallow Jīmūtavāhana's false derivation; for Jīm. see *Dāyabhāga*, p. 6, Col. I, 4, and cf. Bṛ. cited in *Sar. Vil.* = *Dh.K.* 1141 a.

[155]) This is precisely the reason why Jīmūtavāhana, particularly in his first chapter, is so anxious to prove that sons had no birth-right.

*pitryaṃ jñāti-dhanam vā*, "father's property, or the property of a relation"[155a]);

*anvayāgataṃ dhanaṃ*, "property acquired by succession"[156]);

*pitṛ-dvārāgataṃ dravyaṃ mātṛ-dvārāgataṅ ca yat*, "a thing acquired through the father and acquired through the mother"[157]);

(2) *Dāyabhāga* definition—

*pūrva-svāmi-sambandhādhīnaṃ tat-svāmyoparame yatra dravye svatvaṃ tatra nirūḍho dāya-śabdaḥ*, "the word *dāya* is used in a specialised sense in respect of property in which Property arises upon the cessation of the previous Owner's Ownership, Property itself dependent upon a relationship with that Owner"[158]);

(3) *Mitākṣarā* definition and sequela—

*yad dhanaṃ svāmi-saṃbandhād eva nimittād anyasya svaṃ bhavati tad ucyate*, "it is called *dāya* when it is property which becomes the *sva* of another merely by reason of relationship with the Owner"[159]);

*dāya dhanaṃ svāmi-sambandha-vaśāl labdha-dhanam*, "*dāya* is property which is acquired by way of relationship to the Owner"[160]);

*vibhāgārhaṃ svaṃ svāmi-sambandhād eva nimittād anyasya svaṃ bhūtam*, "*sva* capable of partition, which has become the *sva* of another merely by reason of relationship with the Owner"[161]);

*pitā-putra-samudāya-dravyaṃ. vibhāgārhaṃ pitṛ-dravyam*, "a thing common to father and son; a thing belonging to the father which is fit for partition"[162]);

*asaṃsṛṣṭaṃ vibhāgārhaṃ dhanam*, "Unreunited, partible property"[163]);

*vibhāgārha-dravyam: anyadiyaṃ dravyaṃ svāmi-sambandhigāmi*, "a thing fit for partition; a thing belonging to another and passing to the Owner's relation"[164]).

---

[155a]) Bhāruci on Manusmṛti X, 115, p. 368; similar is Aparārka on Yājñ. II, 115, 720.

[156]) Medh. on Manusmṛti X, 115 = *Dh.K.* 1126 b.

[157]) Smṛtisaṅgraha in Sm. C. 255 and Vy. May. 93 = *Dh.K.* 1142 b.

[158]) Dāyabhāga, p. 5, Col. I, 3.

[159]) Mit. prooem. to Yājñ. II, 114 = *Dh.K.* 1132 a.

[160]) Vīramitrodaya comm. on Yājñ. II, 114.

[161]) Sm. C. 267 = *Dh.K.* 1136 a.

[162]) Sar. Vil. (Foulkes), §§ 5, 8.

[163]) Vy. May. 93 = *Dh.K.* 1141 a.

[164]) Viv. Tāṇḍ. 277 = *Dh.K.* 1141 a.

That females might be *dāyadas* we have already seen (IV A i), subject, according to authors whose doctrines became prevalent, to the rule that inherited property should not pass out of the family of a woman's marriage except for her maintenance or necessity, or the husband's spiritual benefit, but should pass (on her *svatva* ceasing) to the next heir of the deceased husband, etc.[165]).

Whether the property of a woman could be *dāya* from the point of view of her relations was thought worthy of some discussion[166]).

The Mitākṣarā definition, which is obviously older than its source (c. 1125), has the merit of attempting to place under one head two very different types of *adhikāra*. The mental picture was of concentric circles of "relations", from the son to the king[167]), having *adhikāras* in respect of any person's *dhana*. The outer circles' *adhikāras* hardly deserved the name as they became operative only in marginal situations and were, from most practical points of view, purely contingent upon the death, etc., of the Owner without leaving surviving him any heirs of a nearer category. The inner circle however, occupied by sons, grandsons, and other agnatic descendants to the fourth degree counting inclusively of ancestor and descendant, contained persons whose rights over the property of the ancestor were, apart from special texts giving the father special powers, so pervasive as

---

165) Based primarily on texts of Kātyāyana, the "limited estate" was always established in Dāyabhāga law, where it is explicitly stated (Col. XI, i, 56 f.). In the "Benares school" its first appearance is in the work of Mādhava (14th cent.) being conspicuously absent from the Mit. The evidence of inscriptions suggests that Brahmanisation encouraged some castes to place restrictions upon females' enjoyment, whereas Dravidian communities, while allowing the husband the management of the household, had accorded a widow full authority over the joint estate: but the matter is not yet fully worked out. For the limited estate as a modern institution (practically abolished in 1956) see K. iii, 708 f. For the woman's struggle to achieve recognition as an heir see ibid. 701 f.

166) The complex discussion in the Sar. Vil. (Foulkes), §§ 21, 333.

167) "Relations" include agnates and cognates, the spiritual teacher, pupil, and fellow-student, then fellow-Brahmans, or, in the case of non-Brahmans, the king (or his assignee). It was axiomatic in *dharmaśāstra* that a king should not take, or if he took should not keep, the property of a Brahman. While Brahmans were attached to spiritual, religious, and educational functions, the need that property should flow perpetually from the non-Brahman to the Brahman and not *vice-versa*, and that in the hands of the Brahman it should be protected by superstitious sanctions, made adequate sense. By Manu's time, however, Brahmans had ceased

to inhibit certain alienations, and to enable grandsons to demand from their fathers partition of the property left by the grandfather and in the hands of the fathers[168]). These rights of control were exactly what many northern and all eastern jurists found it impossible to accept and impose upon their understanding of *smṛti* texts, some of which suggested the reverse[169]). By a pleasing metaphor, drawn from the law relating to pledges and mortgages (IV C viii [h])[170]), the Mitākṣarā school call the *dāya* of the inner circle *a-pratibandha*, "unobstructed", i. e. permanently operative until satisfaction by partition; while that of the outer circles is called *sa-pratibandha*, "obstructed", i. e. dormant rather than contingent until the happening of events which may never happen, and, while dormant, not unreal, but merely ineffectual.

It may be that two entirely different phenomena are wrongly classed under one *śāstric* heading by this device; in any event the Bengal school refuses to allow male issue any rights whatever in the father's property, however acquired, but on the contrary maintains that the father has rights over the acquisitions of the male issue[171]),

---

to confine themselves to priestly functions: some of the restrictive rules remained, none the less.

[168]) The crucial passages are Mit. (Col. I, i, 27 and I, v) and, in explanation of the true meaning of I, i, 27, MRP, 210. Misunderstood in the British period, these texts establish that all joint family property is "owned" equally by father and sons, but that the father has special powers of alienation with reference to some properties. It is clear that by custom, however, partitions at the demand of sons against the father's will were unusual unless the father were utterly incapable; and similarly sons were sparing in their control over their father's dispositions.

[169]) Jīmūtavāha makes the most of Manu IX, 104, Devala and Nārada cited in his ch. 1. The texts collected by Jhā, *HLS*, ii, 12—24, form even more impressive a testimony. However, the Mit. school explain all away on the basis that what sons lack during their parents' lifetime is *svātantrya*, not *svāmya* (notwithstanding Devala's actual denial of *svāmya* in so many words). See below, p. 97.

[170]) Iṣṭaliṅgappa S. Pawate, *Dāya-Vibhāga: or the Individualization of Communal Property and the Communalization of Individual Property in the Mitakshara Law* (Tontadarya Press, Dharwar 1945), ch. 3. This remarkable little book well justifies the praise bestowed upon it by modern lawyers.

[171]) The famous text of Manu (n. 333 below) was not forgotten, but Jīmutavāhana in fact relied upon Kātyāyana: Col. II, 65, 66, 71—2. The trans. of II, 46, appears to be faulty, for the father is competent to sell, give, or abandon his *son*. The denial of the father's Property in his son at II, 67 is intended for a different purpose; and is based upon Jīm.'s notion

until the father's death, *sannyāsa,* or *pātitya* enable the male issue to come into an inheritance once and for all, having, on that account, never less than a fractional interest in the undivided estate to which they have succeeded pending a partition[172]).

### iii. *The Joint Family*

The joint family remains to a large extent the characteristic form of property enjoyment, in which *adhikāras* of a multiple character converge upon each *dhana.* Even in 1956, when legislation in India seriously, and still further, modified the extent to which joint family property could be enjoyed by successive generations, the essential character of the institution, which lies, in the Mitākṣarā school, in the common ownership of ancestral property between father and son, has not been destroyed[173]).

The *sādhāraṇa-dhana* or *samudāya,* "common estate", belonged according to that school to the several generations jointly, the manager, called variously *gṛhin, gṛhapati,* "householder", *pradhāna,* "chief", *prabhu,* "boss", *kuṭumbin,* "family-possessor", and in modern times *kartā,* "officiant", being their representative in dealings with strangers[174]). Those males who were entitled to claim a share at partition, or to initiate a partition, were agnatically connected to an inclusive limit of four generations, the natural limit of sapiṇḍaship. *Sapiṇḍas* are agnates within a pattern of four generations of living *sapiṇḍas* and three generations of dead *sapiṇḍas* (participating at *śrāddhas* in their descendants' property), the word originating from two sources: (1) *sa* + *piṇḍa* ("body"), and (2) *sa* + *piṇḍa* ("ball of rice", "rice ball offered in the *śrāddha* to ancestors")[175]). Those who

---

of what Property is. His date (c. 1090) warns us not to expect too refined a definition.

[172]) For the discussion (neglected here) whether before partition sharers owned the whole estate see *BSOAS,* Prop., 488, n. 11.

[173]) D e r r e t t, "Law and the predicament of the Hindu joint family", *Economic Weekly,* Feb. 13, 1960. The identity of father and son, harped upon in śāstric texts, is very old: W. R a u, *Staat und Gesellschaft im alten Indien* ... (Wiesbaden 1957), 44.

[174]) K. iii, 592.

[175]) *Piṇḍa* definitely did mean "body", as the Mit. insisted (see Raghuvaṃśa II, 57, 59, and the list of meanings given in the Medinī (*piṇḍo bāle bale sāndre,* etc.)). The basic meaning appears to have been a conglomeration, or mass made up of different components. Hence, e. g. "body", "rice-ball", "flock of sheep". Piṇḍ means "body" in Panjābī to this day. Nevertheless, the connexion with *piṇḍa,* the rice-ball offered in

were messmates in life were usually givers or takers of *piṇḍas* in *śrāddha*-ceremonies, other members of the agnatic family within the degree of sapiṇḍaship sharing in the benefit of the ritual[176]).

Originally all acquired property seems to have been joint. Later exceptions were created to enable a family to remain undivided though individuals had shown initiative and been industrious. The category of "self-acquired property", i. e. that acquired without detriment to the family estate, was not compulsorily partible[177]): in fact earners must often have preferred to merge their acquisitions or waive their special rights at a partition; nevertheless the classical *dharmaśāstra* provided equitably for objections to sharing. Family property, even when lost, had a sentimental value, and when recovered with the aid of one member ("coparcener" in Anglo-Hindu language) the *śāstra* provided for the settlement of the others' apparently unreasonable claims upon it[178]). Even after a partition, which was made *per stirpes* and upon the assumption that all partible property had been available to all relevant generations since the previous partition, the separating members retained the right to reunite with a view to equal sharing eventually[179]), provided that they were within close degrees of kinship (in order to prevent abuse of this *adhikāra* of residual jointness)[180]).

---

ancestral worship, existed before the definition of *sapiṇḍas*, and jointness in food and worship and connexion for the purposes of giving and taking such offerings were intimately connected ideas; taking that as a basis sapiṇḍaship for marriage, and connexion through cognates seems to have developed, whence the "body" meaning became emphasised.

[176]) The best old exposition is in Medh. on Manusmṛti, V, 60. See also J. R. Gh ā r p u r e, *Sāpiṇḍya* (Bombay 1943).

[177]) K. iii, 577—585.

[178]) See e. g. Mit. on Yājñ. II, 118—19 (Col. I, iv, 1, 2): note the expression "with the acquiescence of the rest". A further study of this commentatorial addition might reveal an attempt to obviate fraud.

[179]) K. iii, 763—769. The right to reunite was inherent, but reunion was entirely contractual.

[180]) The text of Bṛ. (XXVI, 113, p. 215) relied upon by the Mit. on Yājñ. II, 138 a, and other front-rank authorities to show that only brothers, sons and their father, or uncles and nephews could reunite, is explained by the Viv. Cin., the Vy. May., and by Mitra-miśra, all important authors, as merely illustrating the divided coparceners who might reunite. K. iii, 766. None, however, suggests that a person not formerly joint could ever reunite (though this has been achieved in Anglo-Hindu case-law). Obviously the desire of the Mit., etc., was to put some limit to "sponging", for the notion of residual jointness could go much too far.

The needs of an agricultural, commercial, or even professional family built upon the psychological and legal foundation that the property of *X* belongs to all his relations even during his lifetime, and his preeminence merely consists in his having acquired it, etc., were not conducive to individualism. But patriarchy existed as well as patriliny. The sons' birth-right undoubtedly gave them a right to challenge rash acts by their father, and to threaten to separate if their views were not attended to, but social pressure must have hindered, as it still does, peevish separations by sons[181]). The long battle between widows and their agnatic kindred by marriage (and the latter's wives) was settled diversely in different parts of India[182]). It was not

[181]) Anglo-Hindu case-law allowed some brake on sons' desire to partition in Bombay state, based partly upon a misconstruction of the texts and partly on unproven "custom"; while in Punjab customary law the son has not generally the right to separate without his father's consent.

[182]) To the references adduced at n. 165, add the custom referred to by Medhātithi on Manusmṛti VIII, 3 (Derrett, "Strange rule of Smṛti and a suggested solution", *J. R. A. S.* 1958, 17 f., at p. 19), and the very curious custom referred to by Sāyaṇa (14th century, Deccan) commenting upon *ṛg.* I, 124. 7, where the strange word *gartārug* is explained (see also Nirukta III, 5). Sāyaṇa says, "Just as in practice a certain widow approaches the *garta* ("dicing-table") in order to obtain *svakīya-rikthāni* ("her own estate"). But the *sabhyāḥ* ("members of the court"), having examined her (or "questioned her"), and having "beaten with the dice" any property she may take up, grant (or "award") to her that *dhana*." The words "any property" in this translation represent *yadīyaṃ dhanaṃ*, which may very well mean "the property of whichever person". The reference by the very reliable reporter *Sāyaṇa* must be believed. It accords extremely well with what Medhātithi tells of as a notorious Southern custom, and it is more likely that the usage was common knowledge, than that Medh. obtained it from the Nirukta or other pre-Sāyaṇa material on the Ṛgveda, though the latter is certainly possible. The meaning is apparently this: a sonless widow, whose right to separate property out of her deceased husband's joint family estate was in dispute, because of her failure to agree with her brothers-in-law, and because of the undoubted southern rule that only a *divided* sonless man's property would pass by succession to his widow (Mit. on Yājñ. II, 135—6, p. 221; Col. II., i, 30, 39), applies to the court, which meets in the appropriate public hall, for relief. Their decision will be two-fold: is the widow qualified to take a share in the family property (chastity, etc.), assuming some partition is essential in the circumstances; and secondly, if so, what share, i. e. what lands, etc., in the present occupation of the brothers who are liable for her maintenance, shall be allotted to her? Satisfactory answers to the court's question settle the first point, and the use of dice (after she has expressed her preferences) settles the second: the brothers must settle amongst themselves

always advisable for women to take actual shares at partitions, or for females to inherit shares for an absolute estate. We have seen (IV A i, B iv) that females on the whole were permitted to inherit subject to a limited estate; as for partition, texts specifically gave them shares. Daughters who were unmarried were entitled to a ¼ share, i. e. one-fourth of what they would have had had they been males, but most jurists interpreted this as a vague requirement that their needs at marriage should be attended to, which in many castes would cost the family much more than that ¼ share[183]). Mothers, wives, and grandmothers were likewise entitled to shares at a partition in order to secure their independence[184]). These shares were subject, eventually, to a limited estate. One southern jurist of note denied that they were entitled to specific shares, but merely to maintenance, and his view has been followed in practice in Madras, Andhra and Kerala[185]).

---

how the balance is to be distributed and worked. No doubt a method of drawing lots was used. The continuation of the word *garta* in the specialised sense, "gambling-table", or "gambling-hall", while in the original passage it probably meant only "hall", is probably due to the use of dice to settle such practical problems. Gambling had, it seems certain, lost its social and magical importance amongst the general public by the 14th century, but any public gaming would no doubt take place in the same building as housed the court (not that this is relevant here). There is no question of the woman herself being struck with dice (as someone has suggested), but it is not quite impossible that her chastity, if impugned by the brothers, might have been inquired into by consulting dice! That does not seem necessary, however, to explain Sāyaṇa's passage.

These passages are good evidence for a rule that in special cases even the widows of coparceners would obtain allotments of family property. Whether they would be entitled to pass them to persons of their choice is, of course, quite another matter. In this connexion the inscriptions nos. 429 and 538, App. B. (1918), *Ann. Rep. Epigr. (Madras)*, 1919, p. 97, dated in the 14th year of the Cōla emperor Rājādhirāja II (A. D. 1180) and situated in the Tanjore District are informative. The king permits widows (presumably if they have no sons or step-sons, etc.) to inherit *all* the property of their husbands, apparently including the undivided share in joint family property.

183) The controversy is discussed by Kane, iii, 619—20.

184) K. iii, 605—6.

185) Sm. C., followed in Madras (K. iii, 606); cf. the equally disturbing view of the Vyavahārasāra and Vivādacandra cited by Kane, iii, 605. The trend away from allowing specific shares for women appears at first sight to be hostile to their interests as well as destructive of the plain *smṛti*-rules, but that is not necessarily the case. Maintenance, though it implies de-

The jurists were much concerned with the question whether a coparcener in the Mitākṣarā school might alienate his undivided interest, and whether the coparcener in the Dāyabhāga school might alienate his undivided share. It seems that alienation of any common property without consent of co-owners was sinful, but the question was whether it was effective in law. It seems clear that there was a considerable body of opinion in Bengal that the alienation would be good, and the alienee would have a right to call for a partition, or to press his claims when a partition occurred[186]). In the Mitākṣarā school however it was not until the British period that such transactions were permitted, and then only in the South of India[187]). The reasons for the distinction are still open to doubt.

The history of *dāya* in the joint family is not complete without the puzzling presence of a customary family, consisting of husband and wife and their children, each spouse bringing his or her share to the common home, and each child taking an advancement on his or her marriage, and partition normally following marriage[188]). That such families existed in the South is certain, and there are traces of such ideas even in the jurists who normally adjust their data to the

---

pendence, can be an extremely valuable right in the hands of a determined female.

[186]) Jagannātha, trans. I, 303, 403—6. *Peramanayakam* (1952) Mad. 835. D e r r e t t, "Alienations at Hindu Law ...", *Sup. Ct. Journal (J)*, XX, 1957, p. 85 f.

[187]) *Suraj Bunsi* (1879) *6* Ind. App. 88, 102. The present writer has always contended that this was not evidence of the breaking-up of the joint family, but proof of its ability to move with the times. Junior members wanted to utilise their undivided interests without being obliged to sever from their agnates. The hitherto unnoticed document in the *Lekhapaddhati*, p. 56, according to which a son takes an advancement from the joint estate upon undertaking that when a partition takes place his share is to be debited by that amount, shows that even in western India the idea of quasi-separation within the framework of the joint status was understood.

[188]) Aparārka emphasises the point that partition is normally for those who, having completed their Vedic studies (where appropriate), have married or are about to marry. The Thesavalamai code prepared by the Dutch reveals that the state of affairs mentioned in the text prevailed in Tamil customary law. The special customs of the Chettis support this even for modern South India, and customs in other castes point the same way: see instances cited in D e r r e t t, "Supreme Court and Acquisition of Joint Family Property", (1960) 62 Bom. L. R. (J.), pp. 57 f., also *Chidambaram* A. I. R. 1953, Mad. 492.

Āryan pattern[189]). This is of the patriarchal joint family, the wife joining her husband's family and bringing her dowry, while the husband contributes nothing but a place in his ancestral home. How far this type of family influenced the development of the *apratibandha* theory is still open to conjecture.

No space is given in Sanskrit juridical literature (outside the marginal *anācāra* literature)[190]) to matrilineal and other types of family characteristic of Malabar. There the pure matrilineal joint family seems to have had no conception of individual property, and partitions were rare, they embraced whole segments of the family, the quantity of property allotted depending upon the numbers involved, allotment being calculated *per capita* but not made to individuals. Jurists and logicians studying the nature of Property make no reference whatever to this type of property-enjoyment; and the same applies to the mixed, or a "half and half" systems known in Malabar[191]).

### iv. *Community of goods between spouses?*

The rule *dampatyor madhyagaṃ* (or *madhyakaṃ) dhanaṃ is* ascribed by Jagannātha in the 18th century to an unknown *smṛti-*

[189]) The Mit. interprets *pitṛ-dravya-* in Yājñ. II, 118 as *mātāpitror dravya-*, and thus very curiously selects as impartible self-acquired property only that which is earned "without detriment to the property of the father or of the mother" (Col. I, iv, 2). Since joint family was normally (and theoretically exclusively) held by *sapiṇḍas* as partrilineal joint family enjoyed by agnates, there seemed to be no question of acquisitions being joint if they were acquired with the aid of the mother's property. Surely they would either be part of the mother's *strīdhana* or a present from her to her son or step-son. The fact that a family might have several mothers complicates the position, and makes it *prima facie* undesirable that property earned with the use of a mother's property should be *sādhāraṇa* to the agnatic family of father and male descendants. However this passage (which no one seems to have explained) makes sense if father's and mother's property formed a joint mass, indistinguishable until death or divorce. The śāstric subordination of sons, especially in their exercise of their right of partition, to their widowed mother (treated perfectly seriously by even Jīmūtavāhana) also makes sense against this background.

[190]) Most *anācāra* works are late. Kane mentious, without particulars, only the Anācāra-nirṇaya. K. iii, 848, 856 f., discusses the earlier treatment of anomalous customs. The special customs of Malabar are described in the Keralotpatti and Aliyasantānam, works that, so far as is known, have not been critically edited or discussed in this century.

[191]) For very brief accounts of the various Malabar systems see Derrett, *Hindu Law Past and Present* (Calcutta 1957), 175 f., 185 f., 247 f.

writer Datta[192]). Probably it was by that time anonymous. However it is as old as the 3rd century since it appears in Śabara-svāmī[193]). It was taken seriously by jurists, for it is referred to by Viśvarūpa commenting (in the 8th century or earlier?) upon the Yājñavalkya-smṛti[194]), and it is commonly cited in the 17th and 18th century works on Property[195]). Literally it means, "Property is joint, or common, between spouses"[196]).

Classical Hindu law knows that husband and wife are indivisible[197]), and that no partition actually occurs between them unless the husband becomes *patita* or a *sannyāsī*, and even then some spiritual jointness remains. Yet it is quite certain that there was no community

[192]) Datta (trans. II, 541). The significance of this text was first noticed by the present writer, who mentioned it in *Z. f. vergl. Rechtsw.* LVIII, 220, n. 101; in "Legal status of women in India . . .", *Rec. Soc. Jean Bodin*, XI, 1959, 237 f., 257, and elsewhere. The references given at *BSOAS. Prop.* 490, n. 4, require to be completed. Note, e. g. *Sorolah* 15 Cal. 292. Sabitri A. I. R. 1933 Pat. 306.

[193]) Śab. on J. VI, i, 17. The *yāga* must be made jointly with the wife, for property is common between them. JhāS. 985 seems to miss the point.

[194]) II, 51. *Sādhāraṇa-dhana* of spouses is referred to in the Sm. C. (Mysore edn.) at p. 654 (Rege, p. 223).

[195]) *Sv. Vic.*, IV, 2. *Sv. Rah.* IV, 24. Śrī Kṛṣṇa on Śūlapāṇi (who himself uses it), *Śrāddha-viveka*, 124; on *Dāyabhāga* (Col.) XI, i, 25, p. 268. Jagannātha, I. O. 1770, fos. 7 a, 38 b, 39 b (trans. I, 307, 434); I. O. 1768, fo. 10 a (trans. II, 193). Balabhadra Tarkavāgīśa, Dāyabhāga-siddhānta, Ms. I. O. 1386 c, Egg. 1529, f. 2 a.

[196]) The normal words for "joint", namely *sādhāraṇa* and *samudāya* (the latter implying that various sources have combined to provide an undifferentiated fund) are here discarded for the word *madhyaga*, or *madhyaka*, which imply "indifferent", equally applicable, that is to say, to either. But the age of the text is so great that no great reliance may be placed upon any inference to be drawn from the word alone. *Madhyaga* is found, however, in the sense of *sādh.*, "joint".

[197]) They are one flesh: *Śruti* cited in *Dāyābhāga* (Col.) IV, ii, 14; Manusmṛti IV, 184; K. ii, 428, 556—7; iii, 703. Hence the wife's interest in the husband's property. Medh. on Manusmṛti, IX, 44; the discussion at K. iii, 603, n. 1140 is valuable, with refs. The text *jāyā-patyor na vibhāgo vidyate pāṇigrahaṇādd hi sahatvaṃ karmasu*, which is discussed there, is splendid evidence of the ancient concept of the likeness of spiritual "goods" and physical property. The idea of the spouses' jointness is found everywhere. See Sar. Vii. (Foulkes, sec. 3, 69, 71, 76—9) on Āpast. II, vi, 14, 16. Even in Nandapaṇḍita's Dattaka-mīmāṃsā (at I, 22 of the trans.) we find the idea that any wife of the adoptive father must acquire sonship in any son he adopts or has adopted, just as in any property he may acquire or have acquired.

of goods between spouses in *dharmaśāstra!* Complete separation of property is the rule, the very concept of *strīdhana* making sense only in that context[198]). However, there is evidence that in the customary joint households to which reference was made in the preceding subsection the property of the spouses might have been merged, their earnings might have been joint, and at death or divorce a notional partition took place. As a literal legal rule the jurists had practically no use for it, though we observe that a spouse could not act as surety, on the ground of their community of property[199]).

Moreover, the wife's *adhikāra* over the husband's property for her own maintenance and for family purposes, her right to manage it in his absence without any question of agency, and his *adhikāra* to take and use her *strīdhana* in an emergency without incurring debt[200]), and his right to confiscate her *strīdhana* for her misbehaviour[201]), all point towards a sort of nexus of dependence and mutual responsibility which expresses itself in the property-sphere. The maxim may have been useful, notwithstanding the loss of its original meaning in the orthodox *śāstra*. In default of a better explanation of the development in question we may attribute it to a late Āryanisation of *smṛti* rules.

The question of the husband's Property in his wife must be postponed (V ii [cf. IV A i]).

### v. *Clan or lineage: gotra*

*Sapiṇḍas*, whom we have discussed above (IV C iii), were all *sagotras*, "possessing *gotra*, or patrilineal clan, in common". The residual jointness, cut down in practice by equitable texts, was likewise referred to. In a not unimportant sense the *gotra* seems to have been a residual *adhikārī*, whose rights were to a large extent overshadowed by those of the king (except in the instance of the property of Brahmans), and whose rights cannot have been a collective right in any technical sense[202]). The *smṛtis* have a somewhat vague voca-

198) On the relationship between this text and *strīdhana* see *Sv. Vic.* IV, 5: *BSOAS.* Prop., 492.

199) Aparārka on Yājñ. II, 52. Sar. Vil. § 71—76 (important).

200) K. iii, 785 f. There was a custom postponing this right until the wife had borne one or more children, which raises points of comparison into which it is not possible to enter here.

201) Text of Kātyāyana referred to by Kane, iii, 788.

202) B. N. Datta, *Dialectics of land-economics of India* (Calcutta, 1952), 7, guesses that *gotra* is derived from common pasturage.

bulary, the words *sakulya*, "member of the same *gens*", *sagotra*, and even *jñāti*, "relative", which is later appropriated chiefly to cognates, being at times confused. *Samānodaka*, "one with whom one shares the rite of water-libation to remoter ancestors than deceased *sapiṇḍas*", is by some authorities synonymous with *sagotra* (exclusive of *sapiṇḍa)* but the commoner opinion was that *samānodaka*-ship extended only to the 14th degree inclusive[203]). As heirs *sapiṇḍas*, followed by *samānodakas*, had a firm place in the *śāstra*, though one wonders if the latter ever took in practice.

The Hindu custom of preemption, which long antedates the introduction of Islamic law, subject to which it was ignorantly placed by Anglo-Indian judges[204]), is a survival of *gotra* right. Amongst

---

Far too little is known about the residual rights of the *gotra*, upon which the *śāstric* writers are most reticent, emasculating texts which seem to have a bearing on it (e. g. the spurious text of Manu *avibhaktā vibhaktā vā*, Jhā *HLS*, ii, 8, and the curious text of Uśanas or Vyāsa *avibhājyam sagotrāṇām*, ibid., 73, which says that land, and the wages of performing a *yāga* (?), water, women, etc., cannot be partitioned by *sagotras* even up to the thousandth generation). A. S t e e l e, *Law and Custom of Indian Castes* (London 1868), 239: mortgage assented to. Very early texts on devolution of estates of deceased males suggest that the *gotra* takes at a relatively early stage. Rules of modern times, according to which villages are managed centrally, the land being redistributed periodically, may stem from practices admitting the local agnates, however remote, to ownership of the shares of deceased villagers to the exclusion of cognates, the king, and so on. Rules of Punjab customary law may be referred to in this connexion (see Rattigan's *Digest*), which the present writer prefers not to discuss further.

[203]) Mit. on Yājñ. II, 135—6, p. 223 (Col. II, v, 6).

[204]) *Gordhandas* (1869) 6 B. H. C. R. 263; *Jagmohan* 46 All. 627; *Ramchand* 45 All. 501; *Chakauri* 28 All. 590, and other refs. cited by Tyabji, op. cit., 669, 670. That preemption existed at Hindu law (nothwithstanding the absence of a special word for it) is proved by the text in the Mahānirvāṇa-tantra cited to Macnaghten (see n. 21 above), and by the Vyavahāra-niṃaya's citation of Vyāsa and Bṛhaspati and other texts at pp. 355 f. It is evident that a complete order of priority existed, and that even as between neighbours those lying to the east, west, north, and south had the right to preempt in that order; moreover the time within which each class of claimant might exercise his right was laid down. For these and other interesting details relating to preemption see forthcoming articles in *Adyar Library Bulletin* (Jubilee Number) and *Univ. of Ceylon Review*.

That preemption existed as a widespread Hindu custom is proved by the numerous statutes on the subject applicable to persons of all religions in the various former provinces and states; by some early cases such as (1792) 1 S. D. A. Sel. Rep. 1 and n.; (1851) 7 S. D. A. Rep. 322; 11 Ind.

others entitled to preempt, a person of the same *gotra* could compel the vendor to sell to him rather than to a stranger in clan. How widespread this *adhikāra* over a *sagotra's* property was it is impossible to say.

vi. *Neighbours: s ā m a n t ā ḥ*

Normally there is no ground for supposing that neighbours would have any *adhikāra* over one's property. There is no doubt however but that, with regard to immovable property, the owner of adjacent land had a right to participate in transfers[205]). An ancient authority declared that their "consent" was needed to the validity of a gift or sale, and although commentators point out that this is only to facilitate the transaction and not to invalidate a sale, for example, made without it[206]), the suspicion remains that the consent was genuinely required in such regions as retained the law or custom of preemption, for neighbours were amongst those entitled to preempt. This extremely contingent *adhikāra* would be far from valueless, and was undoubtedly a right in the nature of Property.

vii. *Dependency*

While shares in joint family property were denied to disqualified persons, to females in some regions, to concubines and their issue (except in the cases of *dāsi-putras* of Śūdras)[207]), the shareless ones were all entitled to maintenance out of the property[208]). Aged parents, wife, and children were dependants of the first degree in that their

Dec. (O. S.) 749; and by material on the Laws of Goa and Jaffna (see art. last cited).

[205]) See texts on preemption cited in the last note. The expression *kraye matāḥ*, "are *considered* in a sale", is much wider than "are to be allowed to preempt". The crucial texts are those relating to consent (or rather assent) in transfers: e. g. *svagrāma-jñāti-sāmanta*, etc., cited in Mit. on Yājñ. II, 114, prooem, p. 200, Col. I, i, 31.

[206]) Mit. ubi cit. sup. But note that the Sv. Vic., at IV, 1, *BSOAS.* Prop. 489 and n. 4, takes a different view.

[207]) This peculiar rule has never been satisfactorily explained, it being usually assumed that the majority caste normally expected their illegitimate children by concubines to participate in family property so long as they worked for the family. K. iii, 601—2. It has been established that the Śūdra's *dāsi-putra* was not understood to have a birth-right in that property.

[208]) K. iii, 617 f., 803 f. Jhā *HLS*, ii, 84 f., shows that a high proportion of the texts listing disqualified persons actually commence with a rule that they must be maintained.

rights attached to any property the son, etc., might acquire[209]); others however were to be maintained out of specific property appropriate to their relationship to its holder. The dependants of a *pūrvādhikāri*, "predecessor", would have to be supported out of that *dhana* by the *uttarādhikāri*, the man who succeeded to it. These rights were valuable, though not transferable, and they served as an encumbrance hindering gratuitous transfers. Sanskrit authors apparently would not go so far as to class such rights as *adhikāras*, because of the almost complete lack of a right of initiative on the dependant's part; but we should, it is submitted, not be justified in failing to see in their position a very substantial right of enjoyment in property "belonging" to someone else. To this day in certain circumstances such persons have rights of challenging alienations by the owner of the property from which they must legally be maintained[210]).

viii. *Limited adhikāras, in nine categories*

The last class of *adhikāra* was upon the very borders of *adhikāratva* from the *śāstric* standpoint. We now pass to cases where the *adhikāras* were all clearly recognised as such, but, in contrast with concurrent *adhikāras* in respect of the *same* property, extended only over certain rights in respect of the property. Thus, while the husband's *adhikāra* in respect of his wife's *strīdhana* extended to the whole, but was limited by circumstances, and while the son's right over his father's acquisitions at Mitākṣarā law was limited to a right to prevent improper alienations, the cases which we are about to consider differ from these and their comparable cases in that the rights of the two parties are limited to specific *adhikāras* in respect of the same *dhana*, each excluding the other. The concurrence of *adhikāras* in sub-sections iii—vii of this section extended over the whole *dhana*, neither *adhikārī* absolutely excluding the *adhikāra* of the other or others from proprietary activity with regard to the *dhana;* whereas all the instances in this subsection illustrate *adhikāras* which deprive the *mūla-svāmī*, "fundamental, original Owner", of certain *adhikāras* which he would otherwise have, or originally had, with reference to the *dhana*, thus reducing the total of rights which he might exercise over it. The wife's Ownership in her *strīdhana* was not diminished by her husband's capacity to call upon it in an emergency,

[209]) K. iii, 803—4.

[210]) *Malkarjun* A. I. R. 1943 Bom. 187; but cf. *Satwati* (1955) 1 All. 523 FB.

and the nephew's Property in his inherited estate was not lessened by his aunt's right to be maintained out of it; but in all the instances that follow both *adhikārīs* have limited rights, and each excludes the other from corresponding *adhikāras.*

*(a) Trust: nīvī.*

It was long believed that if the trust existed in India it was confined to the position where *shebaits* managed the property of a *deva,* or a *mahant* or *maṭhādhipati* managed the property belonging to the *maṭha,* "college", of which he was the head[211]). Some have even gone so far as to suggest that the Muslims brought the idea of the trust to India under the heading *waqf*[212]). The *nīvī* (or *nīvi*), which typifies a type of proprietorial relationship, of which the *maṭha-dhana* and *devatā-dhana* are only examples[213]), shows that the relationship of

---

[211]) S. C. Bagchi, *Juristic Personality of Hindu Deities* (Calcutta 1933) deals excellently with the question of a *deva's* (or more strictly *devatā's) svatva,* citing Śrī Kṛṣṇa and Raghunandana. *Deva-dravya* is defined as *deva-niṣṭha-alīka-svāmitva-nirūpita-svatvavad dravyam,* "a thing possessed of Property described by imaginary Ownership located in the *deva*". Gifts to Brahmans associated with dedications to deities, and the Brahmans' and others' appropriation of property so dedicated come under scrutiny. The first may be genuine examples of gift; the second is what is called *uttara-pratipatti* (the form *uttarāpratipatti* is found in Mss. of the *Sv. Rah.* and might be correct), a secondary or immediately susequent appropriation. Mitra-miśra, *Śrāddha-prakāśa,* 8. It is possible that in dedication of lands to deities for the foundation of a shrine, temple, *maṭha,* the deities may be principal recipients, and the gifts may be called *deva-sampradānaka-dānāni,* but this is playing with words, and the truth of the matter is that the dedication to deities, or to the *maṭha* as the case may be, serves to give a secure proprietary interest to the managers or superintendent, who can hide behind the deity, etc., where convenient, and direct the flow of the income to suit themselves. Medh. on Manusmṛti, II, 189; XI, 26. The doctrines of the *śāstra* on the subject are faithfully represented in 2 *Macn. Princ. and Prec.* 102—3 (*c.* 1817) and discussed in * Bhupatinath 37 Cal. 129 FB; Deoki Nandan A. I. R. 1957 S. C. 133. On these institutions' being trusts see Krishnaramani (1869) 4 B. L. R., OC, 231; Tagore 9 B. L. R. 401—2. On the *maṭha-* as a juristic person see Mukherjea, op. cit.; G. C. Sarkar Śāstrī, *Hindu Law,* index, "mutt".

[212]) Text-books of this century admit that institutions comparable with trusts existed in India prior to the Muslim invasions. The Indian Trusts Act recognises that neither the *waqf* nor the Hindu religions endowment are properly "trusts" in the true sense.

[213]) *maṭha-dhana* and *devatā* are both examples of *gauṇa* or secon-

legal owner and beneficiary was well recognised in Indian practice, though curiously enough the word does not occur in that sense in *dharmaśāstra* texts[214]). The word takes its origin in the knot of a woman's lower garment, in which she kept valuables, and the touching of which on the part of a stranger amounted to criminal assault[215]). The word is used in senses also which do not concern us, namely "stake", "wager", "earnest-money", or "security" — all examples of a specific sum or valuable object which is not intended to pass abso-

---

dary *svatva*, whereas in the surviving examples described as *nīvī* the capital fund is actually owned by actual Owners. Save for this difference, and the greater possibility of fraud in the cases of religious endowments dedicated to a jurstic person, there is no difference between *nivī* and these endowments. It is true that for necessity even the *maṭha* or even the idols of the deities may be sold, but there is no proof that in a case where the object of the *nīvī* would otherwise fail the court in ancient India would not have permitted the alienation, in the last resort, of the corpus.

[214]) It occurs in all the lexicons, where our sense appears in the synonym *mūla-dhanam*, "root, or capital fund" whence income would grow as a trunk from the root. And Kṣirasvāmī (about A. D. 1100), writing on *Amara-kośa* (edn. Poona, 1941, p. 218, śloka 80) says *nīvīva parahaste 'rpyamāṇatvāt*, "because it is dedicated, or entrusted, into the hand of another, like a *nīvī* (waist-knot)" The idea is that just as the woman's girdle, which belongs to her, may be loosened only by selected hands and for limited purposes, so the fund must be treated with respect and only its limited profits may be enjoyed by others than the owner. He goes on to refer to other meanings, and adds that in this sense *nīvī* means a fund from which profit is obtained, and thence the word may be used actually for the income or profit itself, i. e. interest. It is precisely in this sense that the phrase *nīvī-dhanam* appears in some South Indian inscriptions.

[215]) The root means "to bind"; the result is that here we have an unsuspected analogy with Indo-European ideas of property being "tied up". A full discussion of this word, the origin of which was discovered by the present writer, will appear elsewhere. On the *nīvi* as part of a garment, Amara and other lexicographers are very full, and an excellent sartorial description is given by G. S. Ghurye in *Bull. Decc. Coll. Res. Inst.*, VIII, 1946—7, 162—6. That women kept valuables there is more than likely, for they still do; and Mit. on Yājñ. III, 258, trans. p. 275, seems to confirm it. The MBh. and Yājñ. refer to the "assault" aspect of *nīvī*. On etymology see hesitating opinions in T. Zachariae, *Beiträge z. Ind. Lexicog.* (Berlin 1883), 28; M. Mayrhofer, op. cit., 174—5. It is not mentioned by Kane. It appears in Gupta and other inscriptions, and is commented upon by S. K. Maithy, *Economic Life of Northern India in the Gupta Period* (Calcutta 1957), 17, 27. Tamil equivalents are *mudal keḍāmaiy* also *vāḍākkaḍan*. It is often called appropriately, *akṣaya-nīvī*, "unwasting capital fund".

lutely into the Property of the person to whom it is consigned, and which is immune from diminution at his discretion[216]).

Our *nīvī* is found in inscriptions with reference to religious endowments[217]), but there is no reason to assume that it was not used also for secular purposes, so long as they were of long duration. A capital fund was placed upon permanent deposit with a "banker", for example a merchant guild with perpetual succession and common funds, upon condition that a part of the income from investment of the fund should be paid over to the beneficiary of the *nīvī*. This was an excellent method of providing for periodical worship of a deity, or the maintenance of some long-lasting object of charity. The depositary's title to the capital fund, which never diminished[218]), was nearly that of full owner, except that he could not alienate it so as to impair its capacity to provide the income stipulated. We should notice the "deposit for use" (IV C viii [i]) which was a comparable type of transaction. The latter lacked the essential feature of a beneficiary's right (for any interest on the deposit would normally be payable to the Owner or his assignee), and was subject to the Owner's right of withdrawing the equivalent in value of the deposit subject to agreement. Here, if the depositary failed to pay over the income he could, it seems, be forced to refund the capital sum to the depositor or his heirs. The *adhikāra* of the beneficiary did not extend to the capital fund itself, but only to the recurring income: the managers of the temple, etc., would deal with the "bankers" on that footing and would not be entitled in any way to interfere in the investment of the fund. The *adhikāra* of the "bankers" extended to investment of the fund, and enjoyment of profits beyond the amount stipulated for in the *nīvī*.

*(b) Trust or lease: kuttā.*

Just as mortgage is treated in the śāstra under "pledge", so leases appear under "hire". To the Indian jurist the hire of a house or garden was much the same as the hire of a man's services or of

---

[216]) It could also mean ordinary commercial investment. The meaning "lump sum" is shown in *Lekhapaddhati* (n. 250, 266).

[217]) E. g. *Epigraphia Indica*, xx, p. 53; xxi, p. 81; xxiii, 55. Minakshi, *Adm. and Soc. Life under Pallavas*, 132—3. K. ii, 68—9 illustrates the endowments made.

[218]) See n. 215, end.

a horse or bullock[219]). A special word for lease does not exist, though the hiring of land had quite special features and involved agreements which could not be paralleled completely in wages or hire of an animal or a tool. From a Dravidian and not a Sanskrit source appears the word *kuttā*[220]), which is used to indicate a type of trust and a class of lease, and in fact it is the only word for lease in the only Sanskrit law-book which uses it. A special word for rent *(stoma)* exists[221]), but this curiously is not used in connexion with *kuttā*. An ancient confusion between the ideas of mortgage and lease, paralleled in other systems[221a]), hindered the clear development of rent in agricultural leases and leases of the right to collect land-revenue, as distinct from rent of a house or the like.

In the *kuttā* the *kauttika*, or tenant, estimates the yearly value of the land, trees, or other source of profit, such as the right to collect revenue in a particular district, and either pays a sum to the owner, or guarantees to pay him money or give him money's worth at a stipulated date[222]). The *adhikāra* of the Owner extends to the land in every respect except that of taking its income or profits during the period in question; the *adhikāra* of the *kauttika* extends merely to the profits. Rules to protect the *kauttika* against loss seem to have been devised, but the account of them in the unique text is not entirely satisfactory[223]).

The *kuttā* was frequently such a lease as would terminate with the end of the agricultural year; but it could also involve the element of trust. It was one method of conveying the perpetual ownership of the property where the Owner's debts and funeral expenses and *śrāddhas* could not otherwise be guaranteed, the only security, upon which he could induce an insurer to cover him in those respects, being his land[224]). The *kauttika* took possession on the death of the *uttama*, or grantor of the *kuttā*, and held the profits subject to the liability to meet the expenses which could only have been estimated

---

[219]) K. iii, 480—1. *KVRA*, 60. Kṛtyakalpataru, *Vyavahārak*, p. 411. A failure to distinguish the terms is found also in Jewish Law.

[220]) Sar. Vil., (Mysore edn.), 161—2, 163—6, 281—3; *BSOAS*. Kuttā.

[221]) Nārada IX, 20—1. K. iii, 480. Sen, 324, 328. *KVRA*, 60.

[221a]) Wigmore, op. cit., Har. L. R. XI, 35, n. 1.

[222]) *BSOAS*. Kuttā, 80—1. Kane says nothing about the *kuttā*.

[223]) Ibid. 79—80.

[224]) Insurance as such seems to have been unknown to India. But the agreement by which the *kauttika* undertook this speculative duty is unquestionably in the nature of an insurance.

at the time of entering into the *kuttā* agreement. For failure to pay he could, no doubt, be dispossessed by the *uttama's* heirs. The debtors of the *uttama*, and persons to whom he had notified his intention that money should be paid from his estate for his spiritual benefit (or that of any assigns of his, such as his parents) were in a position analogous to that of beneficiaries under an English trust, or legatees under a testamentary disposition, for which in fact Hindu law had no precise equivalent[225]).

*(c) Usufructs and bhogopayogi svatva.*

The *dharmaśāstra* is not clear as to whether what we know as usufructs, and what was in general called *bhoga*, was, as a category of *adhikāra*, isolated and specially named according to the type of profit or its source. Usufructuary mortgages were the regular type of mortgage for the greater part of the period and are still much in evidence in Indian practice (IV C viii [h]). The grant of land simply for enjoyment, and without any right of disposition except with the grantor's consent is evidenced in inscriptions, through it is by no means common in surviving examples[226]). It must however have been very usual as a method of settling the claims of maintenance of aunts and step-mothers and other relations who preferred to live separately. Separated wives would similarly prefer to have such arrangements made for them[227]). In such cases the usufruct would belong to the person provided for, while the *adhikāra* of sale, gift, and mortgage (in non-usufructuary forms) would remain with the Owner.

The jurists are familiar with what they call *bhogopayogi svatva*, or "Property appropriate to enjoyment, or possession"[227a]), and this is a term which approaches "usufruct" fairly closely. Its significance will be explained in a later section (IV C viii [i]).

[225]) It is imposible to enter here into the problems relative to the growth of testamentary power in India from the commencement of foreign rule. For many years, and indeed in general until 1956, Hindus had no testamentary capacity which would prejudice the interests of coparceners or dependants. It seems, however, that when English and French courts granted probate of wills and supervised the payment by executors of legacies in the case of the estate of a Hindu they were by no means performing as revolutionary a function as many *śāstrīs* at the time suggested.

[226]) A gift of a *vṛtti* (share or maintenance-grant) without power of alienation: *South Ind. Ins.* IX, i, no. 250; see below, n. 245).

[227]) For modern examples see Darasikrishnayya A. I. R. 1955 NUC 671 (Madras); Purushottamdas [1938] Bom. 1.

[227a]) See n. 316 a below.

*(d) Easements (servitutes).*

There is no part of the *dharmaśāstra* which is dedicated directly to this topic. That easements existed and were transferable proprietary rights is certain. They are compendiously treated under "boundary disputes". The right of way as an impartible object of *svatva* is specifically mentioned[228]). Rights of support, of passage, to use wells, to drive cattle, to take earth, to send down water, and to be afforded privacy certainly existed as types of *bhoga* in respect of the land of others[229]). There is good evidence that *adhikāras* which involved physical contact with the soil had specifically to be transferred at a sale, etc., as they did not pass automatically with the soil itself[230]): but we do not have enough evidence as yet to be sure whether this was equally the case with *adhikāras* which *X* had over the land of *Y*, when the transfer of his land was made by *X*. That there was in general a distinction between an easement and a licence in classical Hindu law, seems likely from what we know of their conveyancing practice, but further research is required.

The ownership of trees did not necessarily pass with the ownership of the soil. Trees were commonly used to mark boundaries. The fruit of trees near a boundary belonged to the owner of the tree; that of trees on a boundary belonged to the land-holders jointly, and not according to the proportion of roots in their respective lands[231]).

That there were purely customary *adhikāras* existing in favour of castes, sub-castes, families, or lineages, authorising them to pass, take, or deport themselves in a particular way on land which they did not own, and without reference to any land they might own at the time or to any limit of time, seems certain. These were rights which were classifiable as *adhikāras*, but they were neither *servitutes*

---

[228]) See Bṛ. in Jhā *HLS*, ii, 68—9; Kātyāyana ibid., 81. Various interpretations of *pracāra*, "way", are found in K. iii, 587: Manusmṛti IX, 219 = Viṣṇu XVIII, 44 = *Dh.K.* 1209 a. Bhāruchi, p. 296, explains *pracāram* in Manu as "a right of way for grazing animals", and "the right to gather kindling fuel, etc.".

[229]) K. iii, 507; Medh. on Manusmṛti VIII, 8; Kātyāyana, śl. 752—3; Lakṣmīdhara, *Kṛtyakalpataru, Vyav. kāṇḍa*, 453; *KVRA*. 66—67. Bari (1959) 61 Bom. L. R. 1041; Kommu (1954) 2 Mad. L. J. 24; J. D. Robinson (1872) 7 M. H. C. R. 37; Komathi (1866) 2 M. H. C. R. 196.

[230]) Bṛ. quoted Vyavahāra-nirṇaya, p. 349, Sar. Vil. p. 326 = *Dh.K.* 896. Rājat. cited by Kane, iii, 494.

[231]) K. iii, 509.

*praediorum* nor easements or licences as understood in English law. Customary rights to hold a market, for example, are of course common in all medieval systems: and just as such rights both in the West and in India[232]) were commonly traceable to a royal grant, so such and similar customs were often treated in India as presumably traceable to a lost grant where one could not be produced. Attempts to forge authority for customs are well known in India.

*(e) Legal charges: nibandha.*

As *nīvī* created an *adhikāra* over the income, or part of the income from a capital fund, which was itself inalienable, so *nibandha* (sometimes inadequately translated "corrody")[233]), which has a strong resemblance to *nīvī*[234]), created in the *nibandhi* an *adhikāra* over a proportion of the profits of some source of production[235]). The main difference between the two forms of providing for dependants, protégés, etc., was that the *nīvī* provided a permanent endowment, while the *nibandha* could be terminated by, *inter alia*, a change in the constitution of the source of profit. For example, if the *nibandha* was granted by a governor in these terms, "3 *paṇas* a day out of the income of the customs-post situated at *X* village", any fresh governmental orders regarding the situation of the post or the liability of goods to customs duty might affect the availability of the *nibandha;* and this might be true even where the *nibandha* was granted for religious purposes, though these had a peculiarly tenacious character. Similarly, if the king granted a monthly salary out of the proceeds of a mine, he was not incapable of reassigning the mine free from the *nibandha*. However, a *nibandha* was every bit as good property as land, and though naturally distinguished from it, it has been

232) Numerous copies of charters setting up markets, and even market-towns with corporations, etc., complete survive amongst the collections of mediaeval inscriptions in Epigraphia Carnatica. The right to hold a market and charge tolls was certainly a right of property created by the king (or his deputy). See, e. g. *Mysore Arch. Rep.* 1911—2, § 90; 1920, § 77 a.

233) By Colebrooke. *Fatṭehsangji* 1 I. A. 34, 51. K. iii, 575.

234) Viśvarūpa on Yājñ. I, 314 calls it *akṣaya-nidhiḥ*, and the last word may well be a misreading for *nīvī* or *nivi* The Sm. C. passage cited by Kane (not at p. 279 as printed) seems very like *nīvī*, but the correctness of the citation is in doubt: it looks much like a similar Sar. Vil. passage.

235) Numerous explanations amount to the same thing. Kane, ubi cit. sup. Grants of such *nibandhas* as are described by Mit. and other authorities are found in huge numbers in south Indian inscriptions. Cf. E. I. XX, no. 109, p. 121.

treated for many purposes as if it were impartible immovable property. *Nibandhas* created by private owners of a source of profit, such as a betel garden, were in a somewhat different position from official or royal grantors. In the former cases the grantor having diminished his own *adhikāras* in respect of the source of profit could not transfer that source free from the burden. Being heritable the *nibandha* was useful in that it provided an income without any necessary connexion between the land-holder, or exploiter of the source of profit[236]), and the owner of the *nibandha,* who could collect his dues through an agent. The transferability of the source upon which the *nibandha* was charged gave it, as a method of provision for a third party, a great advantage over the *nīvī* from the point of view of the owner of the source, while it diminished the security of the *nibandhī* relative to the beneficiary of a *nīvī*. The source might come into incompetent, dishonest, or unlucky hands, while the *nīvī* in the custody of medieval "bankers" was as safe as any property could be.

The survival of the *nibandha* into modern times has its own interest. Anglo-Hindu law has recognised it without any attempt to distort it; but there is room for suspicion that institutions have been categorised as *nibandhas* which perhaps were not really such from the point of view of traditional jurisprudence[237]).

*(f) Conditional transfers.*

The remarkable freedom of contract open to Hindus accounts in some measure for the lack of precise definition in *śāstric* texts of such useful institutions as the *nīvī, kuttā,* easements, licences, and even *nibandhas.* Given that a contract was not unlawful, was entered

---

[236]) For an instance of the creation of a *nibandha* in favour of members of one's family out of inalienable property, see Derrett, "An example of tax-evasion in medieval India", *B. S. O. A. S.,* XIX, 1957, 162 f. *Nibandhas* were distinguished from *bhū,* "land", and *dravya,* "movable", possibly because of their impartibility (and therefore the need to collect through an agent): Yājñ. II, 121 = *Dh.K.* 1175 b; Kātyāyana at *Dh.K.* 1228 b. The curious and controversial word *yogakṣema,* which in medieval times seems to have meant "livelihood", and so "grant for livelihood", and the like, K. iii, 588—9, seems often to have been a *nibandha.* See also Derrett, "Income-tax ... and the *nibandha*", (1961) 63 Bom. L. R. (J.) 17—23.

[237]) Kane, ubi cit. Balvantrav (1872) 9 B. H. C. R. 99; see also 5 Bom. 331 and n. 59 above.

into by a legally qualified person[238]) in circumstances which did not arouse suspicion[239]), and in terms that were not themselves inequitable[240]), any contractual term *(paribhāṣā)*[241]) would serve to pass Property, and it could effect this at some future time, and could even divest Property from a certain moment and cause it to revest in the transferor or his heirs. A wide range of customary transactions were sheltered by this broad contractual liberty, and jurists felt it unnecessary or undesirable to particularise.

Transactions subject to implied conditions were common. The topics of resumption of gift and annulling of sale are too large and involved for detailed treatment here, but they evidently survive from an age when instantaneity of decision was not insisted upon, and transfers, unless accompanied by elaborate solemnities, were commonly subject to implied suspensive conditions which would weaken with lapse of time[242]).

The general proposition that transfers might be subject to a condition precedent ("He shall become owner when he marries *X*") and/or a condition subsequent ("He shall own this until he dies, until he marries, until he leaves the village, until he becomes disqualified to perform his professional functions") shows that in respect of the same *dhana* two mutually exclusive *adhikāras* might exist: *A* would have the *adhikāra* of possession while *B* had the *adhikāra* of acquiring possession at the stipulated time (which might never come) and of hindering transfers in defiance of his conditional title; or *B* would have the *adhikāras* of possession seemingly indistinguishable from full ownership, while *A* or his heirs would retain the *adhikāra* to recover possession should the conditions of transfer be broken or should the suspensive condition become operative. The

---

238) Majority commenced for girls at 12, and for boys at 16. For competence to contract see K. iii, 412.

239) K. iii, 412. Arthaśāstra, III, i, 57 (trans. Shamasastry, 168).

240) U. C. Ṣarkar, *Epochs in Hindu Legal History* (Hoshiarpur 1958), 90, citing the Arthaśāstra.

241) *Paribhāṣā* means "a technical term", it also means a term or condition of a contract which defines the rights created. *BSOAS*. Kuttā, 75, n. 4. The dual senses of *pāribhāṣikatva*, "technicality, pragmatic definition", and "creation of precise (legal) entitlement" deserve to be worked out. See for example Viśvarūpa on Yājñ. I, 53; Vivāda-candra, p. 76; Vya. May. at *Dh.K.* 1123; Sar. Vil., p. 244.

242) K. iii, 489 f.; cf. *Ind. Ant.* VII, pp. 35—6; Sen, 96—7; Jhā, *HLS*, i, 333—45; 265—78; Sen-Gupta, 246, 248 f. 273 f.

latter phenomenon is of great significance in view of what has been done during the British period to introduce and develop the law of testamentary disposition amongst Hindus[243]).

Instances of grants on condition are sufficiently common to make the concept of conditional Property clear[244]). Land is granted for services to the village, and if these services are still required and they cease to be provided the tenure is forfeited[245]). Lands are granted for the maintenance of a branch of the family—if the branch dies out the land reverts to the main branch from which it came[246]).

*(g) Land tenures other than (b) and (h).*

The commonness of leases of houses and gardens, and agricultural and revenue leases is beyond question. Their terms, where they were not based upon objective appraisal, as in the *kuttā*, seem often to have been customary rather than economic[247]). Tenants

[243]) The bequest subject to a condition subsequent, of a life interest, and indeed of vested and contingent remainders generally has entered Anglo-Hindu law under a cloud; but it seems that the English "innovations" were justified. Whether the power of appointment was similarly justified seems open to doubt. For the basic proposition that bequests must be assimilated as far as possible (subject to statutory amendment) to gift, and the difficulties it created in Anglo-Hindu law see Gadadhur (1940) 67 Ind. App. 129.

[244]) Grants of what are now called service *ināms* were normally inalienable: *Madras Arch. Rep.* 1916, para. 60; no. 193 of 1916. Arthaśāstra, Shamasastry's trans., p. 46. Restrictions on transfer were common: Ep. Carn. XII, Chiknay. 2, p. 117 of text is a good example, also no. 118 of 1902, 512 of 1937/8; others are recorded in next note. The opposite provision is also found: e. g. Ep. Ind. XXVIII, p. 208; no. 137 of 1923. Conditions restrictive of the order of devolution are found: e. g. Ep. Ind. XXIX, p. 203—7; Karn. Ins. III, no. 13 (16th century).

[245]) In Ep. Ind. XXX, pp. 71 f., a Kadamba inscription of A. D. 1107 at Goa, the donees took common property with a right to share the income, but without a right to sell their shares — they were all professional people and the shares were in payment for their professional services. Deserters abandoned their shares, and could be fined if they attempted some time afterwards to reoccupy them. The entire residential body, with a particular voice to the neighbours, could introduce a new member to take a deserter's place.

[246]) Anund (1850) 5 Moore's Ind. App. 82; Ranee Sonet (1876) 3 Ind. App. 92; Durgadut 36 Cal. 943 PC. The general notion of a gift subject to defeasance is known to Hindu law, whence Bhoobun (1878) 4 Cal. 23 Pc., Soorjeemoney (1862) 9 Moore's Ind. App. 123, 135, and Pulamuthu (1930) 46 Trav. L. R. 227 are correctly decided.

[247]) Maine. op. cit., 190, 198.

established the right to renew their leases, and where the landholders, e. g. Brahmans, would never cultivate the land personally, the tenant-class developed a status which was dependent only in name. Impoverished cultivating classes have been known to transfer their lands to be cultivated by landless cultivators at rates which were not unadvantageous to the latter. The pattern of land-cultivation agreements was and remains extremely complicated and is beyond the scope of this paper, but jurisprudentially it is important to note that the Owner of certain lands was often in the situation of never having had possession of it for generations, taking perhaps only a small proportion of the net profits, while his relationship to the cultivating tenant is traditionally described in terms of that of mortgagor to mortgagee[248]).

Instances of direct Owner-tenant relationships, in which the former stipulate for a half or more of the net produce are, on the other hand, readily available, and have less comparative legal interest[249]).

*(h) Pledge, mortgage: ā d h i.*

We have already considered summarily the question of usury and rates of interest. Where physical security is offered for repayment of loan and interest the rate of the latter is invariably lower. Where the money-lender is himself a cultivator or can easily and cheaply hire reliable cultivators a favourable rate of interest can be obtained by granting a usufructuary or possessory mortgage, the characteristic Indian mortgage. But possessory mortgages were inconvenient for substantial landholders who needed temporary accommodation, and were inconvenient likewise for professional money-lenders who dwelt in towns and suspected that any cultivators they hired would favour the Owner more than the lender. The development of refinements in the basic propositions of pledge were therefore inevitable. About loans secured by mere acknowledgements little is known[249a]).

---

[248]) The owner is (in Kerala) called *janmī*, the tenant-mortgagee *kānamdār, ottidār*, etc. See *BSOAS*. Kuttā, 67, n. 1. The subject is now much controlled by local statutes.

[249]) In no. 118 of 1888 (Madras, Ann. Rep. Epig.) the *mēlvāram* or landlord's share was 50 %. In South Ind. Ins. III, no. 10 it seems to have been 66⅔ %. For examples of leases see Ep. Ind. I, p. 186 f.; ibid. V, p. 211 f.; *J. B. B. R. A. S.*, XX, 410 f.; *J. R. A. S.*, 1904, p. 642 f.

[249a]) The so-called "promissory note" of no. 105 of 1925 (K. A. N.

The rules relating to mortgage were based upon those relating to pledge, and one word, *ādhi*, served for both[250]). The basic rules found in the *śāstra* set the background against which individual contracts are to be understood. *Ādhi* implies that the object is "placed within" the power of the lender. There were two types, *gopya*, "to be kept", and *bhogya*, "to be used". A *bhogyādhi* provided interest out of its produce, and when the interest reached the maximum applicable (IV B ii) the lender's right terminated and the Owner's *adhikāra* of possession returned to him[251]). If in such cases as this the Owner could not be traced the law provided means for his or his heirs' protection[252]). This right of recovery upon the accumulation of interest to the maximum might be waived by agreement[253]). Profits might by agreement be credited so as to reduce principal as well as interest, the "self-reducing" mortgage being called *kṣayādhi*, "wasting mortgage", for the mortgagee's rights diminish progressively; or *sapratyayādhi*, "with-credit mortgage", as opposed to the reverse, which was an *apratyayādhi*, "non-credit mortgage"[254]).

A pledge or mortgage could not be transferred by the pledgee or mortgagee by gift or sale[255]). Medhātithi says that *anvādhi*, or sub-mortgage to a third party, is illegal[256]). Kullūka, however, commenting upon the same passage in the Manusmṛti, says that sub-mortgage is usual[257]). The Mitākṣarā, which antedates Kullūka by about a century and a half, accepts that a *bhogyādhi* at any rate is not be sub-mortgaged[258]). However, by the 14th century the somewhat

---

Śāstrī, *Cōlas*, 599) seems not to have been negotiable. The *hundī* is beyond the scope of this study.

250) R. Ghose, *Law of Mortgage in India* (Calcutta, 1877), ch. 2 *(dépassé)*; K. iii, 427—433; Sen, 176—206; Viv. Chin., 17—22; *KVRA*, 43; Sen-Gupta 236—40. An example of an actual mortgage-agreement is Ep. Ind. XXV, p. 1 f. Many examples of precedents of different types are to be found in the Lekhapaddhati, the difficult mixed Sanskrit and Mahārāṣṭrian style of which is often a source of embarrassment. In A. K. Majumdar, *Chaulukyas of Gujarat* (Bombay 1956) the book is frequently used, but the details cannot always be relied upon implicitly.

251) Kāty. 516; Yājñ. II, 64; K. iii, 430.

252) K. iii, 434.

253) Lekhapaddhati, p. 37.

254) K. iii, 430.

255) See above, n. 143. K. iii, 429.

256) On Manusmṛti VIII, 143.

257) K. iii, 429.

258) Mit. on Yājñ. II, 58. trans J. R. Gharpure (*Yājñavalkyasmṛti*, Coll. of Hindu Law Texts. II, pt. 3, Girgaon, Bombay 1938), 822.

doubtful *smṛti* authority Prajāpati is alleged to provide details about the deed of sub-mortgage implying that the consent of the Owner was essential[259]). The equally elusive Bharadvāja says that the mortgagor's consent was essential unless the mortgage was to be liquidated[260]). Mādhava, commenting upon Parāśara and referring to Prajāpati's text, comments that the *bhogyādhi* can be sub-mortgaged freely after the maximum is reached without redemption, but only by agreement prior to that time[261]). A surviving precedent for mortgage deeds shows that the mortgagor agrees that if at any time the mortgagee is in need of funds and he cannot redeem on application, mere notice to himself is sufficient before the mortgagee may sub-mortgage[262]).

In the case of a *bhogyādhi* redemption might be made at any time; in the case of a *gopyādhi* the moment was that at which interest equalled principal, or within 14 days thereafter[263]). Premature re-

---

[259]) Cited by M ā d h a v a, *Parāśara-mādhavīya* III, p. 242 (text = *Dh.K.* 660 a). K. iii, 429.

[260]) Sar. Vil. 234—5.

[261]) N. 259.

[262]) L e k h a p a d d h a t i, p. 37., from the Gṛhāḍḍāṇaka-patra. The various terms for "mortgage" have yet to be critically examined; their curious "prākritical" forms show that the learned legal language (like Latin in mediaeval Europe) admitted many local terms from regional languages, which might or might not historically relate back to classical models. Since the passage has been misunderstood by A. K. M a j u m d a r, op. cit., 277, the actual text is of interest: *atha kadāpi vyavahārakasya* ("transferee") *bhīḍāyāṃ jātāyāṃ drammā vilokyante, tadā dhāraṇikam* ("mortgagor") *ākramya dramma grāhyāḥ. no vā* ("in default of which") *dhāraṇika-viditaṃ anya-vyavahāraka-haste patram aḍḍāṇakaṃ datvā drammā grāhyāḥ.* It is of interest to note (i) that the mortgagee is called *vyavahāraka* (which literally means no more than "the party with whom the transaction takes place"), and this is in keeping with the fact that the mortgage is not (it seems) with possession, but only by written deed of mortgage; (ii) the sub-mortgagee envisaged will take the deed, and it is possible that, after paying the mortgagee, he will be substituted into the place of the mortgagee, and the mortgagor can redeem directly from him; (iii) notwithstanding that this is a long way from the ancient possessory mortgage, the transaction still bears the name *aḍḍāṇaka*, which looks like a Pkt. form of *ādhāna-ka*, which is evidently an adjectival formation from *ādhāna*, a parallel form with our Skt. *ādhi* and *ādhamana*. The mortgagor's consent seems to have been needed in the first place to the mortgagee's right to submortgage. For an excellent passage of Jagannātha see n. 299 below.

[263]) Mit. on Yājñ. II, 58. A *bhogyādhi* was judicially redeemed in *Mad. Arch. Rep.* 1918, § 77 = no. 619 of 1917 (A. D. 1643).

demptions, which worked against the interests of professional money-lenders, were discouraged[264]). A very special type of mortgage, called *satyaṅkāra*, permitted the amount due to rest at the principal plus interest of the same amount, with perpetual right of redemption, which of course could be exercised by the mortgagor's heirs[265]). Whatever the basic law on the point, the right of redemption could be limited by agreement, and the same precedent-book shows that it was normal for the mortgagor to agree that his right of redemption should cease, and that after the fixed date the entire Property would pass to the mortgagee "even if I come with the lump sum with double interest"[266]). By the commencement of the British period these agreements were established customarily, and a most interesting struggle began between judicial elements, some desiring to give effect to the terms of the agreements, and others (which were eventually victorious) desiring to introduce the English "equity of redemption", for, after all, the mortgage was, whatever its form, a

---

[264]) K. iii, 433. The same principle applied, naturaly, in the agricultural "mortgage" leases; and the *otti*, for example, in Malabar (and doubtless in the Tamil country and Jaffna) was irredeemable within 12 years: Edathil (1862) 1 M. H. C. R. 122.

[265]) K. iii, 434—5.

[266]) It is important to notice that the "equity of redemption" as it would be called in English and Anglo-Indian law, hovered in the background of many transactions which, upon the face of them, seemed to exclude its possibility. The grave abandonment of a right to redeem which appears in mortgage deeds, and in deeds of conditional sale, is paralleled by similar statements in deeds of absolute sale (the same feature has been found in Ceylon, India, and the ancient Near East, and has caused some embarrassment to modern legal interpreters). In *Lekhap.*, p. 38, line 9, *dīpotsavād ūrdhvaṃ* (after the festival which is fixed as the redemption day) *pratipad-dine granthi-baddhair api drammair* ("even with the coins tied up in a knotted cloth") *dhāraṇikaḥ choṭayituṃ na labhate* ("cannot take — the document? — for cancellation"). In such circumstances some mortgagees would be missing on the redemption-day (as in Jewish experience) and provisions were made for either (i) redemption by public abandonment of the money, or payment to the mortgagee's heir (however remote); or (ii) public appraisal of the amount owed to the mortgagee with a view to its being credited to him as a regular interest-bearing debt. K. iii, 435. The right to "redeem" lands forcibly sold to pay revenue demands and possibly bought at a slight undervalue remained for three generations: K. iii, 495. When all property was confiscated to the king, he had the right to call in all mortgages or terminate mortgage-agreements: *Inscr. in the Pudukottai State*, no. 691.

security and nothing more[267]). The same might be said of all the conditional sale agreements which came under the same Anglo-Indian supervision and adjustment[268]).

If the pledge was not redeemed in accordance with the law and the agreement, the right of foreclosure did not exist unless it was mentioned in the agreement, as, for example, in the precedents cited above, or in the conditional sale agreements, which certainly existed by the 12th century at the latest. A right of sale was implied by law[268a]), and the procedure followed, though it must have varied with locality and period, seems to have secured the interests of lender and borrower alike, while providing (through the public character of the sale) a safe title in the third-party purchaser[269]). Government auctions of land for failure to pay revenue and of revenue assignments were well known[270]), and there is no reason to suppose that they differed in character markedly from the court-auctions of private property. That a "reserve price" was fixed, below which the property would not be sold, seems clear.

We have spoken of sub-mortgage. Could the mortgagor grant a gift, sale, or second mortgage? That he could give and sell subject to the mortgage is beyond question[270a]). But the problem of the second mortgage concerns us closely. If he could not grant a second mort-

---

[267]) The subject is extensive. See Beng. Regs. XV of 1793 and XVII of 1806; Madras Reg. XXXIV of 1802. An excellent example of Reception of what passed then for western law. In Madras the transaction was called by the Islamic name of *bai bil wafa*, but its nature differed hardly at all from the so-called *gahan lahan* mortgages of western India. As a matter of usage an "equity of redemption" was introduced judicially, the Privy Council's very vocal protests going for nothing: Dorappa (1867) 3 M. H. C. R. 363; Pattabhiramier (1870) 13 Moore's Ind. App. 560; Shankarbhai (1872) 9 B. H. C. R. 69; Thumbaswamy (1875) 2 Ind. App. 241, 250 f.; (1881) 4 Mad. 179 FB.

[268]) Venkata (1863) 1 M. H. C. R. 461.

[268a]) For the Anglo-Indian reaction to this see Bhuwanee (1847) S. D. A. Cal. 354; Keshavrav (1871) 8 B. H. C. R., ACJ. 142.

[269]) Texts at K. iii, 434, and Medh. on Manusmṛti, VIII, 143. In pledge, the same principles applied as in mortgage: Lekhap., p. 19. A. K. Majumdar, op. cit., 278—80.

[270]) K. iii, 495, making extensive citations from the Vyavahāranirṇaya (*c.* 1225).

[270a]) Raghunandana, *Dāya-tattva*, ed. G. C. S. Śāstri, V, 14, trans. pp. 31—2. Jagannātha, trans. I, 136—7. But notice the condition laid down (quixotically?) in the paṇḍits' reply (1809) at 2 *Macn. Princ. and Prec.* 307—8 that the transferee must redeem.

gage, as seems to have been the case[270b]), the implication is not that the hypothec (to which we shall come below) was incapable of rising above restrictions obviously applicable where the only mortgages are possessory, but that the mortgagor in parting with the *adhikāra* of *ādhi* (more correctly *ādhamana*, for the process of mortgaging) had so restricted *(pratibaddha)* his *svatva* that that *adhikāra* could never be exercised until redemption restored it again. However, it must be admitted that there are two provisions which suggest that a second or subsequent mortgage was not a legal impossibility. Firstly we find mortgagors agreeing that they will not transfer their land during the pendency of the mortgage[271]); secondly we find a provision in the *smṛtis* that he who pledged or mortgaged to two successively committed a penal offence[272]). This suggests that the first mortgage might be valid in practice without possession, in spite of rules which exhort the mortgagee to take possession[273]), and also that the second mortgage was penalised because it was or might be a fraud, and not because it would be ineffective. Yājñavalkya and Nārada are against the possibility of a second mortgage being valid without possession[274]), but the relation of their rules to our problem is not clear. We are told that if a mortgage, sale, and gift occur on the same day (and it is assumed possession is not given to any transferee) the donee takes 1/3rd, the mortgagee and purchaser sharing the remaining 2/3rds in proportion to the consideration paid by each[275]). This suggests the intention of the *svāmī* is to be construed in such a way that the mortgage does not affect superior *adhikāras* created simultaneously with

---

[270b]) Viśveśvara-bhaṭṭa, text p. 12, trans. Gharpure, p. 29, says so distinctly "because of the absence of *svatva*"!

[271]) Specially of *bandha*, or hypothec, and therefore *a fortiori* applicable to usufructurary mortgage. See Nīlakaṇṭha, Vya. May. (Borr. V, i, 1; Garpure's trans., 142; Kane's edn. p. 166, notes, p. 312), relied upon by M. L. Das, *Hindu Law of Bailment* (Khalispur 1946), 237. See also Steele, op. cit., 251.

[272]) Kātyāyana 517; Viṣṇu V, 181—2; and other texts cited in K. iii, 432.

[273]) Yājñ. II, 60; Nārada IV, 139, cited K. iii, 431—2.

[274]) Last note. From the silence of the commentators and from the context it appears that the intention is not to prevent the operation of a pledge unless it is physically transferred, but to indicate that the pledgee's liability for loss and/or damage commences with his physical enjoyment or custody of the pledge (if any) and not before.

[275]) Vasiṣṭha cited by Sm. C. ii, 145, and Sar. Vil. 238—9 K. iii, 431.

it; but does not suggest that the *svāmī* retains any right of using the mortgaged portion again as a security.

If this is correct, and land once mortgaged could not be mortgaged again during the pendency of the first mortgage, there existed an excellent reason for the development of the hypothec, for which, it seems, the word *bandha* was used[276]). The possibility of non-possessory mortgages would enable those penalised second mortgages to take place in practice. The rule of priority of mortgages according to the dates of giving possession, if any, also supports the existence of hypothecs[277]). Ambulatory pledges of "all property" certainly seem to have existed from very early times, for we have the question whether future assets could be pledged[278]). Customary pledges covering all that a man might have at the time of redemption or "foreclosure" may well have existed notwithstanding the rule that non-existent assets cannot be the subject of a gift or sale[279]). The difficulties to which any such custom must have led jurisprudentially are easy to understand.

In this connexion it is important to notice the transactions *uktalābha* and *avakraya*, which, while they masquerade as sales, show signs of really being types of mortgage[280]). Under the *uktalābha* A borrows less than the market value of a plot of his land, promising to return the money on a certain day; if he did not he

---

[276]) M. L. Das, op. cit., is emphatic that hypothecs were used and supports Ghosh against Sen at pp. 236—7. As elsewhere his emphasis may be excessive; but in this case it appears that Sen (178—188) was only partly accurate. That *bandha* can be an equivalent of ādhi is evident from the Sm. C.'s definition, Kane's edn. of the Vya. May., p. 57. Mortgage of title-deeds, continuously used until British times, is a variety of hypothec: see the transaction in English legal dress in Jivandas (1870) 6 B. H. C. R. 45. The right of a nonpossessory mortgagee to sue in ejectment was recognised: Krishnaji (1872) 7 B. H. C. R. 275.

[277]) K. iii, 431.

[278]) Kātyāyana, 520—2; K. iii, 432; Sm. C. II, 145.

[279]) The fundamental law of transfer was that a person must form an intention with regard to an existing thing and another person must accept or receive the thing disposed of. Hence neither non-existent things, nor non-existent beneficiaries could feature in a transfer. Rāma's gift of Laṅkā to Vibhīṣaṇa has yet to be explained. M. Oodey Koowur (1870) 13 Moore's Ind. App. 598; Ram Nirunjun (1881) 8 Cal. 138, 144. Dissonant propositions in Rajunder (1839) 2 Moore's Ind. App. 181, 202—3 (a reply of pandits in 1810 with reference to a case decided under Mithilā law July 27th, 1812) require further consideration.

[280]) Vya. Nir. 350—1; Sar. Vil. 324 f.; K. iii, 493—4.

## V. Svatva, svāmitva and dhanādhikāritva

### i. *Concurrence of svatvas*

From what has been read already it will have been evident that Indian jurists made a somewhat hazy distinction been *adhikāra* and *svatva*. Perhaps, conjecturing a stage in their thought which does not appear in so many words, the notion was that he who had a *dhana* as his *sva*, so that it was possessed of the characteristic of "ownedness by him", must have *adhikāras* in respect of it; for without some *adhikāra svatva* was meaningless. This would, of course, be to treat *svatva* in an applied sense lexicographically, for, as we shall see, both the mother and the cow are *sva* of the son and owner respectively. Leaving this problem aside for the present, we note that the concept operated in the reverse. In respect of whatever *dhana* a person had an *adhikāra*, that was his *sva* and was possessed of the characteristic of "ownedness by him".

The distinctive feature of the Indian concept of Property, therefore, is the capacity of *svatva* to exist in favour of several persons simultaneously, not only identical *adhikāras* being shared, as in the case of co-owners, but especially where the *adhikāras* are inconsistent, and mutually exclusive[316a]). The number of *bhogas*, which is a compendious word meaning *bhogādhikāras*, "rights of possession, enjoyment, exploitation", was often used as a means of assessing the value of a *dhana* to the relevant *svāmi*[317]). In respect of a piece of land there might be as many as five concurrent *svatvas:* those of the king, ultimate proprietor and receiver of land-revenue and other

---

316a) Sen, 49—53.

317) The fullest alienation was of *aṣṭa-bhoga*, "eight *bhogas*". These were customarily *nidhi-nikṣepa-pāṣāna-siddha-sādhya-jala-akṣīni-āgāmi*, "treasure, unclaimed property, rocks, present sources of profit, accruing sources of profit, water, existing privileges, privileges that may be conferred" K. ii, 865. "Trees over-ground and wells underground" are often referred to. Grants of a village may be *sa-daṇḍa-daśāparādha*, "accompanied with fines and the ten offences", i. e. the right to take fines from the villagers. For examples see *Ind. Ant.* VI, 200, 201; Lekhap., p. 35; a grant of Yaśovarman in Colebrooke, *Misc. Essays*, III, 266; Ep. Carn. V, Bel. 122; inscr. copied in D. Moraes, *Kadamba Kula*, 410—11. A. K. Majumdar, op. cit., 248. K. ii, 865. A particularly interesting example is in the Anbil plates of Sundara Cōla explained in K. A. N. Śāstrī, *Cōlas* (Madras 1955), 578. The word *bhoga* occurs in other senses. An *eka-bhoga* grant is for the benefit of a single individual and his successors; a *gaṇa-bhoga* is under the control of the village assembly: Minakshi, op. cit., 308—10.

it; but does not suggest that the *svāmī* retains any right of using the mortgaged portion again as a security.

If this is correct, and land once mortgaged could not be mortgaged again during the pendency of the first mortgage, there existed an excellent reason for the development of the hypothec, for which, it seems, the word *bandha* was used[276]). The possibility of non-possessory mortgages would enable those penalised second mortgages to take place in practice. The rule of priority of mortgages according to the dates of giving possession, if any, also supports the existence of hypothecs[277]). Ambulatory pledges of "all property" certainly seem to have existed from very early times, for we have the question whether future assets could be pledged[278]). Customary pledges covering all that a man might have at the time of redemption or "foreclosure" may well have existed notwithstanding the rule that non-existent assets cannot be the subject of a gift or sale[279]). The difficulties to which any such custom must have led jurisprudentially are easy to understand.

In this connexion it is important to notice the transactions *uktalābha* and *avakraya,* which, while they masquerade as sales, show signs of really being types of mortgage[280]). Under the *uktalābha* A borrows less than the market value of a plot of his land, promising to return the money on a certain day; if he did not he

---

[276]) M. L. Das, op. cit., is emphatic that hypothecs were used and supports Ghosh against Sen at pp. 236—7. As elsewhere his emphasis may be excessive; but in this case it appears that Sen (178—188) was only partly accurate. That *bandha* can be an equivalent of ādhi is evident from the Sm. C.'s definition, Kane's edn. of the Vya. May., p. 57. Mortgage of title-deeds, continuously used until British times, is a variety of hypothec: see the transaction in English legal dress in Jivandas (1870) 6 B. H. C. R. 45. The right of a nonpossessory mortgagee to sue in ejectment was recognised: Krishnaji (1872) 7 B. H. C. R. 275.

[277]) K. iii, 431.

[278]) Kātyāyana, 520—2; K. iii, 432; Sm. C. II, 145.

[279]) The fundamental law of transfer was that a person must form an intention with regard to an existing thing and another person must accept or receive the thing disposed of. Hence neither non-existent things, nor non-existent beneficiaries could feature in a transfer. Rāma's gift of Laṅkā to Vibhīṣaṇa has yet to be explained. M. Oodey Koowur (1870) 13 Moore's Ind. App. 598; Ram Nirunjun (1881) 8 Cal. 138, 144. Dissonant propositions in Rajunder (1839) 2 Moore's Ind. App. 181, 202—3 (a reply of pandits in 1810 with reference to a case decided under Mithilā law July 27th, 1812) require further consideration.

[280]) Vya. Nir. 350—1; Sar. Vil. 324 f.; K. iii, 493—4.

agreed that his *svatva* would pass to the lender. The word *avakraya* is apparently used in more than one sense[281]), but an important use was for the transaction by which, apparently, *B* paid less than the market value of a piece of land on condition that, if it were not returned to him (presumably with interest) within a very long period, the sale, which was conditional until then, would become absolute. These precedents for the modern conditional sale agreements have never been scrutinised, and are plainly instances of hypothecation.

A pledge or mortgage capable of redemption had to be kept or used with the same standard of care as a deposit[282]). But these provisions also (IV C viii [i]) could be waived by the pledgor or mortgagor, and we find conditions in the precedent-book which would be regarded as oppressive even in modern times[283]). In case of loss of the security through latent faults or Act of God, etc., it was possible for the lender to obtain substituted security out of other property of the borrower[284]).

(i) *Bailment (commodatum, etc.).*

Bailment raises problems of special interest for our study. All forms of bailment do not necessarily reproduce the same problems, but in general it may be said that the bailee obtains in the *dhana* bailed to him a *svatva* mutually exclusive of that of the bailor. The number and character of his *adhikāras* will vary with the circumstances, but his own status with relation to the object is similar in kind with that of the *svāmī* or *mūla-svāmī*, the bailor. It is of interest that when Indian jurists came to examine the *adhikāra* of the bailee, their discussion of the attribution of *svatva* to him centres on the bailee for use (below, and V i). This is comparable with the Roman distinction between the *mutuum* and the *commodatum*, but there is no

[281]) K. iii, 494, n. 874; 495.

[282]) K. iii, 432—3.

[283]) Lekhap., p. 37. It is to be observed that right up to modern times all necessary repairs could be made to the property by the mortgagee at the mortgagor's cost: Rāmji (1864) 1 B.H.C.R. 199, 204. That the mortgagor could not recover from the mortgagee when the latter allowed the property to fall into disrepair, to catch fire, and so forth seems to be contrary to the basic principles of *ādhi*, but was evidently stipulated for. On the other hand the mortgagor was entitled to stipulate that the usufructuary mortgagee should not use the buildings for purposes which would render them uninhabitable (or uninhabitable without great expenditure): Lekhap., p. 37, commented upon by Majumdar, op. cit. 277—8.

[284]) Kātyāyana, śl. 523—4 (see Kane's notes ibid., also K. iii, 432—3).

evidence that Indian jurists denied that a bailee for custody or a bailee for work had an *adhikāra* in the goods. On the contrary one at least contemplated a washerman pledging his customers' clothes[285]). Thus in relationship with the third party and within the limited *adhikāra* the goods were the bailee's *sva*.

Deposits with "bankers" for use, to earn interest, have been mentioned (IV C viii [a]). Deposit in general is considered a relation *uberrimae fidei*, for people used to make deposits as they used to bury treasure, in order to evade the claims of *dāyādas*[286]), creditors, revenue-authorities, and of course the attentions of thieves. To take a deposit was to assume a gratuitous responsibility, and was a test of friendship, hence we have *nyāsa* and *pratinyāsa:* people made mutual deposits[287]). Vocabulary becomes somewhat vague. *Upanidhi*, "minor *nidhi*", and *nikṣepa* are used comprehensively for deposits, covering also material deposited for work to be done on it, as for example clothes deposited with a washerman[288]). *Śilpi-nyāsa* is material deposited with a craftsman, as gold with a goldsmith for fashioning into an ornament[289]).

The deposit must be returned at request (subject to the rights of those who have worked on them in appropriate cases)[290]), but

---

[285]) Mit. on Yājñ. II, 238 (K. iii, 494, n. 874). M. L. Das, op. cit., 186.

[286]) Vyāsa in Sm. C. II, 178 = *Dh.K.* 755; Mit. cited by M. L. Das, op. cit., 75; Jagannātha, trans. i, 276). The great temptation of senior members of the family to use what was really joint family property to make dishonest gains for themselves, and to evade the pervasive (some would think too pervasive) rights of *dāyādas* is evidenced in Medhātithi's comm. on Manusmṛti IX, 214.

[287]) On the whole subject of bailment see K. iii, 452—60, Sen, 207 at 229; Viv. Cin. 40—4; KVRA, 48—50; Sen-Gupta, 241—3, the specialist work being M. L. Das, op. cit., n. 271 above.

[288]) K. iii, 454.

[289]) Ibid., 458, 459—60.

[290]) Ibid. 459—60 curiously makes no reference to any lien in favour of the craftsman over the material for the price of his labour. As in so many cases the rule (which must have existed) is buried in another chapter of law, and that too tacitly. Breach of contract was a title of law, and, provided that basic conditions of validity of contract were complied with, any agreement would be enforcible, subject to "criminal" penalties. We are told in Kātyāyana, 603—4, that the craftsman must pay the price of the material or article if he did not restore it in accordance with the agreement: naturally the craftsman would not agree to restore the article unless terms were agreed as to payment for the work done. One might expect to find a rule providing for a presumption that payment was to be made on delivery, unless otherwise agreed: but this would not be

before witnesses if the deposit was made before witnesses, and not before required, nor to co-owners, unless the depositor has died, in which case the depositary must return the deposit to the heirs generally and not merely to one of them[291]). If not returned on demand interest is payable[292]). A sealed deposit, *upanidhi*, must be returned sealed. Unsealed deposits bear the common name *nyāsa* or *nikṣepa*, words which cover many sorts of deposit other than those which act as security for loans; but any sort of deposit if not intended for use, and used without the depositor's permission, will carry interest[293]).

*Yācitaka* is a loan for a festive occasion; *anvāhita* a deposit taken in connexion with a transaction between two other parties (an example would be *paripaṇa*, "wager"); *avakrīta*, as the name indicates, is property lent for reward, on hire[294]). The rights and obligations of a *pāla* "-herd" as in "cow-herd", are similar to those of a depositary, with appropriate elaborations[295]).

The duty of a bailee was strict. He was free from obligation if he kept the property under the same conditions as like articles of his own[296]). It does not appear that conditions of bailment for custody could be made more severe by agreement. Since the bailee was liable to the bailor for damage or loss due to his negligence he must himself have had a remedy against the thief or offender who had caused the loss. This implies a title, and the difficulty in Anglo-American law, concerning the "special property" of the bailee, seems not to have worried Indian jurists, who recognised the bailee as an Owner, though in an inferior measure as compared with the *mūla-svāmī*, the bailor or his successor in title.

*Svatva* can appear in two forms besides the undifferentiated *svatva* which suggests the maximum relevant number of *adhikāras*. *Bhogopayogi-svatva* (IV C viii [c]) describes the *adhikāras* of a depositary for use, or a mortgagee in possession. *Rakṣaṇopayogi-svatva* is the Property of one whose *adhikāra* extends only to protection of the *dhana*. An example would be the owner of property

---

reasonable in a country where payment was less usual than mutual services, or services compensated for once or twice a year.

[291]) K. iii, 456.

[292]) Ibid., 459.

[293]) Ibid., 457.

[294]) Ibid., 458—9. The standard of care required is the same in all cases.

[295]) D a s, op. cit., 206 f. K. iii, 497 f. Viv. Cin., 81—83.

[296]) K. iii, 456.

who has made a gift or dedication and the donee or managers of the endowment are not in a position immediately to accept and take possession[297]). Such is a *paripālanīyatva-rūpaṃ svatvaṃ*, "Property that has the form of conservation", to use the expression which characteristically sees Property not as an abstract "right", but an actual or potential function[298]). Jagannātha discussing the bailee's *adhikāra* and Vijñāneśvara's position on the question[299]) says that the view that the borrower for use is *svāmī* must be admitted, but this is an *apakṛṣṭa-svatva*, "subordinate Property", the *svāmī's* original *svatva* remains *aviruddha*, "unopposed", and an alienation of the object borrowed can be made by the borrower with the *svāmī's* consent: hence the *smṛti's* prohibition of alienation of a borrowed object. The consent of the *svāmī* then completes the *yatheṣṭa-viniyoga* which the borrower acquires (for *yath-* see VII i). Jagannātha says, further[300]), that a view current in his day, of which he plainly does not disapprove, allowed that those whose interest in an object, such as an *ādhi*, can be quantified in terms of debt, etc., or whose *adhikāra* extends to the whole *dhana* by reason of a deposit, and the like, may create independently an interest equal to their own. The antecedents of this rule are not clear, and it is not impossible that it may owe something to English influence. His own attitude is demonstrated a little prior to this passage[301]) where he declares that *yācitaka* is mentioned separately from *nyāsa, anvāhita* and *ādhi*

---

[297]) Das, op. cit., 93—4. Mitra-miśra cited by Law, op. cit. n. 32 sup., p. 8.

[298]) Mitra-miśra, *Vyavahāra-prakāśa*, 427—8 (G. C. Sarkar Śāstrī's trans. of Dāyabhāga portion, p. 35); *BSOAS*. Prop. 493, Sv. Vic. V, 1.

[299]) Mit. on Yājñ. II, 58. Sm. C. says, *bandha ādhiḥ, so'pi kvacit svatva-nimittaṃ bhavati*, "*bandha* means mortgage, and it may sometimes be a cause (or means to) Property". This refers, not to acquisition of title at foreclosure, etc., but to the commencement of the relationship; and the same applied to bailment. Jagannātha, iii fo. 4 a, trans. I, 402. M. L. Das, op. cit., 245—6, refers to an excellent passage of Jagannātha (trans. I, 134—6), which establishes the right of sub-mortgagees and sub-pledgees to create titles, or allow titles to be acquired against them, so as to diminish their own, and, in the case of adverse possession, even the *mūla-svāmī's* rights. The rules allowing a pledgee to sub-pledge for a smaller amount, or an equal amount but not a greater, are restrictive of a right in the nature of *svatva*, upon which sub-pledging itself rests. That such transactions frequently occurred Jagannātha himself assures us.

[300]) Jagannātha, trans., I, 402.

[301]) Ibid., 401, text IV. Colebrooke's trans. seems, for once, not to be entirely satisfactory.

in the text explaining what should not be alienated because the last is connected with debt, and the *yācitaka* possesses *asvāmi-vyāpāra-paratantratva*, "the character of having transactions with it on the part of a non-*svāmī* non-independent", i. e. from the owner's point of view transactions entered into by one who does not happen to be the owner (the borrower) are *paratantra*, outside his personal control. We might go further and suggest that what Jagannātha understood by the *adhikāra* of the bailee in the case of *yācitaka* was a right of use impliedly authorised by the owner, and that the latter was estopped from denying his right to dispose of it as he thought fit by having held himself out as lender for use. And this peculiar *adhikāra* he quite rightly calls a *svatva*, subordinate to the *svatva* of the owner who had parted with an *adhikāra* temporarily.

ix. *Partnership.*

On this subject the *dharmaśāstra* is well supplied with rules, which no doubt applied in practice with reference to the guilds and commercial partnerships between individuals, or more commonly families, with which India has been familiar throughout history. The earliest recorded instances are partnerships between priests of different classes formed for the purpose of performing sacrifices for wealthy patrons[302]).

The detailed rules prescribing methods of division of profits amongst those whose contributions of capital, skill and other forms of enterprise differ are beyond our scope[303]). However, in all instances of *saṃbhūya-samutthāna*, "joint enterprise", "partnership", the rights and responsibilities of partners extend to the whole assets, though it appears that there was a system whereby express authorisation was required to empower any unusual step to be taken by any member in order to bind the whole[304]). Though profits might not correspond to the share originally contributed (special provisions are expressly allowed by the *śāstra* for partnerships of traders, husbandmen, thieves, and artisans), it seems that each partner was entitled to one vote, for in the context of partnership deliberations, which remind us strongly of limited liability company shareholders' meetings, we have the only genuine instance of the exercise of decision by majority,

[302]) Manusmṛti VIII, 211. The subject is dealt with in K. iii, 466—70; Sen. 329 f.; Viv. Cin., 49—56; *KVRA*, 51—3; Sen-Gupta 243—5.

[303]) K. iii, 468—9.

[304]) Bṛ. XIII, 22 f., p. 133; K. iii, 467.

which is normally anathema to Indian traditions[305]). That a partner might be impliedly authorised to bind the whole partnership assets by his acts within the ostensible scope of activity allotted to him is not stated in our texts, but it is difficult to see how business can have proceeded without such provisions. Property was owned by the partnership, apparently, much as in the case of ancient guilds, under the partnership name[306]). Acts against the interest of the partnership or done negligently without the partners' consent must be compensated for by the partner out of his private assets[307]) and it would seem that although there is no trace of the third party's rights against the partner's private assets, his remedy, if any, against the other partners should be capable of being worked out by them in turn against the delinquent partner. For fraud of the partnership the partners were entitled to deprive the fraudulent partner of his share of profits, and to expel him from the partnership[308]).

The essence of the institution is pooling of assets and skills, in order to share profits. What we know is sufficient to detect *adhikāras* on the part of each partner in the shares contributed by the others and in the earnings made therefrom. The differences from coheirs' interests in an undivided estate are plain. Incidentally it will be observed that *dāyādas*, because of their jointness of property, cannot act as sureties for one another, nor enter into mutual transactions such as partnership-agreements[309]). The partners, however, preserve a special status sufficiently removed from that extreme position for it to be possible for them to act mutually as sureties[310]),

---

[305]) K. iii, 467, n. 806.

[306]) This is an inference drawn from modern usage, according to which a firm trades under a name such as Jivan Das Gokul Das, an individual partner having one of these names, or having had one of these names within living memory. For an example of difficulties raised by the names of Hindu joint family businesses see Tulsidas A.I.R. 1960 Ker. 75.

[307]) K. iii, 467—8.

[308]) Ibid. Partnership agreements could be enforced by appeal to the king, notwithstanding the general submission to copartners in mutual disputes: cf. K. iii, 486 f. with ibid. 467. Sen-Gupta, 259 f.

[309]) Yājñ. II, 52. There are, in classical Hindu law, no cases where undivided relations may have mutual transactions with regard to property, except "gifts of affection" from father to son and daughter, husband to wife, etc.

[310]) Kātyāyana, 114—116 (better translated by Kane, p. 137—8, than by Gharpure, Vy. May. 19) and Yājñ. II, 10 show that a person competent

while the very essence of their relationship to one another lies in the capacity to contract. It is this difference which makes it desirable to distinguish partnership from the various concurrencies of *adhikāras* described in IV C iii—vii and from the limited *adhikāras* described in the nine categories of IV C viii. Partners are *adhikāris* with regard to each other's shares, and yet confined, as to their *adhikāra*, to rights of dealing with the whole, whilst acquiring individually a fixed proportion of the income.

Sleeping partners were known, who contributed nothing but capital, and it is possible that this was a feature of the institution from the beginning[311]).

Illustrating the extent of the partners' *adhikāras* over the shares of other partners, the rule regarding succession to such share places the partners of a deceased partner in the order of heirs midway between near and distant kindred[312]).

x. *Public property*

A concurrence of a still further type is to be seen in the co-existence of *adhikāras* of individuals in respect of *dhana* belonging to the whole or a great part of the public. This is not specifically *gaṇa-dravya*, or the like, which is the property of a caste, guild, or some determinate body. The terms *sādhāraṇa-dravya*, *sādhāraṇa-dhana* might perhaps be correctly used of the "common property" of the public in tanks, paths, shelters, and so on: but in those contexts the term *sādhāraṇa-svatva* would go too far[313]). There is a distinction between *asvāmika-dhana*, like river-water, or fish in a river (IV C i), and property in which all people have *adhikāras* but of which no one can ever become *svāmī* by any act of appropriation.

When an individual or family "released" a tank, or a well, or some other facilitity for the public's use they did not destroy their own *adhikāras* of enjoyment, though they created what appears to have been the equivalent of an irrevocable general licence[314]). An

---

to satisfy an eventual claim may be selected as surety, exclusive of a long list of persons either legally unfit, or practically unsuitable: and the commercial partner is not within this list.

311) Yājñ. II, 265.

312) Yājñ. II, 264; Nārada VI, 7; 17—18. K. iii, 467—8.

313) The special *adhikāra* to use such things really needs a special term. In fact the property is (the subsoil may not be) *asvāmika*. There is in fact an *utsarga* "for *bhoga*", etc. and no one becomes *svāmī*.

314) P. N. Saraswati, *Hindu Law of Endowments*, ch. VIII, esp.

outright transfer was impossible because of the absence of a definite body on whose behalf acceptance might be made[315]).

It is of interest to notice that Medhātithi uses the expression *sarva-sādhāraṇa-viṣaya* when he wants to indicate "public property". Manu says[315a]) that one of the eightfold group of vices which beset kings on account of *krodha* (approximately, "anger") is *asūya*, "discontent", "envy". Medhātithi appears to illustrate this condition by, "terminating (or 'abridging') the commonness *(sādhāraṇya)* of public property". Such property would naturally be parks, commons, and lakes, over which the public had rights of enjoyment.

Such *asvāmika dhana* could not be protected in the same way as any *sa-svāmika-dhana*. Accordingly it was the duty of the king to punish interferences with common rights, and there are rules (too numerous to list) which tend to the protection of the cleanliness, efficiency, and safety of public amenities[316]).

---

pp. 205—7. Sv. Vic. VIII. *BSOAS*. Prop. 498. People were fully alive to this question as early as Medh. He says, on Manusmṛti IV, 202, that tanks assigned for public use were *adatta*, even if *tyakta*, "relinquished". On Manu, XI, 61 (where *sales* of tanks are subjected to penace) he has nothing to say.

315) The author of the *Sv. Vic.* refers to a text *pariṣad-dattaṃ adattam*, "what is given to a *pariṣad* is ungiven". *Pariṣad* means a caste group or committee made up of persons with a common qualification, commonly a Brahman committee assembled to deal with some problem or accomplish some task. In payment for their services, or to secure their favour, a gift might be made to them. It may be made to one with instructions to distribute it; but a collective gift to all was apparently considered inoperative. The matter, which is evidently one arising in *Mīmāṃsā*, deserves fuller consideration. The author refers to the text as part of the *pariṣad-adhikaraṇa*. It has not been identified, but in the absence of skilled *mīmāṃsaka* advice the reference appears to the writer to be to Śab. on J. X, iii, 50—52. JhāS. 1774—5. The rule there laid down is that the *yajamāna* must make his gift (which is expressly described as a gift for "hiring" and not purely gratuitous) to the individual priests according to their shares, and these may be unequal (Śab. on J. X, iii, 53—55, JhāS. 1776—7), but not to the group collectively: for the contract by which the priests were employed was with them individually, for it is impossible to make a contract with a group. Perhaps the author of the *Sv. Vic.* thought the principle capable of extension to any situation where rights were to be transferred to a group.

315a) Manusmṛti VII, 48. Jhā's text (II, p. 15) differs from the order adopted in his translation (III, 2, p. 306), but his latest views are represented by the text.

316) Kātyāyana, 758—9. K. iii, 509. Cf. Arthaśāstra (Mysore edn.), 48 (trans. Shamasastry, 47).

## V. Svatva, svāmitva and dhanādhikāritva

### i. *Concurrence of svatvas*

From what has been read already it will have been evident that Indian jurists made a somewhat hazy distinction been *adhikāra* and *svatva*. Perhaps, conjecturing a stage in their thought which does not appear in so many words, the notion was that he who had a *dhana* as his *sva*, so that it was possessed of the characteristic of "ownedness by him", must have *adhikāras* in respect of it; for without some *adhikāra svatva* was meaningless. This would, of course, be to treat *svatva* in an applied sense lexicographically, for, as we shall see, both the mother and the cow are *sva* of the son and owner respectively. Leaving this problem aside for the present, we note that the concept operated in the reverse. In respect of whatever *dhana* a person had an *adhikāra*, that was his *sva* and was possessed of the characteristic of "ownedness by him".

The distinctive feature of the Indian concept of Property, therefore, is the capacity of *svatva* to exist in favour of several persons simultaneously, not only identical *adhikāras* being shared, as in the case of co-owners, but especially where the *adhikāras* are inconsistent, and mutually exclusive[316a]). The number of *bhogas*, which is a compendious word meaning *bhogādhikāras*, "rights of possession, enjoyment, exploitation", was often used as a means of assessing the value of a *dhana* to the relevant *svāmi*[317]). In respect of a piece of land there m i g h t be as many as five concurrent *svatvas:* those of the king, ultimate proprietor and receiver of land-revenue and other

---

[316a]) Sen, 49—53.

[317]) The fullest alienation was of *aṣṭa-bhoga*, "eight *bhogas*". These were customarily *nidhi-nikṣepa-pāṣāna-siddha-sādhya-jala-akṣini-āgāmi*, "treasure, unclaimed property, rocks, present sources of profit, accruing sources of profit, water, existing privileges, privileges that may be conferred" K. ii, 865. "Trees over-ground and wells underground" are often referred to. Grants of a village may be *sa-daṇḍa-daśāparādha*, "accompanied with fines and the ten offences", i. e. the right to take fines from the villagers. For examples see *Ind. Ant.* VI, 200, 201; L e k h a p., p. 35; a grant of Yaśovarman in Colebrooke, *Misc. Essays*, III, 266; Ep. Carn. V, Bel. 122; inscr. copied in D. M o r a e s, *Kadamba Kula*, 410—11. A. K. M a j u m d a r, op. cit., 248. K. ii, 865. A particularly interesting example is in the Anbil plates of Sundara Cōla explained in K. A. N. S ā s t r ī, *Cōlas* (Madras 1955), 578. The word *bhoga* occurs in other senses. An *eka-bhoga* grant is for the benefit of a single individual and his successors: a *gaṇa-bhoga* is under the control of the village assembly: M i n a k s h i, op. cit., 308—10.

profits from each tenure[318]); of the *mūla-svāmī* or *bhaumika*, the land-holder[319]), payer of land-revenue; of the mortgagee to whom he has mortgaged it; of the sub-mortgagee to whom the mortgagee had sub-mortgaged it; and finally of the cultivator to whom the sub-mortgagee has leased it.

---

[318]) On the controversy concerning the king see *BSOAS*, XXII, 115; Derrett, *Hoysalas*, 233 f. Early observers, such as Wilks, Dubois, Elphinstone, Patton, Chamier, were clear that the king owned concurrently with the *bhaumika*, and their reports (discussed in E. Sicé. Essai sur la Constitution de la Propriété du Sol ... dans l'Inde, Pondichéry, 1866), not difficult to reconcile, agree substantially with what is said by Śrī Kṛṣṇa and Jagannātha. See J. Grant's *Inquiry* (1791). See also Śrī Kṛṣṇa on Dāya-bhāga (Col.) I, 10, at p. 18, on what a *rāja* buys when he buys a new *rājya*. Differences of opinion on this subject would not have been tolerable to Indian kings, and the view that jurists differed about it is not acceptable. The difficulties were caused by texts in Mīmāṃsā writers, utilised by some jurists (in particular Nīlakaṇṭha, Vy. May., Kane's edn., p. 19), which explained that in the Viśvajit sacrifice, which was intended to make the king ruler over the earth, certain items of property were not to be given, although the injunction was to give all he had. That Indian kings gave their kingdoms away in fact is certain: the *mokṣa-pariṣad* ceremonies in which Buddhist monks were given the kingdom and then allowed the king to redeem it at a fair estimation are referred to in J. Legge, *Record of Buddhistic Kingdoms*, 22—3; S. Beal, *Buddhist Records of the Western World*, I, 51—2; II, 261, 267, and elsewhere. Before the custom of redemption arose there was a problem whether the Earth was indeed within the king's gift. The *mīmāṃsaka* writers agreed that the Earth in the sense of the entire land and its produce could not possibly be given as it was not in the king's power to give it; the rights of occupiers and tenants which he had disposed of, or had been disposed of before his time, had to be respected. From this very meagre and obvious rule it has been concluded that the king was thought by the Mīmāṃsā not to have been ultimate owner of the soil. This is incorrect, and similarly to interpret Aitareya *B.* VIII, 21, 8 and Śatapatha *B.* XIII, 7, 1; 14—15, is mistaken. But the fact that the king was expected to confirm old grants and that only he could grant land to a deity, so that the *bhaumika* had to take his consent before alienating his interest in it, and the fact that even lesser grants made by others were made in reality with his authority (see Mīmāṃsā here, Śab. on J. VIII, i, 34, which more than balances the Viśvajit passage), show which way facts really lay. Kane, whose opinion is of greater value than most, expressed his view in four places: edn. of Kātyāyana, trans. 121, n. on ślokas 16—17; *H. D.* ii, 865—7; ibid., iii, 189, n. 243 (where he provisionally rejects the evidence of so great an authority as Mitra-miśra in the Rājanīti-prakāśa (p. 271)), and ibid., 196, 495. It is evident that, despite his (incorrect) hint that the British adopted one of two possible views because it was more "paying" (*H. D.* ii, 866), he really believes that concurrence of *svatvas* was the answer. Anglo-Indian

That possessory rights, provided they had a lawful origin, were of the same character, qualitatively, as the original right of ownership, and that the western distinction between *dominus*, "legal owner", and other interested parties would have been of no assistance to Indian jurists (rather a hindrance), is clear from so old an authority as that *śloka* which is constantly cited on the evidential value of *bhukti*[320]):

*na mūlena vinā śākhā antarikṣe prarohati*
*āgamas tu bhaven mūlaṃ bhuktiḥ śākhā prakīrtitā*

"Without the root no branch grows into the air; title must be the root, and possession is famed as its branch." In other words the chain from the *mūla-svāmī* (*"root-owner"*) to the final, perhaps temporary, possessor must be complete, and each link is of the same qualitative likeness as the parts of a tree, from root to twig. It is possible to overstress the similarity between the *mūla-svāmī* and the bailee[321]), for example, for their *adhikāras* themselves are of different qualities: but that they seemed both to be *svāmīs* is clear from the literature.

### ii. *Svatva, svāmitva, and svātantrya*

A non-lawyer may be confused by the above demonstration. Where, after all, he asks, is the Owner in all this? If there are at any one time five *svāmīs* of one plot of land, is not the *svāmitva* (or *svāmya)* merely *split up* between them? This is not to approach the problem in the Indian manner. As we have seen, they are all *svāmīs*, but their *svatvas*, though all examples of *svatva*, are not identical. Nor is it a question of something approaching an "equity of redemption" which gives the *mūla-svāmī* his *svatva* in land which he has mortgaged in possession. The sentimental reality of that *svāmitva* was and remains a potent force in India; yet what makes him *svāmī*

cases (as, e. g., 3 Bom. 524) are nothing to the point, whether they support or deny this view: legislation on the whole supports it, and independent India is far from departing from that tradition. K. V. R. Aiyangar takes far too pessimistic a view of the king's position in his intro. to Kṛtya-kalpataru, *Rājadharmak*. (Baroda 1943), 94.

[319]) The passage distinguishing him from the king (from whom he in fact held as tenant or sub-tenant) is Nīlakaṇṭha, Vy. May. (Kane's edn.) 91. The "right to collect the revenue from the land" was one of the most prominent of the king's *adhikāras* and was as much an incident of *svatva* as the *bhaumika's* right to take the crops.

[320]) *Dh.K.* 419 b. Sm. C. II, 70. Sar. Vil., 131.

[321]) M. L. D a s, 93. See above pp. 88—9.

still is the fact that he can exercise *adhikāras* over it other than the one which has been used already — and, however *pratibaddha* his *svatva* may be, the quality of "ownedness by him" is still as much present as before the granting of the mortgage.

We are however no nearer answering the western reader's question until we have investigated a parallel but connected question, that of *svātantrya*. Here law and anthropology share the field between them. The relationship between son and father and between wife and husband, and between subject and king, has been studied sporadically[322]). No systematic definition of the special dependence in western terms seems to have emerged, for the studies are all incidental parts of much wider surveys. To grasp the point of this present brief survey the reader must be told that in a case of a mortgage or bailment, though the mortgagee or bailee has a strictly limited *svātantrya*, "independence", with reference to the *dhana*, and the owner's *svātantrya* is limited precisely to that extent, if one were asked, "Who has *svātantrya* with reference to that field?", the answer would immediately be "the owner". On balance he seems the one who joins in his own person the essential features of what even western lawyers would recognise as Ownership.

One who is *svatantra* needs to ask no consent before acting. *Pāratantrya*, "non-independence", is the state in which all persons are born, and *svātantrya* is acquired by relatively few. The concept is not the same as *vyavahāra-yogyatva* or *vyavahāra-prāptatva*, the legal capacity to enter into binding transactions.

> *trayaḥ svatantrā loke 'smin rājācāryas tathaiva ca*
> *prati varṇañ ca sarveṣāṃ varṇānāṃ sve gṛhe gṛhī*

"Three persons are *svatantra* in this world: the king, and also the spiritual teacher; and in every caste, caste by caste, the master of the house in his own house[323])." *Svātantrya* comes with age, seniority, and the death of ancestors. A son is never *svatantra* while his father (some say his parents)[324]) live. Upon becoming *svatantra* he will, if still a minor, be *aprāpta-vyavahāra* and therefore a protected person

[322]) For example, S. C. Dube, *Indian Village* (London 1956); E. M. Carstairs, *The Twice-born* (London 1957).

[323]) Nāradīya-Manu-saṃhitā II, 28; Nārada IV, 32 = *Dh.K.* 561 a. K. iii, 413.

[324]) Jhā *HLS*, ii, 19—23. Jagannātha, trans. I, 407. On *svāmya* and *svātantrya* see Baba, 7 Mad. 357. See n. 189 above.

from certain legal standpoints[325]). While his father is alive he is spoken of as "son" in this text[326]):

*asvatantrāḥ striyaḥ putrā dāsāśca saparigrahāḥ*
*svatantras tatra gṛhī yasya syāt tat kramāgatam*

"Non-independent are women (wives), sons, and slaves together with the household. Independent there is the householder, to whomsoever it has come by descent (or, in order)." The son at Mitākṣarā law is an excellent example of *pāratantrya;* his birth-right and entitlement to partition of joint family property nevertheless leave him dependent upon his father in respect of the management of the family and the disposition of certain acquisitions of the father[327]). Even when the father dies it is open to question whether he is *svatantra* with regard to the joint estate; the elder brother, if manager, will be[328]). At Dāyabhāga law, undoubtedly, the brothers in such circumstances are each *svatantra* in his undivided share, and hence the difficulties of the jurists of that school in validating alienations of the undivided property without the coparceners' consent. Even in the Mitākṣarā, where women were allowed property by inheritance and partition apparently without any trace of a limited estate, it is clear that they were not *svatantra*[329]), and for their own protection had to seek the advice and

[325]) Nāradīya-Manu-saṃhitā II, 27; Nārada IV, 31 = *Dh.K.* 560 a, 695 a.

[326]) Nāradīya-Manu-saṃhitā II, 30; Nārada IV, 34. K. iii, 413.

[327]) Refs. in n. 168 above. Moreover, as in the case of the wife, he was suspected to be propertyless and alienable (this subject cannot be discussed here): see Sm. C. cited n. 368 below. On the father's right to give away his son, or sell him, see Z. *f. vergl. Rechtsw.* LX, 1957, 34 f., at 51—53; Sen, ch. VIII. N. C. Sen-Gupta is of the opinion that the power of the father over the son is not Āryan at all, but pre-Āryan *(Evolution of Ancient Indian Law,* p. 657). The question deserves further discussion, undesirable here.

[328]) On the elder brother as master see Manu IX, 105—110. The relevant commentaries (which rather weaken the force of the precepts) are set out at *Dh.K.* II, 96—8.

[329]) In Medh. on Manusmṛti VII, 21 *sva-svāmibhāva* (relation between *sva* and *svāmī*) is what gives women husbands and prevents their have *svātantrya.* The famous text of Manu, Manusmṛti V, 147, the sense of which is repeated in the much more commonly cited IX, 3 (*pitā rakṣati* . . .) is however by no means incompatible with the proposition that a woman can inherit and can dispose of her strīdhana. Mit. on Yājñ. I, 85. The question is ably dealt with in P. W. R e g e, *The Law of Strīdhana* . . . (unpublished), Ph. D. Thesis, London 1960, pp. 197—224. Texts recited at ceremonies are often significant. The almost doggerel banality of the verses *śataṃ*

authority of their protectors before entering into transactions. The inscriptional evidence from the peninsula of India suggests that there were castes where female independence was highly rated, as well as more "orthodox" castes which followed roughly the *śāstric*, Āryan pattern[330]). Where *svatva* and *svātantrya* are not combined, there arises a situation in which "full ownership" in the western sense is missing. But Property, as we have seen, is by no means dependent upon independence, and we must bear this in mind while considering early definitions of Property in India.

This brings us to a question at which we have hinted. In early times the absence of independence led to a popular conclusion, that the non-independent person had no *svatva*. The word *svāmī*, though undoubtedly meaning "possessed of *sva*", in fact was used throughout classical Sanskrit for "lord", "master", being synonymous with *prabhu*, "boss", and *pati*, "chief", "husband"[330a]). Ownership in the public mind was inseverable from mastery, lordship, power, and the right and duty to protect. Naturally this popular notion is only a generalisation and a predominant idea, and could not effectively hamper legal investigations. But before the discussions to which we are coming it was thought that if a woman was *paratrantra* she had no freedom of disposition and *therefore* could not be a *svāmī* and *therefore* could not have *sva*[331]). A subtle distinction between *dhana* belonging to the woman, and the woman's *svatva* seems to have been envisaged, which if it was mooted, came to nothing. Similarly with a slave, whose

*sahasraṃ* and *go vṛṣāṃ* recited by (or for) the husband to the wife at the *saptapadī* (the heart of the wedding-ceremony), as reported from two Pandits by K. P. Saksena in his *Hindu Marriage Act, 1955* (Lucknow, 1958), 24—5, does not prevent their being evidence of two doctrines, viz: (i) all acquisitions, however valuable, are to be acquired by the wife "in the hand of the husband", i.e. are virtually his; and (ii) no alienations are to be made by her without his consent. The intent of the whole passage is to intimate the oneness of husband and wife in secular as well as spiritual matters.

330) A. S. Altekar, *The history of the widow's right of inheritance*, *J. B. O. R. S.*, XXIV, 1938, 4 f., at 22—23. On the development of Mitākṣarā law on the point see now R. L. Chaudhary, *Hindu Woman's Right to Property* (Calcutta, 1961).

330a) On *pati* see below n. 409; Śab. on J. IX, iii, 32; JhāS. 1579.

331) On the confusion between the idea of independence and property see Rege, op. cit., ch. I, sec. 3; ch. III. See also Sab. on J. VI, i, 10—14. JhāS. 980—1. Devaṇṇa-bhaṭṭa, Sm. C. (Mysore edn.) 654 and Medhātithi on Manusmṛti VIII 416 (Rege, 223) are valuable here.

rights of possession and accumulation were commonly accepted in certain cases[332]), and with a son, whose acquisitions came within his father's *svatva* but who was allowed certain perquisites at the father's option[333]), it was thought that the female's *dhana* was owned in a subordinate and different manner from the *dhana* of the householder.

The woman after all was *sva*, "own" wife. We have seen that the conception that the wife was property of her husband played a substantial part in Indian practice as it did in juridical theory[334]). Other female relations, such as the daughter, were in the householder's power: the daughter was given or sold in marriage or otherwise, and it is clear that if a man were in debt he could sell or pledge not only

[332]) K. ii, 183. Slaves evidently could inherit from their own fathers: Arthaśāstra (Mysore edn.), 182 (trans. Shamasastry 207). It is evident that this facility, as that to acquire for himself what he earns in addition to his labour for his master, could be open to him only with his master's permission. Viv. Cin. 73 is plain on this, relying on Kātyāyana, 724 (where see Kane's note). N. 338.

[333]) That the son's acquisitions were *prima facie* the father's was the starting-point of Āryan law on the subject; the rules regarding self-acquisitions (above n. 177) being a gradual amendment of that position. The text of Manu, Manusmṛti VIII, 416, stating that the wife, son and slave are alike in that their acquisitions are those of the man to whom they belong (Jhā *HLS*, ii, 9—10) is quite extraordinarily frequently cited in mediaeval texts. The son's right to take presents is stated in Nārada cited in Mit. on Yājñ. 114 (prooem.), Col. I, i, 19, Jhā *HLS*., ii, 56—7; also Yājñ. II, 123, Jhā *HLS*., ii, 71.

[334]) The *sva* aspect of the question is well demonstrated in the discussion at Śab. on J. VI, vii, 6 (JhāS. 1182), the decision being that the Śūdra servant should not be given away at the Viśvajit sacrifice! That the wife was her husband's property explained the rule that the man to take the widow paid her husband's debts (K. iii, 453), and the innumerable instances where the right of the husband to dispose of his wife (see the summary in K. V. Rangaswami Aiyangar, ed., Kṛtyakalpataru *Dānakāṇḍa*, 1941, introd., 89) is to be inferred. A wife might be pledged for debt: U. Thakur, "Some aspects of slavery in Mithilā in the 17th—19th centuries." *J. Bihar Res. S.* XLIV, 1958, 47 f. Amongst the Khasas women are treated juridically precisely as property (Rege, p. 635). In Nepal formerly for certain grave crimes the offender's *gṛha* (house), *kṣetra* (field), *kalatrādi* (wife or wives, female slaves and daughters), and *sarvadravya* ("all his things") were forfeited to the Buddhist *saṅgha:* S. Levy, *Le Népal*, 3, 138. Nīlakaṇṭha, Vy. May. 92, is the only author denying that in *sva-patnī* sva implies *svatva* (Rege, op. cit., 248—251). As for the rest, see Medh. on Manusmṛti V, 150; VIII, 149; IX, 46 (where contrary customs are assumed), 65; Mit. on Yājñ. II, 175; II, 51; Sm. C. II, 189. Cf. Sāyaṇa on *Rg-veda*, I, 123, 5. Rājataraṅgiṇī,

himself but also his immediate kindred, including close female relations[335]). The *śāstra* seems to have avoided discussing the nature of this *adhikāra* to sell or pledge one's sister, for example; it probably found no place in pure Āryan custom. However, it existed, and although the *strīdhana* of a mother or sister might not be taken by a woman's sons or brothers to satisfy their debts[336]), and their creditors had no access to it, it is evident that under some circumstances they knew that her assets were available for that purpose[337]). It is possible that women might themselves be sold, etc., only with their own consent. However, the very fact that consent could validate such a transaction serves to prove the nature of the *adhikāra* and the extent to which *svātantrya* went in practice.

The ability of certain classes of slaves, and persons pledged for their own or others' debts, to redeem themselves *(niṣkraya)* is a feature of such legal institutions[338]). The notion of debt was very pervasive in ancient times and even the householder himself was believed to owe certain debts to the *devas* quite apart from any vows he had voluntarily undertaken. Payment of these could be by various sacrifices, by which he was "redeemed"[339]).

---

IV, 36. R. C. Agrawala, "Position of women ... in Kharoṣṭī documents ...", *Ind. Hist. Q.*, XXVIII, 1952, 327—41.

[335]) Sales of daughters in a famine are recorded: e. g. no. 86 of 1911. This and other examples from Madras can be found in S. Appadorai, *Economic Condition in Southern India* (Madras 1936), I, 314—5 and in K. A. N. Śāstrī, op. cit., 555. A traitor's close relations by blood and marriage would be stripped of their property as well as the culprit: Ep. Ind. XXI, 169—70.

[336]) K. iii, 785. Rege, op. cit., ch. III, sec. 1 (D).

[337]) The rules found in the *Arthaśāstra* and elsewhere subjecting to punishment (sometimes a light punishment) those who mortgage or sell relations are adequate evidence that such transactions used to occur. That children were always sold in times of famine is beyond doubt. And if relations could be disposed of it follows that their assets, if any, could be disposed of in similar emergencies.

[338]) The word covers both "compensation", "redemption", and apparently in limited contexts "sale". *Dh.K.* iii, index, 77 a. Redemption was necessary from self-imposed obligations, e. g. undertaking to perform a long sacrifice, and from wrongdoing: Śab. on J. VI, iv, 32—3.

[339]) The general concept of a man's indebtedness from birth, the theory of the triple debt (or according to others, quadruple debt or quintuple debt), which can be paid by study, marriage, charity, etc. (K. iii, 415—6) is outside the scope of this paper, as is the Hindu law of Debt itself. Kane's notion (ibid.) was that the religious idea of indebtedness anteceded the secular idea of debt: the present writer submits that the

Wherever a person could redeem himself from secular bondage by payment it is evident that *svatva* could exist without *svātantrya*. The question may arise, however, whether there could be such a thing as limited *svātantrya*, i. e. that a person who was *paratantra* in general, as a wife, might have *svātantrya* with regard to his or her assets. Progress into such an investigation seems not to have kept pace with investigation into the nature of *svatva*. Perhaps this was because until well into the 16th century *svatva* was anchored to *yatheṣṭa-viniyoga*, and of course it was useless to posit *svātantrya* of any sort in a person who possessed the right to dispose of *sva* providing only that the consent of another person was given to the disposition. And *svātantrya* being itself so varied an expression of the absence of dependence, a sociological as well as legal notion, it was natural that if *svatva* was to be utilised as an entity in legal discussion it must be detached from variable conditions under which the *adhikāras* associated with it might be exercised.

## VI. Philosophy and Svatva

Thought about the nature of *svatva* occurred far earlier than any philosophical text which we now possess. The earliest stages are hidden from us. We are confronted with ideas, the history of which is (and perhaps will remain) conjectural. That *svatva* was essentially the creation of Law was, as we have seen, widely believed; and connected with this belief we find the view that *svatva* cannot be severed from its purposes and functions, a view destined to be rejected by most jurists. The very nature of *svatva* had been seen as a connexion or relationship between *dhana* and the person or persons of whom it was *sva*. *Svatva* was articulated when someone said or thought *mamedam*, and the phrase *mamedam iti*, "The idea, or assertion, of 'it is mine'", came to be the equivalent of *svatva* in very early texts[340]). It remained to the end the subjective visualisation of *svatva*, which, like all ideas in Indian thought, was conceived as an objective reality, particularly, and with absolute rigidity, by the

---

contrary was the case on the basis that metaphorical ideas must follow, and not precede, the concrete facts upon which they are based.

[340]) The form *mameti* is found in MBh. XII, 13, 4; 57, 41 as an equivalent of Property. *Mamedam iti* is found in Manusmṛti VIII, 31 = *Dh.K.* 1953 b, and appears as an effective factor in Dāyabhāga (Col.) I, 24 and Śrīnātha (c. A. D. 1525) thereon at p. 28.

*naiyāyikas* or logicians. But *mamedam* implies a *saṃbandha*, or "connexion", an invisible link or association. *Saṃbandha* is the word sometimes used for "marriage" or any kind of relationship such as kinship by blood or adoption, or paedagogical relationship, or civil subjection. Property, named a *saṃbandha* in so early a text as Kauṭalya's phrase *sva-svāmi-saṃbandha*[341]), was thus inevitably likened to social relationships, and it seems that there was some interrelation, as the rituals and mock transactions believed to be essential to the validity of marriages, adoptions, and so on, took on the forms appropriate to transfers of Property. Without pursuing this aspect of the story, it is evident that a considerable degree of abstract investigation must have preceded the discovery that between "me" and "my thing" there must exist a *saṃbandha*, of which there need be no concrete evidence, which makes the thing mine, and without which it would "belong" to no one, or at least to others than to me. For centuries jurists were content to take this *sva-svāmi-saṃbandha* as self-explanatory, to settle in what circumstances it might arise, and in what it would cease (above IV A iii, iv), and to leave the matter there.

### i. *The Sāṃkhya school*

It must be recollected at the outset that all schools, or *darśanas*, of Indian philosophy were believed to be equally true; contrary or inconsistent approaches to a question in the various schools by no means cancelled each other out; and the same man might be a master in several schools, originating doctrines which would advance learning in each, but which would be mutually incompatible. This was possible because the original teachers of each school had made fundamental postulates without responsibility for their reconciliation with those of rival teachers. The value fortunately of much of the ratiocination in the various schools did not depend upon the rationality or objective truth of some of those fundamental propositions, and this is particularly the case with the work of the *navya-naiyāyikas*, to whom we shall come.

---

[341]) Arthaśāstra I, 1; 3, 16 = *Dh.K.* 8, 382. The word *saṃbandha* may be translated "connexion", "relationship", or "conjunction". In the *Arth.* the expression is used to classify questions such as Resumption of Gifts, Sale without Ownership, Loss of Ownership by Lapse of Time. See Shamasastry's trans., pp. 213 f.

The Sāṃkhya school[342]) is concerned with the question of the evolution of the phenomenal world from a condition in which existence was divided between souls, a principle of intelligence (called *puruṣa*, which otherwise = Man), and an incoherent, indeterminate and indefinite state (called *prakṛti*, which otherwise = Nature), in, or in association with which, subtle substances (called *guṇas*, which otherwise = Qualities) remain unmanifested due to a primordial equilibrium. The lifeless *prakṛti* and the *guṇas* have a teleology which brings about the disturbance of the state of equilibrium, from which the stages of evolution commence. The transcendental influence of the *puruṣa* attracts the *prakṛti* into action. Because of a *connexion* between the *prakṛti* and the *puruṣas*, which enables the latter to enjoy pleasures and suffer pain and through experience to find absolute freedom *(mukti)*, evolution happens and the process towards ultimate release of all *puruṣas* from existence is initiated. The service of *prakṛti* to the souls or *puruṣas* is simultaneous with the operations of the *guṇas*, which are in fact guided and directed by the teleology of *prakṛti*. The individual *puruṣa* is enabled to have *bhoga* of *prakṛti*, and it is not surprising that the former is conceived as masculine and the latter feminine. "*Prakṛti*, which was leading us through cycles of experiences from birth to birth, fulfils its final purpose when this true knowledge arises differentiating *puruṣa* from *prakṛti*. This final purpose being attained the *prakṛti* can never again bind the *puruṣa* with reference to whom this right knowledge was generated; for other *puruṣas* however the bondage remains as before[343])." When *prakṛti* has performed its function it ceases to operate, as we are told, like a dancer who has danced to amuse her host, performs her function, and departs[344]).

One of the effects of *mukti*, when the purpose of *prakṛti* has been served with regard to a particular *puruṣa*, is the cessation of ideas such as *mamedam. na me*, "naught is mine", is one of the "knowledges" leading to release: just as *asmitā* (egoism) is a symptom

[342]) On this school see S. Dasgupta, *Indian Philosophy*, I (Calcutta, 1922), 228—267; S. Radhakrishnan, *Indian Philosophy*, 2nd. edn., II (London 1931, 1941), 248 f. The *Sāṅkhya-kārikā* of Iśvara-kṛṣṇa is believed to have been compiled about 200 and the *Sāṅkhya-sūtra* some time after about 800. The spelling Sāṃkhya has been retained in the text above because of its established familiarity.

[343]) Dasgupta, ubi cit., 265—6.

[344]) Mādhavācārya, *Sarvadarśana-saṅgraha* (Calcutta 1858), 153.

of non-knowledge[345]). But while *prakṛti* is operating upon the *puruṣa* (or rather, while they are inter-operating) the notion *mamedam* is important. For some Sāṃkhya thinkers posited the *saṃbandha* between *prakṛti* and the *puruṣa* as *sva-svāmi-saṃbandha*, the *prakṛti* standing towards the *puruṣa* as property stands towards its Owner. Or it was *sva-svāmi-bhāva*, Property itself[345a]). In other words (since we are still at a crude stage in these discussions) *svatva* exists in *prakṛti* from the point of view of the *puruṣa*. This may not be a contribution towards the understanding of the concept of *svatva*, so much as a comment upon the concepts of the Sāṃkhya school: but it is evident that "inevitable belonging" was so firm a concept by the time when the chief Sāṃkhya authorities were compiled, that it could be utilised for this rather specialised purpose. *Svatva* and *bhoga* are inseparably united here, though there is no suggestion that the *bhoga* is in any sense at the will of the *puruṣa*, and in fact if it had been suggested that *svatva* = *yatheṣṭha-viniyoga-yojyatva*, or even *-yogyatva*, the basis of the idea would have collapsed[346]) for it is of the essence of Sāṃkhya that the experiences of the *puruṣa* are not of his choice; happen through the self-application of the *prakṛti;* and are intended to stimulate him to a condition of mind which many, if not most, *puruṣas* in fact neither wish nor can attain.

The dating of this Sāṃkhya concept presents insuperable difficulties, but it seems that 800 A. D. is not too early, and we are on fairly sure ground if we assume that it was in existence some time before the great legal commentators whom we may cite on the subject of *svatva* (circa 800+), and it is very likely that it preceded the greater writers of the Mīmāṃsā school, though not, possibly, Śabara-svāmī himself.

ii. *The Mīmāṃsā school*

Direct contributions to the analysis of the concept of Property

345) Dasgupta, 267. The "released" individual reveals his attainment of knowledge by being *nir-mama* or *a-mama*, curious adjectives meaning "non- 'of me'", "non- 'mine'", or, more intelligibly, "devoid of possessiveness, or consciousness of possession".

345a) Sāṅkhya-pravacana-bhāṣya, ed. R. Garbe (Cambridge, Mass., 1895), I, 19, p. 12, 14; 55, p. 24; 105, p. 51; 106, p. 52; VI, 67—8, p. 162—3. Nandalal Sinha, *Samkhya Philosophy* ... (Allahabad 1915), pp. 40, 42, 51, 52, 79, 570—2. Also Yoga-sūtra, II, 23.

346) For *yath-* see below, p. 114. *-yojya* = "usable"; *-yogya* = "to be used".

did not occur at the hands of Mīmāṃsakas until after the time of Raghunātha Śiromaṇi and the challenge thrown out by the New Logic. But, as we have already seen, distinct viewpoints on many of the incidental topics of Property had grown up amongst the commentatorial literature based upon Jaimini's *Mīmāṃsā-sūtra*. The whole science of sacrifice and the interpretation of Vedic texts bearing upon that voluminous subject was bound to afford opportunity to consider the rights to acquire, use, and dispose of property. The great contribution of the Mīmāṃsā (IV B ii) was the distinction between prohibition and nullity[347]). In the study of the very concept of Property they were forced, for very similar reasons, to make another significant contribution.

We must pay attention to the Mīmāṃsā because, between that school and the Nyāya, it was the former which had the greatest influence upon *dharmaśāstris*. Colebrooke once said that the weight of the impressions created upon the minds of jurists by the two schools differed according to localities[348]), and indeed the influence of the logicians in Bengal was great — but it was only a local influence, and the intimate connexion between the rules of interpretation taught for centuries by the Mīmāṃsakas and the fabric of established *dharmaśāstra* scholarship made it certain that in the event of a direct conflict between Interpretation and Logic, the former would win.

If the *sva* which must be the object of all dedications and oblations and sacrifices[348a]) took its *svatva* from circumstances outside the knowledge of the sacrificer *(yajamāna)*, the question arose, who should determine whether it was lawfully his or not? Since the Mīmāṃsā had already determined that *svatva* was not to be tested with exclusive reference to śāstric texts, it followed that popular recognition alone supplied the test. The burden must rest, therefore,

[347]) See above, n. 100. The sinfulness of taking, using, or sacrificing with the property of another was, of course, by no means diminished by the discoveries there referred to. See, for example, Manusmṛti IV, 201—2; and the story of the sale of Nṛga in Bhāgavatam X, 64 quoted by Raghunandana, cited by Colebrooke in a long note on Dāyabhāga, XIII, 12, relating to the question of the difference between mistaken appropriation and theft.

[348]) In his Account of the Hindu Schools of Law reproduced in T. E. Colebrooke, *Misc. Essays by H. T. Colebrooke with a Life* ... (London 1873), I, 94 f., at 95.

[348a]) The Vedic rule *svam yajeta* (see *Taitt. Saṃh.* VI, i, 6. 3) is applied by the Saṅgrahakāra (cited by the Sm. C. and Vīramitr.) at Jhā, *HLS*, II, p. 27.

with the *yajamāna* and such lay advisers as he might consult. The suggestion that *svatva* was an entity in its own right, resident or inhering in objects, was in practice hostile to this conclusion. The Mīmāṃsakas therefore preferred to consider it a *saṃskāra*, or mental impression (Colebrooke translates, "faculty"[349]), of course on the part of the *yajamāna*, and its opposite on the part of those with whom he had entered into transactions. If *svatva* was a part of the state of mind of the *svāmī* (whose reasons for believing he was *svāmī* could be checked with reference to the appropriate authorities), what he believed was his *sva*, was *sva* for the purposes of acquisition by his priests and others with whom he entered into transactions during sacrifices and at other and comparable times. The shift in the centre of enquiry, from the object itself and the history of its passage into the hands of the *yajamāna* to the mental state of the *yajamāna*, was greatly conducive to the convenience of all parties concerned with *dharma*, or more strictly *apūrva*, "religious merit".

The definition of Property as a *saṃskāra* was convenient from additional points of view. Quite apart from the inconveniences alleged to exist in the "category" theory, to which we shall come, the Mīmāṃsakas had difficulty in seeing how a cognition which had always been expressed as *mamedam iti* could produce anything other than an impression upon the appropriate aspect of the personality. Not all the meanings associated with the word *saṃskāra* are relevant here[350]: we are not concerned with the effects of Fate or *karma* upon the soul before birth, nor with the *dharmaśāstri's* special *saṃskāras*, or birth-ceremony, initiation, marriage, and the like, which, in a fashion reminiscent of sacraments, produce a supersensory change in the personality. To the Mīmāṃsaka the *saṃskāra* in question here was merely an example of a use of a term which appears much in Vaiśeṣika philosophy, "a mental impression or recollection resulting from a prior experience"; it is in fact the last of the *guṇas* (or "qualities") of the Nyāya-Vaiśeṣika system, being a quality which the Self is inherently apt to acquire. Each cognition is capable of producing an instantaneous *saṃskāra*, which may be revived or

[349]) Jagannātha, trans. II, 186,n. So also Annaṃ-bhaṭṭa, ed. cit., 362.

[350]) N. K. 938 f. Annaṃ-bhaṭṭa, ubi cit. Radhakrishnan, 380—6. Dasgupta, 263—4; cf. ibid., 290 n. 3. In reference to Sāṃkhya he translates "potency" at p. 273. In reference to Buddhist philosophy he translates "mental state". In Nyāya-Vaiśeṣika philosophy it is "elasticity": ibid, p. 281, 285, n. 2.

aroused by the operation of memory, resulting in mental non-cognitive perception[351]). If memory fails the *saṃskāra* may not produce the perception, and if Property is a *saṃskāra* it follows that awareness of it is, to put it mildly, precarious and, from a purely practical point of view, speculative. This is only one, as we shall see, of the difficulties inherent in the *saṃskāra* theory of Property.

It is not merely a coincidence of vocabulary that *saṃskāra* is regularly used in Mīmāṃsā technique for the preparatory act or experience (whence the *dharmaśāstra* use of the word) intended as a preliminary to a sacrifice[352]). It can hardly be doubted but that the Mīmāṃsakas, in choosing to identity *svatva* as a quality of the Self, and a particular *saṃskāra* due to a cognition related to a particular contact between a thing or things and the senses, were deliberately meeting the requirement that in order to be a *yajamāna* one must be "qualified" in point of Ownership of the necessary property. In their eyes, unless the *yajamāna's* Self were qualified with the several Properties in respect of the several objects necessitated in the sacrifice, etc., the latter would be a nullity, and this seems to have been so despite the independent determination that the *acquisition* of Property was not itself a subsidiary to the principal rite itself[353]).

### iii. *The Navya-Nyāya school.*

The old school of Logic did not concern itself with Property so far as is known. It was assumed to be a *guṇa* of a thing: it was a characteristic of a thing that it was fit to be employed at pleasure (or at will) by a person—and thus categorised it ceased, until

---

[351]) Dasgupta, 263—4: "The saṃskāras represent the root impressions by which any habit of life that man has lived through or any pleasure in which he took delight for some time. or any passions which were engrossing to him, tend to be revived, for though these might not now be experienced, yet the fact that they were experienced before has so moulded and given shape to the *citta*" (conscious mind) "that the *citta* will try to reproduce them by its own nature even without any such effort on our part."

[352]) Pārthasārathi-miśra in the *Śāstradīpikā* (trans. D. Venkatramiah, Baroda 1940), pp. 38, 128—131, 187, uses *saṃskāra* as "impression", and in fact the discussion at pp. 128—131 is very useful to show the Mīmāṃsā notion of its function. Yet the same author uses *saṃskāra* as "auxiliary of the sacrifice", "purification", at 197—8, and elsewhere. In Edgerton's *Mīmāṃsā-nyāya-prakāśa* the word occurs only in the latter sense, translated "preparatory act"; p. 296 for refs.

[353]) Śab. on J. IV, i, 2 (2 B in JhāS. 711—13).

Raghunātha's time, to be a problem. However, the atomic theory of the logicians raised the not unconnected question how a thing which had changed its *guṇas* so as to change its very character could still have the characteristic of being its previous Owner's property[354]). What would cause curds, for example, to be characterised by the Property of *X*, when the milk, out of which they had formed, had been given to *X* by *Y*? If the characteristic of being fit for disposition at will by *X* began to inhere in the milk at the time of the gift, when did it leave, if ever, and when did that same characteristic begin to inhere in the curds? A similar problem arose when clay was handed to a potter. At what moment, and how, did *X*, former Owner of the clay, begin to be the Owner of the pot made from it? The atomic theory was welcomed for its ability to cope with this difficulty. The Property inhered in the atoms which made up the milk and the clay, and since they were indestructible (though capable of rearrangement) their former Owner continued to own them though they had begun to comprise a new entity in each case. The beginnings of this discussion are clearly visible in the *Nyāya-sūtra* of Gotama called Akṣapāda, and the question continued to interest logicians until the 17th century at the earliest[355]).

The New Logic was characterised by extreme objectivity, a subtle and exact mode of expression, and a willingness to investigate facts with the minimum dependence upon ancient technical authorities. The usefulness of the investigation of Property is at once appar-

[354]) According to the Mīmāṃsā outlook change in the character of the thing would not be so catastrophic as change in the character of the person in whose mind the *saṃskāra* existed. From the *nyāya* standpoint, however, Property was a quality of the thing itself, and if the thing changed did not the Property change with it? See next note.

[355]) Gautama, *NS.*, III, ii, 13—17, with Vātsyāyana's comm. (pp. 202—3 of the Poona, 1939, edn.). According to the Sv. Vic. (*BSOAS.* Prop., 496—7) lapse of time extinguishes the Property in the object which has changed. Jayarāma, *Svatvavādārtha*, p. 5, denies this solution: Property in the changed article arises out of the Property in the article before its change, like that in crops from that in the land. This gives more weight to legal usage, as is proper. Viśvanātha Siddhāntapañcānana, *Padārtha-tattvāloka*, fo. 166 a—b, denies the lapse of time theory, using the problem to defeat the idea that Property is *vilakṣaṇa-jñānarūpa* (see below, p. 125), "a form of particularised knowledge". Property continues to exist though no knowledge of the change has occurred, and the old knowledge persists. Jagannātha, trans. II, 187, allows that Ownership must change as the thing changes (but this is the final result of developments mentioned at p. 123 below).

ent when we find the logicians prepared to take seriously a *śāstra* other than their own, to test their hypotheses with reference to legal propositions, to examine these latter as if they were lawyers, and to treat actual practice as well as legal theory as their guides. The prestige which logic obtained in Nava-dvīpa (or Nadiya, Nuddea) in Bengal had the result that by the 18th century professors of law held for the most part degrees in logic, and their vocabulary and methods of expression, not to speak of their professional expertise in matters of judicature (about which we must proceed largely upon conjecture), owed much to this new queen of studies.

Logicians did not in fact have time to investigate many topics of law. That of *svatva*, as we shall see, was so heavy an assignment, that it left little leisure for other excursions into the alien *śāstra*. But remains of a treatise on the nature of Marriage have been found, and the fragments show what an interesting effect a shaft of logical light could produce when cast into that involved institution which is the foundation of so much of every system of law[356]). It is much to be regretted that so little logical work of this character survives, and that the teaching of the great logicians is to be appreciated for the most part only through the work of their pupils, the lawyers, who, as we have seen, were in any case bound to follow Mīmāṃsā doctrines wherever possible.

### iv. *The Reaction of Philosophy upon Law*

The Naiyāyikas had no "axe to grind". The discovery that Property was not a *guṇa* but a *padārtha*, or category of existence, was independent of any desire to produce particular juristic effects. But the doctrine, for all its advantages over the *saṃskāra* theory, had grave disadvantages of its own. For example if Property is a category,

[356]) Curiously similarly with the *Sv. Rah.*, the work in question bears the two titles *Vivāha-vāda* and *Vivāha-vāda-rahasyam*. Two copies existed in 1927 (K. P. Jayaswal and A. P. Śāstrī, *Descriptive Catalogue of Manuscripts in Mithila*, I, Patna, 1927, nos. 338—9, pp. 382—3) but their present whereabouts have yet to be discovered. No. 339 seems to be complete. The definition of Marriage given is *carama-saṃskārānukūla-vyāpāro vivāhaḥ*, "Marriage is a transaction conformable to (or favourable to) the final *saṃskāra*". At first sight this highly eccentric definition seems incredibly objectivised; but it is the result, doubtless, of rejecting all other possible definitions, including, it seems, any reference to "taking", or any participation involving "knowledge" (for child-marriages dispense with knowledge on the part of the parties). But the rediscovery of the manuscripts is awaited with impatience.

and is created by gift independently of acceptance, and I give X an elephant, and before X can communicate his refusal the elephant does damage, who is responsible[357])? The jurists and logicians co-operated to see whether Property might not be a category without these and similar disagreeable conclusions following[358]). As we have seen, the range of transactions involving *svatva* was exceptionally wide in India, and as a result the number and variety of tests to which such an apparently simple theory must be submitted were great.

The work of the logicians is evident in the legal writings of Mitra Miśra, Kamalākara, Nīlakaṇṭha, Śrī Kṛṣṇa Tarkālaṅkāra, Jagannātha, Anantarāma in his Vivāda-candrikā, and others. Their chapters cannot be understood without the background which we are now studying. The study of *dharmaśāstra* was made thereby even more esoteric and more difficult for the European reader: but the standard of juristic writing was improved by the contact; and that the *naiyāyika* doctrines were enlivened by the mutual instruction which was involved can admit of no doubt.

In the chapter which follows the student of jurisprudence would naturally expect to find a full statement of the reasons which led the authors to settle their definitions of Property, and the manner in which the definitions, as settled, led to the various solutions of the test problems. This is not possible. With very few exceptions, such as the Vivāda-bhaṅgārṇava, Svatva-vicāra, and Svatva-rahasya, there are insufficient copies available to provide critical editions of the texts; even in the cases of the last two works grave doubts remain as

[357]) Our writers speak of the problem in terms of gifts by *caṇḍālas* to Brahmans. All are agreed that no definition of gift can be satisfactory that would permit the Brahman's Property to arise under any circumstances (see above, p. 44). The question of the ownership of the bull released in the *vṛṣotsarga* and doing damage is another problem (see above, n. 79).

[358]) The test topics were (i) causation of Property; (ii) destruction of Property; (iii) the effect of partition of a joint family (somewhat bedevilled by failure strictly to separate Bengali and Maithila or Mitākṣarā legal doctrines); (iv) the wife's alleged Ownership in her husband's estate; (v) change in constitution of the thing; (vi) gift and acceptance; (vii) creation of metaphorical "Properties", e. g. of gods, ancestors, etc., and the public. It is quite impossible to say which theory best stood up to these tests, since the legal positions were themselves not entirely concrete, and it was possible to restate them in such terms as to make the theories seem about equally plausible.

to the text in some difficult passages, since the copies vary markedly. Even assuming that a perfectly sound text could be settled, the language in which these works are written is, if capable of translation, quite unsuitable for use in such a survey as this[359]). It will be seen that the Naiyāyikas are using a jargon of their own, and to the extent that the *dharmaśāstris* follow them they are compelled (as we are) to utilise the jargon. To convert it into readable English is almost impossible, and to retranslate into language meaningful to comparative lawyers would be to destroy the mode of thought and obscure the logical procedure which the authors adopted. Hence, while it is possible to give and to explain their results, and to interpret them roughly with sufficient accuracy for practical purposes, a grave disservice would be done to the history of Indian logic if clumsy double translations were attempted; and the result would be of much less value to comparative lawyers than full translations, accompanied by technical introductions and a running commentary, which is a desideratum and may become available shortly. The examples that follow illustrate the position: they are both extremely mild examples of the technique.

A. (Extract from Mathurānātha's Nyāya-Līlāvatī-Prakāśa-Rahasya)

*caitrasyaivedaṃ dhanam ityādau anyasya yoga-viśeṣaṇatayā 'nvayaḥ caitrānya-svatvābhāvavat caitra-svatvāvaccheda⟨ka⟩ṃ dhanam ity-anvaya-bodhāt.*

"In cases such as the notion, 'This asset belongs exclusively to *X*,' there is a proposition by conjunction-qualifierness of another person, information obtained from the proposition being that 'this asset, possessed of the absence of Property of others than *X*, is the limitor of *X*'s Property' "[360]).

B. (Extract from the Svatva-rahasya, III, 21)

*caitrasyaivedaṃ dhanam ityādau anyasya yoga-viśeṣaṇatayā 'nvayaḥ*

[359]) In "Correlations between language and logic in Indian thought", J. F. Staal showed (*B. S. O. A. S.*, XXIII, 1960, 109—122) that characteristic thought-structures could be demonstrated by the use of symbolic logical analysis. The works of Ingalls (cit. sup.) and of Potter (cit. inf.) undoubtedly pave the way towards the possibility of intelligible translation of *navya-nyāya* syllogisms in non-philosophical contexts, but though retranslation into symbols would undoubtedly save much space it is doubtful whether such techniques would help the busy comparative lawyer.

[360]) Fragmentary Ms. I. O. Tagore 62 b, fo. 10, line 4 f.

*naṃ prati carama-prāṇa-śarīra-saṃyoga-dhvaṃsātmakasya maraṇasya viśeṣaṇatā-viśeṣa-sambandhenābhāva eva śarīra-niṣṭhatayā hetur lāghavāt. na tu kvāpi jīvanaṃ hetuḥ.*

"But in reality, as a general rule, by relation of describerness the absence (by particular qualification relation) of death, which has the nature of a final extinction of the union between spirit and body, is the cause, through locatedness in the body, of that which is limited by Propertyness: for this is "light" [i. e. logically direct, involving fewer assumptions]. And never is *life* a cause (of Property)[361])."

The definition of *nidhi* given elsewhere served as a warning to the present writer[362]). In working out the "algebraic" formula which contains the definition, he made a slip: one who is not a specialist in *navya-nyāya* jargon may easily do so, since the relationship between the words which are strung in a series with a minimum of case-terminations is seldom clear without a grasp of the entire background to the discussion, which roams far beyond law; and each author has his own variety of jargon and his own pet refinements of definition-technique. The value of this present study would be much diminished if close attention were drawn to the thought-processes of the logicians and their lawyer pupils at the verbal level — for that is an exercise best undertaken independently. We might then perhaps shorten the period of training which was needed in India to master the jargon, and give the western student the impression that he shares a method

---

[361]) For "particular qualification relation" see Ingalls, index, 174 b; "relation of describerness", ibid., 172 b under *nirūpaka*. The attack on life as a cause of Property is part of the characteristic Bengali reaction to the claim that the text of Gautama, *utpattyaiva* (above, n. 71), involves *svāmitva* from or by reason of birth alone.

[362]) *BSOAS.* Prop., 497, n. 2 is incorrect. The text is nidhitvañ caupādāniketara-svatva-sāmagryabhāva-viśiṣṭa-svatva-nāśavattve sati svatva-sāmānya-bhāvatvam; pavana-gaganāder upādānāt pūrvam āraṇyaka-puṣpādeś ca nidhitva-vāraṇāya *satya* antam; vikrayādi-janya-svatva-nāśotpatti-kṣaṇe nidhitva-vāraṇāya *viśiṣṭāntam*. "And nidhi-ness is the presence of the generic character of Property in a case where there is possessedness of the extinction of Property qualified by the presence of totality of Properties other than that of the finder. The phrase beginning "in a case where" is for the purpose of excluding *nidhi*-ness in air, sky, and so on, and in forest-flowers, etc., prior to their being appropriated. The phrase beginning "qualified" is for the purpose of excluding *nidhi*-ness at the moment of the production of the extinction of Property due to sale and so on . . .".

of communication which, when at the height of its prestige, was available to a few hundred of India's intellectual élite, and is now intelligible to perhaps a score of persons. Meanwhile we must concentrate on what puzzled the authors about Property, what conclusions they arrived at, with occasional reference to some tests they used to prove their conclusions, and why they stopped short of better definitions, of which one will be suggested (upon Indian lines) by the present writer[363]).

## VII. Definition of Svatva

### i. *Early attempts*

The *saṃbandha* appears in two definitions which are by no means old, and its survival to this late stage is remarkable. *"caitra-syedam" iti pratīti-viṣaya-dhana-caitra-saṃbandha* is Viśvanātha Siddhāntapañcānana's definition of *svatva:* "The relationship between the *dhana* and *X* which is the subject-matter of the cognition 'this belongs to *X*'[364])". A refinement found in Veṇīdatta does not take us further forward[365]). The difficulty with *saṃbandhas* is that they themselves require to be defined, and in this case we have the added embarrassment that "belonging to *X*" is a notion left unexplained.

The popular idea everywhere about Property is that "one can do as one likes" with the thing in question[366]). When it is pointed out that even in primitive societies one can never do exactly as one likes with anything, the answer is always that if Property exists "one can do whatever one likes with the thing, within legal limits". India was no exception. The earliest definition of this class, which has the longest effective history, is *yatheṣṭa-viniyoga-bhāva,* "the presence of an application at pleasure". When the thing is being so used, it is *sva.* What if it is not being used or enjoyed[366a]? It must be fit for

---

[363]) Below, p. 127—8.

[364]) *PTA.*, fo. 165 a.

[365]) *PM.*, p. 31. Cf. Rāmabhadra Sārvabhauma, comm. on Raghunātha, p. 117, *BSOAS.* Prop., 483, n. 2, which is almost identical. He merely inserts two *vṛttis* to show the dual location of the *saṃbandha.*

[366]) Code Civil, Art. 544. F. H. Lawson, "Family property and individual property", *Rapports Généraux au V^e Congrès* ..., (Bruxelles 1960) 17 f. at 18, "We know pretty well what individual property means. It is property of which the owner can dispose completely and independently ...".

[366a]) These precise difficulties are raised by Mitra-miśra (c. 1610—50), Vyavahāra-prakāśa, 422 (G. C. S. Śāstrī's trans., p. 24).

enjoyment. Bhavadeva in his Naya-viveka says *tacca tasya tadarham yad yenārjitam*[367]). The confusing word *arha*, "fit", "due", "worthy", "worth", "suitable" gets us little further: what a man has acquired, he says, he deserves, or is due to him or is fit for him. *tadarham*, of course, really amounts to *yatheṣṭa-viniyogārham*, "fit to be applied at pleasure"[368]). A better attempt is due to the author of the Madana-ratna-pradīpa, a thinker of no small stature. *Svatva* is, he says, *yatheṣṭa-viniyoga-yogyatva*, "the fact that a thing is capable of application at pleasure"[369]). This gets over the two difficulties of *yatheṣṭa-viniyojyatva*, that the thing might be used unlawfully, which is destructive of a good legal definition, and that the thing, while owned, might not be in use at all. He startles readers by pointing out that though a seed, when laid up in a dry barn, does not produce a sprout, it has by nature a capacity to sprout given adequate conditions; and similarly *sva*, though it may not in fact be employed in lawful enjoyment at pleasure, possesses the capacity to be applied at pleasure[370]). Unfortunately *svatva* can hardly consist in a capacity only, since incapable persons are found in practice to be *svāmīs*, though they may never be in a position personally to exercise *yatheṣṭa-viniyoga*, and it is the personal element which is predominant in the idea of *sva*. The other major objections appear from Raghunātha's side, as we shall see.

Whatever the success of the attacks on *yatheṣṭa-viniyoga-yogyatva* as a definition, the idea did not die. *yatheṣṭa-viniyogārhatva* remained for some obstinate scholars the true definition[371]), while *yath- vini- yojyatva* is accepted by Śrī Kṛṣṇa as the *lakṣaṇa* or characteristic of *sva*[372]), and of *svatva* itself by Anantarāma[373]). Moreover,

[367]) Cited in *MRP.*, 325

[368]) *MRP.*, 325. *Sm.* C. (c. A. D. 1250) II, 190—1.

[369]) Ibid. Explained in the comm. on *PTN.*, 62. 1—2; attacked by Gokulanātha, *(N)STV.* fo. 118 b.

[370]) Neither Mitra-miśra, ubi cit., nor Rāmajaya Tarkālaṅkāra, below, n. 412, approve of this notion.

[371]) Sar Vil., § 832. Cf. Annaṃ-bhaṭṭa and his commentators, below, n. 385. Jagannātha certainly never altogether lost faith in *yath-*, trans. I, 378. See Rāmabhadra on Raghunātha, p. 119. Raghunandana, *Dāya-tattva*, ed. G. C Śāstrī, V, 20; trans. p. 33.

[372]) Comm. on *Śrāddha-viveka* of Śulapāṇi (passage on p. 31); comm. on the *Dāyabhāga* of Jīmutavāhana, p. 31.

[373]) Viv. Can. fo 18 b—19 a, 19 b. Anantarāma was a contemporary of Jagannātha, though whether or not very much junior to him it is difficult to determine.

when the idea, "I have taken *dhana* from *X*", exists it is quite possible that it connotes *yath-viniyoga,* and not *svatva:* for practical fitness for application at pleasure is not confined to one's own property[374]).

This difficulty, which is really fatal to the definition, however we may tinker with it, encouraged a totally different approach. If the idea of Property is not a *saṃbandha* between a man and a thing, and it is not just the fact that he can do what he likes with the thing, perhaps it is some state of affairs in which the acquisition of the thing has happened, and alienation has not taken place? The gap, as it were, between these two might be the answer. *tat-krayādyanyata-motpattikālena yāvad-vikrayādyabhāva-viśiṣṭaḥ tat-krayādyanyata-mottara-kāla-saṃbandhaḥ svatvam iti* was the result: "Conjunction between Time posterior to acquisition with the Time of production of acquisition, particularised by persisting absence of alienation"[375]). Unfortunately alienation might never happen, and naturally a definition which hinges on the absence of a thing which may never happen is faulty. There is a circularity in this definition, too, which is fatal: even acquisition and alienation are indefinable except in terms of Property itself. An attempt at an improvement on this definition reappears in a work written by Jayarāma Nyayapañcānana attempting to reestablish the nucleus of Raghunātha's theory[376]).

### ii. *Raghunātha Śiromaṇi*

Raghunātha was the *enfant terrible* of the *navya-naiyāyikas*[377]). The distribution of entities between the categories did not suit him, and a great number of new *padārthas* (called *atirikta* because he made them "additional" entities) were detected. His methods were peculiar, but at first sight they have much to recommend them in our particular connection. He says[378]): —

---

[374]) Śrī Kṛṣṇa on *Dāyabhāga* (Calcutta, 1930), 295. Jayarāma Nyāyapañcānana, *Kārakavāda,* p. 43. Bhavānanda Siddhāntavāgīśa, *Kārakacakra,* p. 93.

[375]) Raghunātha cites and rejects this. Jayarāma, *Svatvavādārtha,* p. 1. Cf. Viśvanātha Siddh., *PTA.,* f. 166 a.

[376]) Previous note. *BSOAS.* Prop. ,483, n. 3.

[377]) For his life and work see Ingalls, op. cit., 9—20. He dates him c. 1475—c. 1550.

[378]) This passage is taken from his *PTN.,* ed. Potter, p. 76. If I deviate from Potter's translation it is only because I feel the choice of words might suit my purpose better, and also to remove one or two

Fitness for application being a quality of a thing, and *svatva* being merely a quality of that quality, there is no necessity to assume that Property is any separate entity in itself. And the distinguishing characteristic of *yath-*, of which it is a *rūpa*, is the fact that the *dhana* was acquired in a particular legal way, and so on. The law determines the limits of *yath-*, and discussions of Property must concentrate on



"So even *svatva* is an additional *padārtha*. If you say that it is 'fitness for use at pleasure', I ask, 'What *use* is that?'. If you reply, 'Eating, etc.', I deny it, for that may happen even in respect of some one else's food, etc. If you reply that that is forbidden by the *śāstra*, I ask, 'What *śāstra* have you in mind?' If you instance the text, 'Let him not take the *sva* of another person', I ask, 'How can that operate when there exists a non-cognition of *svatva* itself?' Consequently *svatva* must be a distinct entity. And proof of its classification lies in that very text, 'Let him not take the *sva* of another', and other such texts. And *svatva* is produced by acceptance, appropriation, purchase, death of ancestors and other predecessors, and is destroyed by gift, etc. The creating of the relationship between cause and effect is due either (as I believe) to the single-efficacyness of several causes or (less probably) to a generic difference between the effects."

This new *padārtha* is *dhana-vṛtti*, i. e. has the property itself as its *locus*. We should not be misled by

terms of a prior-non-existence of the future event, would be Property itself. It is as well that flaws were found in this, for otherwise the author would have been in danger of that despair of the logician, the perfect definition.

*b) The "potentiality" theory: śakti, etc.*

Upon this, in default of adequate documentation, it is impossible to enlarge. Kamalākara, who, as we have seen, favoured another definition, likewise treated this with respect[392]). His relative Nīlakaṇṭha-bhaṭṭa, a very distinguished jurist, preferred to define *svatva*

[290]) On which see Ingalls, op. cit., 54, and Kuppuswāmī Śāstrī, *Primer of Indian Logic* (Madras 1932), 48.

[391]) K. Śāstrī, op. cit., 20. *BSOAS.*, 483, n. 5.

[392]) Ubi cit., n. 387 above.



*BSOAS.* Prop., 493.

[385]) Op. cit., p. 65, 369.

since it is notorious that *saṃskāras* inhere only in the person. A



as a *śakti*. He was well aware that Raghunātha himself defined *śakti* as a further category, but that seems not to have deterred him. He says[393]):

> *dāyādi-nirṇayopayogi svatvaṃ, tacca kraya-pratigrahādi-janyaḥ śakti-viśeṣaḥ. tat-kāraṇatā tu krayādīnāṃ loka-vyavahārād eva gamyate, na śāstrāt.*

Such Mīmāṃsakas as were not prepared to see *svatva* as a *saṃskāra* must have found this agreeable. Popular usage enabled a man to know whether what he had transacted created *svatva*; and *svatva* was "a particular potentiality, taking its origin in purchase, acceptance, and so forth, and tending to serve legal investigations such as into the nature of *dāya* and the like". The *śakti*, "power", "potentiality", evidently resides in the *dhana* itself, since it is by means of it that passing a coin buys an object. This accords with a curious passage in the Mitākṣarā, in which the author reveals in a characteristic negative statement that he believes that it is through the *svatva* of the thing, and not through the thing itself that transactions such as purchase and the rest are effectuated[394]).

This approach has its drawbacks. It implies that Property is to be defined in terms of what may lawfully be done with a thing that is *sva*. Yet it is evident that many things may be done with

return to the forelorn *saṃbandha* notion[407]). Dismissing the category and the *saṃskāra* theories, and their later accretions, he asserts, *"caitrasyedaṃ dhanam" iti pratīti-viṣayo dhana-vṛtti-caitra-vṛtti-saṃbandhaḥ*, "A relationship, or conjunction, located in the asset and located in the person (*X*), being the subject-matter of the cognition, 'this asset belongs to *X*'". This does not cease to be objective (cf. the basis of the *saṃskāra* definition in VII iii (c)), and it takes advantage of the fact that a *saṃbandha* must have a double simultaneous location. But we hear nothing further of this enterprising suggestion.

The big advance came, as Gokulanātha admits[408]), with the Svatva-rahasya. There Property and Ownership were identified as

[404]) Jagannātha, I. O. 1768 (II) fo. 4 a—b, trans. II, 186—7.

[405]) Ibid., I. O. 1770, iii, fo. 5 b, trans. I, 404. Rāmabhadra Nyāyālaṅkāra, commenting upon the Dāyabhāga, says *vastuto dhana-niṣṭham na svatvan nāma padārthāntaram, kintv ātma-niṣṭaṃ svāmyaṃ, dhanan tan-nirūpaka-mātraṃ.*

[406]) I. O. 1768 (II), fo. 4 b, trans. II, 187.

[407]) N. 365 above.

[408]) *(N)STV.*, fo. 115 b.

one and the same category. To paraphrase the extremely involved conclusion[409]), this category, which can be expressed indifferently by either word, is the facilitator or effectuator of practical *observations*, such as, "in this (is) *svatva*, this (is) *sva*" and, through the operation of a similar relation, "in this man (is) *svāmitva*, he (is) *svāmī*": the two observations being present at the same time by the operation of different relations[410]). The mutual definition-qualification inhering in both person and thing, being single, proves that Property and Ownership are really identical.

It is not clear whether Jayarāma's conclusion is an advance on this. In his view *svāmitva* is still distinct from *svatva* (which it would certainly appear to be to the amateur logician); the definition of *svāmitva* being *ātmani śarīre vā samavetaṃ nirūpakatā-saṃbandhena tad eva dhana-vṛtti svatva-vyavahāra-prayojakam*, "Whether it be located in the Self or the body, it is the means whereby transactions with *svatva* occur, referable to the asset, by relation of describerness"[410a]).

---

[409]) To ch. I: navyas tu svatvaṃ svāmitvañ caika eva padārthaḥ sa ca vilakṣaṇa-viśeṣaṇatā-sambandhena "atra svatvam idam svam" ity ādi-vyavahāra-kārako; vilakṣaṇa-viśeṣaṇatayā ca "atra svāmitvam ayam svāmī, atra patitvam ayaṃ patir" ity ādi-vilakṣya vyavahāra-kārakaḥ. na tu svatva-svāmitvayor bhedaḥ; tad-ubhayor bhede 'pi tad-ubhayor avaśyaṃ puruṣa-dhana-niṣṭha-paraspara-vilakṣaṇa-viśeṣaṇatābhyupagamāt. etena viṣayatva-viṣayitvam api vyākhyātam. tad-ubhayor apy eka-padārthatvāt.

[410]) The first, "definition-qualifierness-connexion", the second, "definition-qualifierness". It is doubtful wheter any very substantial difference is intended. *Svatva* and *svāmitva* being identical, the single (unnamed) *padārtha* which they represent, produces two facts: (i) the thing's possession of Property, Property inhering in the thing not by the inherence of a generic character, but by a peculiar qualification relation due to the inevitable owner's defining the thing by his ownership immediately it is an owned thing; and (ii) the owner's possession of Ownership, the latter inhering in the owner because of his peculiarly qualifying the thing, defining it in terms of himself.

[410a]) *Svatvavādārtha*, p. 6. "Relation of describerness" is indirectly explained in Ingalls, op. cit., 46. In the statement, "There is fire in the mountain", which may be expressed, "The mountain is a locus of fire", fire or fireness may be called the *describer* of the locusness in mountain. The relation of fire or fireness to locusness in mountain is the relation of describerness. Jayarāma's syllogism appears to be this: "The thing is a locus of *X*'s Ownership", i. e. the relation of Ownership of *X* to locusness in thing is the relation of describerness, because *X's* Ownership describes the locus "in", or scope provided by, the thing. The relationship of

The process of identifying categories was not at an end. Gokulanātha made "debt" (*ṛṇatva* "debtness"), and its correlative *adhamarṇatva* ("creditorness"), categories, and so also *jaya* and *parājaya*, victory and defeat in gambling, which he very properly distinguishes from indebtedness[411]).

The last stage in the discussion to emerge chronologically is that recorded in Rāmajaya Tarkālaṅkāra[412]):

*svatvan tāvat: "svāmi ṛktha-kraye" tyādi-vacanāvagata-niyato-pāyakaṃ viṣayatā-sambandhena dravya-vṛtti "yatheṣṭaviniyoga-yogyam idam" ity ādy ākārakaṃ tat-tat-puruṣiya-yathārtha-jñānam eva. tad eva viṣayitayā puruṣa-gataṃ sat svāmitva-śarīraṃ labhate. aprāpta-vyavahārācetana-devasvādau teṣān tathāvidha-jñānābhāve 'pi jñānāṃśe yogyatā-vinikṣepa-mahimnaiva kṣati-virahaḥ sampādanīyaḥ.*

"As for Property — it is *true* knowledge on the part of individual persons, having the form, "this is fit for application at pleasure", located in (or referable to) things by contentness-relation, and having its means (of acquisition) determined from texts such as that of Gautama[413]). When by containerness-relation it is located in the person it acquires the form (literally "body") Ownership. In the cases of the *sva* of minors, mindless *devas*[414]), and the like, though such knowledge be absent, we must avoid admission of a fault in the definition because the sufficiency of a scintilla of knowledge explains the importance of the trust involved."

Rāmajaya was undoubtedly exposed to the influence of English law: he saw the British courts functioning and was familiar with the principal rights and remedies available therein[415]). It is difficult to see in the word *vinikṣepa* anything varying even slightly from the

---

Ownership to X, however, is another question, with which he deals, but which he does not think it essential to settle for this purpose.

411) *Padavākyaratnākara*, Ms. I. O. 161 g, fo. 96 a, ed. P. B. Ananthachariar (Conjeevaram 1904), 161; *(N)STV.*, fo. 118 a.

412) Op. cit., p. 5.

413) Above, p. 34.

414) Less probably, "lunatics and *devas*".

415) On his function as a pandit of the College of Fort William and later of the Supreme Court of Calcutta, c. 1818—1823, as revealed by documents, etc., in F. W. Macnaghten's *Considerations*, see Derrett, "Sanskrit legal treatises compiled at the instance of the British", *Z. f. vergl. Rechtsw.* LXIII, 1961, 72 f., esp. at p. 114—5.

English legal term "trust", and the curious expression *jñānāṃśa*, literally "fraction of knowledge", looks remarkably like the English term "constructive knowledge". That minors' and deities' properties were in fact managed "in trust" cannot be doubted, the question was how to account for their Property if Property was to be defined, as the Mīmāṃsakas defined it, in terms of the result of knowledge. Rāmajaya, whose definition does *not* require, as theirs did, that the acquirer *himself* should have had knowledge of acquisition, is relying on the fact that knowledge by others that property was for the use of its owner is sufficient to sustain the legal purposes of Property, and in the cases of minors and lunatics and deities the incapacitated Owners can be said to be such because they possess, or there exists, a "scintilla of knowledge" sufficient to enable the trusts to be established and managed. The great emphasis which the Anglo-Indian law placed upon guardianship both of minors and idols may explain Rāmajaya's somewhat peculiar way of referring to the position.

The *padārtha* theory is by no means abandoned by Rāmajaya, but the nature of the *padārtha* is settled with the aid of ideas borrowed from the general discussion which we have considered. The reference to *true* knowledge might upset some critics, as it would satisfy others, and the reference to texts would not please Mīmāṃsakas, unless we are to take the phrase as a compendious expression (IV B i).

## VIII. Conclusion

These discussions, when they can be followed word by word, have an educative value, in so far as they accustom one to a new technique of considering well-known phenomena; we, however, are for the present deprived of the opportunity to follow the writers in detail. Their tests of the theories with reference to the stock problems are interesting, but we should prefer to see a more fundamental examination of the nature of Property, assuming, of course, that its incidents and general practical character are as they plainly appeared to be to Indian lawyers.

To attempt a redefinition of Property along lines familiar to Indian jurists might seem superfluous. The Sanskrit language however affords unequalled opportunities for succinct statement, and the highly objective approach we have observed in Indian writers serves as an attractive pattern for all subsequent attempts at definition.

Without attempting to give a general definition of Property, and without presuming to continue either the plainly inadequate *saṃskāra*, the *padārtha* or other allied and combined traditional theories, a new example is offered below for the purposes of research and discussion.

Wherever Property is found certain factors are present, namely a cognition, an asset, an individual, and benefit to that individual by reason exclusively of that asset within the bounds admitted by law. You may use someone else's property unlawfully, but it will not be your Property which is involved. Your own property may be a source of illegal profit to you, but in so far as it is so it is not legally Property, for as Property is a legal concept Property must be absent in that connexion. Property does not therefore *reside* in either person or thing in any continuous, or perhaps in any, sense[415a]). If the benefit is not "of right" it may stem from someone else's Property[416]). A licensee has the enjoyment so long as his licence endures, and within those limits he may consider the enjoyment his property; in so far as he has a right to the enjoyment that benefit is a factor tending to establish Property in his favour. The moment, however, the right ceases, and the enjoyment depends upon non-ejectment by the true owner, Property in respect of that asset or the benefit derivable from it ceases. Independence is therefore an essential factor, though it may exist within the scope of dominance on the part of others, provided that to the extent that Property is claimed the enjoyment in question is based upon a right and not mere sufferance. The definition may be put as follows:—

*tena tena dhanena caitrādi-nyāyya-svatantrātīta-lābha-yog-yatvam iti "caitrāder idam" iti pratīti-siddhatvam iti svat-*

---

[415a]) This was developing in India, for Gokulanātha, *(N)STV.*, fo. 115b, rightly recognises *svatva* by turns.

[416]) Hence Rāmajaya; ubi cit., was right in saying that *yath-* was unsatisfactory as a definition of *svatva* because it might exist in reference to the property of another *behind his back (tat-parokṣe)*, for if it were known to him and he took no action (*tat-samīpe*) a permissive enjoyment would exist which would be consistent with *yath-*. The inference is that that inaction would give one *svatva;* from being a trespasser one would become a licensee. In the definition given in the text above it will be observed that while a licensee has no Property in the source of his enjoyment, he has Property in its profits (whatever they may amount to). Thus a right to walk across another's garden is a right in the nature of Property, the garden itself not being referable to the Property of the walker.

*vam. lābha-grahaṇaṃ mānasa-santoṣa-kāyika-bhoga-vyāvahārikāyādi-phalopalakṣaṇaṃ. "caitrāder idam" iti pratīti-siddhatve, caitrādeḥ svāmitvaṃ prasiddham.*

"Property is the fact that cognition has occurred that, "this belongs to *X*, etc.", i. e. that from certain assets *X*, etc., possess the capacity lawfully to obtain a non-permissive profit. The word 'profit' is illustrative of mental satisfaction, physical enjoyment, legal income, and so on. When this cognition, "this belongs to *X*, etc." has occurred, the Ownership of *X*, etc., is undoubted."

One merit of this definition is the avoiding of the trap into which some Indian writers fell, of describing Property in terms of the powers of disposition implied.

It may be objected that although the cognition need not be on the part of any particular person, it may be mistaken. It may be added that although the term "lawfully" appears in the concept which must be cognised the cogniser may very well be under an illusion as to whether the "profit" is lawful. Since he may be proved wrong (in legal proceedings or otherwise) a Property has existed, according to this definition, for a time, and then is annulled *ab initio*, which is undesirable. The answer is that this is precisely what happens in every legal system. Mistakes are made, and individuals have frequently to pay for them. As a legal concept Property is not immune from such hazards[417]).

[417]) It may be objected that Property is thus being defined as a relative concept, dependent upon who has the cognition. If any cognition may turn out to be wrong. While two persons have incompatible cognitions about, for example, the lawfulness of an acquisition of profit by *X*, are we to assume that Property both exists and does not exist? The answer is that Property being a legal concept, and one cognition being right and the other wrong, the determination must be awaited. The word *cognition* does not imply a premature decision, and if the question arises whether it has been cognised it will naturally be considered whether material exists upon which such cognition could reasonable be arrived at. That refers us to the law, which is what is required. Indian authors, by referring to "popular recognition" (above, p. 48), showed their awareness of the difficulties in indiscriminate cognition — but they found no direct escape from the possibility of erroneous or conflicting cognitions. The "category" theory, by accepting from the lawyers the causes and destructive agents of *svatva*, correctly, it is submitted, assumed that the presence or otherwise of *svatva* must be determined by law, and this accepts the possibility of more or less lengthy doubts as to its location. The matter is nowhere

Fortunately, in any such discussion we are not obliged to follow traditional Indian thought in looking for the precise "location" or inherence of our Property. But since Rāmajaya was content not to specify precisely which persons must have the knowledge which he identified as Property, we are safe in assuming that a departure from the traditional ideas, or perhaps a development of them, was imminent when the discussions were prematurely closed by the collapse of the ancient judicial system. And since our definition does not look to knowledge, or even the cognition, as the thing to be defined, but to the fact that a cognition has taken place, we are faithful to the Indian way of thinking in seeing Property in an abstraction: we must follow it up therefore by a further short definition.

"Property" as understood by jurists is really the abstraction of the Property defined above; it is what the logicians called *svatvatva*[418]). "Property as the subject-matter of juristic investigation is the fact that Property as previously defined occurs." That is to say, in Sanskrit:

*vyāpāra-vyavahārādi-nirṇayopayogi svatvatvan nāma yathokta-svatvasya loke sadbhāvaḥ iti.*

Since Indian writers assumed, for the most part, that *svatva* must be conceived as existing in favour of determinable individuals and since no means of transfer could be recognised in which an indeterminate group could be transferees, it was natural that the expression "Public Property" should appear absurd[419]). However, it seems likely, by the careful choice of the expression "*X*, etc." in the first definition above, that public Property is not impossible.

The phrases "X has Property in that", and "Property passes from *A* to *B*", are established in usage, but are misleading and inaccurate. Curiously, the conception of Property *passing*, *moving*, and *reaching* is not altogether foreign to Indian thought, since it

---

clearly discussed, since to Indian scholars the rights of any disputed matter existed in a supersensory form, awaiting a judgment that might not occur. To western jurists this approach will not appeal uniformly: to us doubts as to the location of Property may imply doubts as to the existence of an answer: the possibility that in any particular case Property may not exist at all, though various parties claim to be entitled to use a thing, has to be faced.

[418]) Above, p. 117, n. 380.

[419]) Above, p. 91, n. 313.

is a commonplace for Indian texts to speak of *dhana*, even immovable property, moving, etc.[420]). However, there is a difference between, on the one hand, extending the metaphor appropriate to a cow or a horse to barely analogous instances of property, and, on the other, suggesting that Property itself passes. Here violence is being done to the abstraction Property itself.

[420]) Above, p. 54, n. 164.

## ADDITIONAL ANNOTATIONS

Tit. J. N. C. Ganguly, 'Hindu theory of property', I.H.Q. I (1925), 265-79, concentrates on *artha*, speaks of contentment and working for a subsistence, and visualises the Golden Age (appropriately to the period). Though the *Bṛhadāraṇyaka Upaniṣad* is older that c. A.D. 800 the passage to which Ganguly has the credit of drawing attention is specially worthy to be reproduced as throwing light on the most ancient Indian concept of the proprietorial relationship: 'Wealth such as cattle is his [the sage's] fifteen members, and the body is his sixteenth member corresponding to the fixed member of the moon. Like the moon he increases and decreases by wealth. This body is fit to be the nave and the wheel, the external outfit (*pradhi*, periphery) like spokes and the felloes of a wheel. Therefore even if all wealth of a man is lost but he himself remains alive, people say that his external outfit only is gone [like a wheel losing spokes].' (*Bṛh.Up.* I.5,15, ed. trans. Ramakrishna Math, Madras, 1945, 104). S. also Y. Bongert, 'La notion de propriété dans l'Inde', Travaux et Recherches de l'Institut de Droit Comparé de l'Université de Paris, 23, *Études de Droit Contemporain*, 1962, 149-162, who used my article on property in vol. I, supra, but not this present article. S. also W. Kirfel, 'Frühgeschichte des Eigentums in Altindien', *Anthropos* 60 (1965), 113-163. This concentrates on the *smṛti-s* and deals most helpfully with the following: 1. Die altindische Rechtsliteratur; 2. Die Besitzverhältnisse im vedische Zeit; 3. Die soziale Struktur der Gesellschaft und die gesetzlichen Beschäftigungen des Stände unter normalen Verhältnissen und in Notzeiten; 4. Der Lebensabschnitt des geistlichen Schülers; 5. Die Lebensabschnitt des Eremiten und Asketen; 6. Das Leben des Haushalters und seine Bemühungen um Lebensunterhalt und Eigentum; Eigentumsverlust; Kultivierung; Bewässerung; 7. Familienverhältnisse und Erbteilung: a. Die Familienverhältnisse; Eheschließung; Adoptivsöhne; b. Die Erbteilung; 8. Kauf und Verkauf; 9. Schuldverhältnisse, Bürgschaft, Zinsen und Pfand; 10. Bestimmungen über Schenkung; 11. Der Schatzfund; 12. Der König: seine Pflichten und Rechte. Steuern und Zölle.

p. [8], n. 2. Inf., pp. 260ff.

p. [10], n. 8. For 'Kuttā' s. sup., vol. I, 280ff. For 'Prop.' s. sup., vol. I, 333ff.

p. [11], n. For '*Sv.Rah.*' s. sup., vol. I, 365ff. For '*Sv.Vic.*' ibid., 358ff.

p. [12], n. 8b. After several years' sleep the Act came to life in *Thomas* v. *Sarakutty* 1975 K.L.T. 386, discussed at 1975 K.L.T., J., 41-2, 44-6, ibid., 43, and (more satisfactory) *Abbas* v. *Kunhipattu* 1975 K.L.T. 604. The evils of the dowry system are commented upon (once again) by R. Jaganmohan Rao, 'Dowry system in India: a socio-legal approach to the problem', 15/4 J.I.L.I. 617-625 (1973).

p. [14], n. 14. Now at Derrett, R.L.S.I. (1968), ch. 9.

p. [16], n. 19. On *smṛti* the best source now is R. Lingat, *Classical Law of India* (Berkeley/New Delhi, 1973), pt. 1.

p. [17], *l. 24.* S. the conclusions by Derrett, *Bhāruci's Commentary on the Manusmṛti* (Wiesbaden, 1975), 4-17.

p. [17], n. 21. S. inf., pp. 393, 395, 398-9.

p. [19], l. 11. For *dhana* meaning 'money' s. M.IX.113.

p. [19], n. 32. Jagannātha II, 510-11 (Madras edn., II, 189-90).

p. [20], l. 11. S. next n.

p. [20], n. 36a. *Pratigraha* refers not to all kinds of acceptance but to transcendental transactions. Medh. on M.IV.5 (trans. Jha, 304).

p. [21], l. 16. For human beings as *objects* of property s. inf., pp. 23, 24-5, 91-3.

p. [24], l. 4. Jagannātha utilises this to provide an analogy whereby assignments might be legal (I, 66, Madras edn.). Medh. denies that this can happen, e.g. on M.VIII.90.

p. 24], l. 10. For definitions of *dhana* s. Medh. on M.VIII.147 (trans. p. 174), 149 (trans. p. 183).

p. [24], n. 51. Examples of actual formulae amongst unlearned people: Medh. on M.III.148 (trans. 158, p. 181). Selling fruit of sacrifices: ibid. on M.IV.214 (trans. p. 467). S. sup., p. 4, n. 18 and add. ann.

p. [25], l. 10. *Sidhe Nath* v. *Prem Club* A.I.R. 1972 All. 324: Gangaputras giving religious services to pilgrims on banks of the Ganges at Kanpur have a *Brit Jajmani* which is property, heritable and alienable; a more than transient relationship between those who give and those that seek these services.

p. [25], n. 57. Medh. on M.VIII.47.

p. [25], n. 58. On what is *dakṣiṇā* s. J.C. Heesterman, 'Reflections on the significance of the *Dákṣiṇā*', I.-I.J. III/4 (1959), 241-258; 'Brahmin, ritual and renouncer', W.Z.K.O. 8 (1964), 1-31. K. Potdar in *Charu Deva Shastri Felicitation Volume* (Delhi, 1973), 379ff.

p. [25], n. 59. Rights by grant and rights by custom are liable to be struck down as infringing the freedom to practise religion and to practice a profession (Constitution of India, artt., 19, 25): *Baijnath* v. *Ram Nath* A.I.R. 1951 H.P. 32; *Gotimayum Birabari* v. *Thinganam Ibomcha* A.I.R. 1960 Man. 34.

p. [26], n., l. 4. Huk Purohitee-jujmans (*sic*) had a right to select their own priests: 1 Dec. S.D.A., N.W.P., 1862, p. 314; 1867 Rep. H.C.J., N.W.P. (Agra, 1867), 80.

p. [26], n., l. 10. For the traditional right: *Damoodur* v. *Roodurmar* (1862) 1 Marshall Cases on Appeal (Cal. H.C.), 161. On *nibandha* s. *Coll. of Thana* v. *Hari Sitaram* (1882) 6 Bom. 546, 559 F.B.

p. [26], n.,l. 11. For śāstric rules on hereditary purohitship: Medh. on M.VIII.388.

p. [26], n., l. 21. For ref. substitute A.I.R. 1953 M.B.7.

p. [26], n., l. 26. S. M. L. Jain, 'Is an *osra* an interest in immovable property?' A.I.R. 1969 J.80H-101 (2 pp.). He claims it is, relying on Hindu law in spite of *Jati* v. *Mukendra* (1911) I.C.884 (Cal.) and *Jagdeo* v. *Ramsaran* A.I.R. 1927 Pat. 7. The controversial *Sampathkumar* v. *Andalamma* A.I.R. 1969 A.P.303 F.B., criticised at Derrett, *Critique of Modern Hindu Law* (1970), app. 1., held that *śiṣya-sañcāram* (going round and initiating hereditary disciples) was neither a legal right nor partible.

p. [26], n., last l. An illuminating case: *Ramchandra* v. *Gavalaksha* (1973) 75 Bom. L.R. 668 (explaining Civil Procedure Code, 5 of 1908, sec. 9, 9A, and the limitations of Constitution of India, art. 25).

p. [27], l. 16. The fact that Gautama insists on the caste distinctions and that Manu ignores them is brought out by G.N.Jha, 'Sources of property under Hindu law', [Pt. Madan Mohan] *Malaviya Commemoration Volume* (Benares Hindu University, 1932), 213-17, where he reproduces the commentaries on both in translation, and notes that the commentators on Manu uniformly applied Gautama's distinctions to Manu!

p. [27], n. 64, l. 2. On this s. Medh. on M.IV.9 (trans. p. 309).

p. [27], n. 64, l. 5. *Śulka* was regularly an endowment of the bride by the husband in S. Indian usage: s. V.V. Mirashi, 'Epigraphic Notes-I', I.A., 3rd ser., I (1964), 175. In the *śāstra* however *śulka* occurs (where not excise duty) in two guises, as bride-price, and as a part of the married woman's own *stridhana* (a development of bride-price?).

p. [28], l. 10. Medh. has an explanation at M.X.94 (trans. p. 317).

p. [29], n. 75a. S. the trans. of Bhāruci by Derrett, *index*, 'possession ...'.

p. [31], n. 79, On *vyavasarga* s. L. Sternbach, J.A.O.S. LXXXIII (1963), 41.

p. [33], n. 90. Kane, at his *Kāty*. 971-2. Disposal in water: payment of a debt where no relative can be found (Nārada IV.40, Jolly (1876), 28). In the ritual of donation water must be poured: where there is no recipient, e.g. a *maṭha* for *sannyāsis*, the offering water must itself be thrown into a pot of water: Kamalākara, *Dānakamalākara*, cited by V.N. Mandlik, 334. The notion that assets should be thrown into water if enjoyment of them is prohibited is found also in Jewish law: the Dead Sea is the place for forbidden objects, etc.

p. [34], l. 1. Āśādhara (b.c. 1235) says that if a buried hoard is found it must be left alone since, as treasure trove, it is without an owner but belongs to the king (*Sāgārdharmāmṛta* IV.46-9). R. Williams, *Jaina Yoga* (London, 1963), 84. D. Bhargava, *Jaina Ethics* (Delhi, 1968), 119. The *Praśnottara-śrāvakācāra* (15th cent.) says that if lost property is taken up it must be devoted to worship in a Jaina temple.

p. [34], n. 95. In one *jātaka* tale a monk was forced to marry to beget a son to prevent the escheating of the family estate. In the Mayhaka-Jātaka (No. 390: E.B. Cowell, ed., *The Jātaka*, III, 186-7) the king's men spent a week carrying a rich man's estate into the palace, because he was a 'stranger' and had no (known) heir. Ibn Batuta (in K.A.N. Sastri, *For.Not.* 239) says the *rāja* took nothing from Muslims dying leaving only a brother; the brother was allowed to take all. There are, however, śāstric texts which make it plain that where a man died without very close relatives the person who performed the funeral was entitled to 1/10, 1/5, or even the whole: s. Bṛh. XXIX.10,11 (Renou, p. 140, R. Aiyangar, p. 227) (*Vyavahāra-nirṇaya*, 441), and Kāty. at *Dh.k. 1524*. It is *alleged* that Śaunaka allowed 1/10 in the case of a rich deceased, 1/5 in the case of a poor one, where he died without male issue, father or wife. The king would take the balance, except in the case of Brahmins (but how general was that?).

p. [35], l. 7. Nār. I.44-49; Viṣṇu LVIII (see trans.[1] of both in S.B.E.). A long discussion: Medh. on M.IV.226 (trans. pp. 475ff.). Additional textual material: K.K.T., *Gṛh.K.* 159-160.

p. [35], n. 99. Misbegotten wealth: s. Medh. on M.IV.170. Hemacandra, *Yoga-śāstra* (Bibl. Ind.), 151 looks back to ibid., 145: honestly earned wealth is available for charity (he dilates). For purity of wealth s. M. V. 105, 106. One must use only properly-acquired assets for gifts, in order to obtain merit: *Sutta Nipāta*, Māghasutta, trans. V. Fausböll (S.B.E. 1881), 80-81; M.Bh. Anuśāsana-p. LXXIII. 15-19 (P.C. Roy's edn.). M.IV.193,226. Inscriptions bear this out: Munirabad Stone Ins. (1088) (Hyderabad Arch. Ser. 5, 1922); Phnom Pen ins. of c. 670 A.D. (11.13-14) at G. Coedès, *Collection de Textes et Documents sur l'Indochine. III. Inscriptions du Cambodge*, V (Paris, 1953), 47.

p. [36], l. 22. *S.C.* (Mysore edn., 1914), II, 448-456.

p. [36], n. 100. Sup., vol. I, 266ff.

p. [37], l. 4. *Kūrma-purāṇa* II.25, 11-12 (ed. Gupta, Varanasi, 1972). Kane, *H.D.* II, 130. A *snātaka* (J.C. Heesterman in *Pratidānam. Fest. F.B.J. Kuiper*, 436ff.) may not accept from a king with whose history he is unacquainted: Mit. on Yājñ. I.130. He should not take from an avaricious king who violates the scriptures: ibid. I.140.

p. [37], l. 18. On selling prohibited things: Medh. on M.II.118 (trans. p. 388). S. inf. n. 111. The high-minded thief will not steal the property of one

who lives selling oil, rice, salt or cloth: Gopālayogindra, *Dharmacaurya-rasāyana* (Adyar, 1946), II, 63, also usurious gain: ibid., II.60!

p. [37], n. 104a. See add. ann. *ad* l. 4 sup.

p. [37], n. 107. M.Bh. XII.262,7-8.

p. [37], n. 110. Hemādri, *Caturvarga-cintāmaṇi*, Prāyaścitta, on selling food, horse, woman, and wife. Kane, *H.D.* III.848-9, cites Kumārila, *Tantravārtika*, trans. 182-3: people who by custom sell or give horses and mules, etc. Amongst the five *vipratipattis* (anomalies) are northerners who sell wool.

p. [38], l. 1. On reprehensible occupations see Hemacandra, *Yoga-śāstra* dealt with by R. Williams, op. cit., 263-4.

p. [38], l. 5. On *vṛddhi* s. B.K.Ins. II (1964), no. 217, p. 264-6 (A.D. 1205). On the entire subject the leading secondary authority is H. Chatterjee Sastri, *The Law of Debt in Ancient India* (Calcutta, 1971).

p. [38], l. 9. On Usury s. Bṛh. in *Gṛhastha-ratnākara* cited by Kane, *H.D.* II, 124. Medh. on M.II.183, III.153, IV.224. One *can* perform sacrifices with usurer's gain: ibid. on M.IV.226.

p. [38], n. 111. Sup., vol. I, 295 n. 3. Vasiṣṭha's list of objects a Brāhmaṇa must never deal in: S.C. Banerji, 'Aspects of ancient Indian society', J. Ganga. Jha Res. Inst. (All.), XVI, 49f, 55, while Gaut. appears at 88.

p. [39], l. 16. *rāja-pratiṣiddha-pratikraya*: Medh. on M.IV.226 (p. 406: trans. p. 478 — 'selling' may be wrong).

p. [40], n. 121. J. Jolly, *Hindu Law and Custom* (Calcutta, 1928), 198-9 (with B. Ghosh's note). Jagannātha, I, 436 (Madras edn.).

p. [42], l. 13. Bṛh. XXVI.12 (vibhāga-krama) (Aiy. p. 197, Renou p. 119): yathā yathā vibhāgāptaṃ dhanaṃ yāgārthatām iyāt / tathā tathā vidhātavyaṃ vidvadbhir bhāga-gauravam. On Jaina texts dealing with spending, apportioning incomes, see R. Williams, op. cit., 264. Property is really for sacrifices: *Kūrma-purāṇa* II.25.21 (ed. Gupta, Varanasi, 1972). The idea is obviously Vedic: so clearly at *Bṛh.Up.* I.4.17. So the M.Bh. is quoted by Bhāruci on M.XI.12[13]. Denied by Medh. on M.VI.89 (trans. p. 264).

p. [42], n. 131. Yājñ. II.166, with Mit., is good on this. A hostile text of Nār. (VII.10) is dealt with in a discussion by Jagannātha, II, 90-1 (Madras edn.).

p. [42], n. 133. Kāty. 822A. Nār. XVIII.39.

p. [42], n. 134, l. 10. A.S. Nataraja Ayyar, *Vyavahāra-nirṇaya* (Delhi), IV (1955), at 54ff.

p. [42], n. 134, l. 16. Kāty. 852. Āp. II.10.26.2.

p. [44], l. 7. Gifts of entire property by hypocrites: Medh. on M.IV.176 (trans. II, 1, 440); cf. VIII.99 (trans. IV, 1, 117-8).

p. [45], l. 12. For a gift of earth to perform sacrifices s. M.Bh. Anuśāsana-p. LXVI,22 (P.C. Roy's edn.). Example: Brahmins buy and receive land for *agnihotra* and *pañcamahāyajña*: Damodara Copper-plate of Kumāragupta (A.D. 443/4, 447/8) (s. U.N. Ghoshal at A.B.O.R.I. XLVI (1965), 70-1.

p. [46], l. 4. A.B. Shinde, 'What is Dāya?', A.B.O.R.I. LIII (1972), 233-238, makes out that it is a completely non-evaluative concept.

p. [47], l. 29. Add the remarkable definition of Hemacandra, *Arhanniti* (Ahmedabad, 1928), 110-1: 'dāyo nāma mātṛpitṛpitāmahādi-vastūnāṃ sva-svatvāpādanaṃ yena tad-vyayādau ko 'pi niśeddhuṃ na śaknoti. sa dvividhaṃ (*sic*) sapratibandhako 'pratibandhakaś ca. tatra pitṛvya-bhrātṛjādīnāṃ putrādi-pratibandhaka-bhāvena yat svatvaṃ sa sapratibandhakaḥ. tatra putrādīnāṃ pratibandhakatvāt. putra-pautrādīnāṃ tv apratibandhakaḥ putratvena tat-svāmitve na hi ko 'pi pratibandhako 'stīti.' On the nature of this work and its (late mediaeval?) period see Derrett, 'Hemācārya's *Arhanniti*: an original Jaina juridical work', A.B.O.R.I., LVII (1976).

p. [48], l. 9. L. Rocher, '*Janmasvatvavāda* and *uparamasvatvavāda* ...' *O.H.* XIX/1 (1971), 3-13. Sup., vol. I, 198ff.

p. [49], l. 11. The basic text of Gaut., *utpattyaiva* is cited or miscited at Medh. on M.IX.156, cf. IX.212 (end), IX.209.

p. [49], l. 170. The second edn. (much enlarged) appeared from Dharwar (Karnatak University, 1975).

p. [49], n. 171. On the father's rights over his son's acquisitions see Derrett, 'The father's share: a forgotten chapter of Dayabhaga law', (1965) 69 C.W.N., J., xxxvii-xxxix.

p. [50], l. 12. In Kerala State, however, legislation in 1975 tried to end the vindicating at law of any rights based on birth alone.

p. [52], n. 181. The aberrant case of *Apaji* v. *Ramchandra* (1892) 16 Bom. 29 F.B., limited by *Jaswantlal* v. *Nicchabhai* A.I.R. 1964 Guj. 283 (see Derrett, *Critique*, § 204) was disapproved and held impliedly overruled (for Karnatak State) in *Devagya* v. *Shivagya* A.I.R. 1973 Mys. 4. The matter was commented upon by me at (1973) 75 Bom. L.R., J., 92-3.

p. [52], n. 182. Sup., vol. I, 217ff.

p. [53], l. 5. Medh. on M.IX.118 (trans. V, 101). Sisters are not *svāmī-s* and therefore their brothers' duty is moral only.

p. [53], l. 9. Derrett, *Critique*, 91 n. 7.

p. [53], l. 11. Inf., vol. IV, apropos of the *HSA*.

p. [55], n. 191. S. inf., vol. IV.

p. [56], l. 5. Kullūka on M.VIII.416. Raghunandana, *Prāyaścitta-tattva*, 307.

p. [56], n. 193. Medh. on M.III.202 (trans., 212, p. 231 f) takes for granted the need for the wife's permission before he spends on *śrāddha-s*; at VIII.163 (text p. 152 bottom) the *dhana* of spouses is clearly said to be *sādhāraṇa* (s. also p. 153 bottom).

p. [56], n. 197. *dampatyor aikyam: Vājasaneya-brāhmaṇa* cited by Kullūka on M.IX.45, 206-7 (cf. 211). C. Sankararama Sastri, *Fictions in the Development of the Hindu Law Texts* (Adyar, 1926), 206. Father and mother are joint owners of their daughter: Medh. on M.V.149.

p. [58], n. 204. S. inf., pp. 391-2.

p. [58], n. 204, last l. The artt. ref. appear inf., vol. IV.

p [61], n. 211. Criticised by A.S. Nataraja Ayyar, 'The juristic personality of deities in Hindu law', *Vyavahāra-nirṇaya* III (1954), 106-177.

p. [63], l. 3. The etymology and history of *nīvī* is explained by me at '*Nīvī*', *Acharya Dr. Vishva Bandhu Commemoration Volume*, pt. I = *Vishveshvarananda Indo. J.* XII (1974), 89-95.

p. [64], l. 7. Āp. I.6.18,20 *ye cādhim* (*ājivanti*) is construed by Haradatta thus: sva-gṛhe parān vāsayitvā tebhyo bhṛti-grahaṇam *ādhir* yaḥ *stoma* iti prasiddhaḥ ... ye tu prasiddham *ādhim* ājīvanti teṣāṃ vārdhuṣikatvād eva siddho 'rthaḥ. For *stoma* s. Bṛh. at Pṛthvīcandra, *Vyavahāra-prakāśa* (Bombay, 1962), 205.

p. [64], n. 221. S. last n.

p. [64], n. 224. But s. vol. I, 241.

p. [66], n. 228. Bhāruci (1975), II, 266.

p. [67], l. 11. *nibandhena* can mean 'as a matter of obligation'. Cf. Medh. on M.VI.73: the servant was has been given an advance on his wages, etc., serves *nibandhena ārādhayitum*. He is financially bound to serve (cf. the self-sold slave).

p. [70], l. 14. The size of rent might depend on the question whether the land has been neglected: Bṛh. XIX.55 (cf. I.43) (Renou, 102 [I.-I.J.], 10 [É.V.P.]).

p. [70], n. 244. Lands should be granted without power of alienation: Kauṭ. II.1.7 (trans. Kangle, 63). Examples of conditional grants: E.I. XXV, no. 21,

p. 199, 218, 11.117-20; Ind. Ant. XIV, p. 319 (A.D. 1271); E.I. XXXII, p. 31, 44; Sirpur (Dist. Raipur, Central Provinces) Stone Ins. of Mahāśivagupta (8th-9th cent.) *vv.* 31-35. Verse 31 reads: 'Their sons and grandsons should be such as offer sacrifices to fire and know the six supplements of the Vedas, who are not addicted to gambling, prostitutes, etc., who have their mouths clean and who are not servants'. Verse 32 continues: 'If one does not answer to this description (he should be abandoned); also one who dies sonless — in their places must be appointed other Brāhmaṇa-s possessing the foregoing qualifications' [editor's trans.]'.

p. [71], l. 7. Grants of land coupled with a small rent (*nikara*): E.I. XXXIV, no. 37, p. 233; E.I. XXXIII, no. 28, p. 150, 153 (*śataṃ purāṇān nikaraṃ niyamya*).

p. [71], l. 24. For a creditor's lien on a cultivator's crop. etc., s. an intriguing passage at Jagannātha, I, 257.

p. [72], l. 18. But see Jagannātha, I, 432.

p. [73], n. 259. Jhā, HLS I, 154. The text had already occurred in the *S.C.*, *Vyavahāra-kāṇḍa*, 334 with a valuable commentary.

p. [74], n. 266. S. sup., vol. I, 257.

p. [75], n. 267. Jagannātha is rich on this.

p. [76], l. 10. Jagannātha comments on this.

p. [78], l. 17. For *stoma* meaning hire of movables (cf. sup., p. 64, l. 7) Bṛh. X.14 (cf. *Dh.k.* 634) (Renou, 86).

p. [79], n. 287. L. Sternbach, *Juridical Studies in Ancient Indian Law*, I (Delhi, 1965) chh. 1-3.

p. [80], l. 9. K. R. R. Sastry, *Hindu Jurisprudence* (Calcutta, 1961), 206-7, refers to *S.C.* citing Kāty. and Vyāsa. These are quoted by the Mit. on Yājñ. II.67a, to the effect that a little less, say 1/4 is to be paid where the loss is due to ignorance. An analogy applies?

p. [80], n. 293. Yājñ. II, 67 with Mit.

p. [84], l. 19. Yājñ. II, 187; Agnipurāṇa 256.38; Hārīta at *Dh.k.* I/1, 184b. For *gaṇa* see Medh. on M.IV.209: *gaṇika* = appertaining to a company (undivided brothers are *not* a *gaṇa*). Modern cases are familiar with ownership vested in a *caste*: *Krishnasami* v. *Virasami* (1886) 10 Mad. 133.

p. [85], l. 10. *sarvārtham utsṛṣṭam*: dedicated to the public (Medh. on M.IV.201, trans., p. 456). On M.IV.202 (trans., p. 457) Medh. explains that what is dedicated for the public does not belong to any individual: *sarvārthatayā upakalpitāni ... na tāni 'parakīyāni'; tyaktaṃ hi tat samyak.*

p. [86], n. 317. The *aṣṭa bhoga-s* are dealt with by Kane, *H.D.*, II, 865; *Ravji* v. *Dadaji* 1 Bom. 523; *Amrit* v. *Hari* 44 Bom. 237. All eight sorts could be mortgaged: Vyavahāra-nirṇaya, 342. There could be *eleven* types of these eight (!): E.I. XXXII, p. 36. A text of Manu listing the eight, with a commentary in verse by Bṛh. attempting to explain them is in Varadarāja, *Vy. Nir.* 342 (above) as translated by Renou, I.-I.J. VI/2 (1962), 95-6.

p. [86], n. 317, l. 6. *daśāparādha*: Renou, ubi cit., 141 on Bṛh. XXIX.12,13.

p. [87], n. 318. B. Breloer, *Kauṭalīya-studien* I. *Das Grundeigentum in Indien* (Bonn, 1927). L. Skurzak, 'Megasthenes ... property of land', *Hist. and Cult. of Anc. India*, 26 (Moscow, Intern. Congr. of Orientalists, 1963). W. Ruben, *Gesellschaftliche Entwicklung* ... (Berlin, 1967), I, 225-6. U. N. Ghoshal, *Agrarian System in Ancient India* (Calcutta, 1930), pp. 818f. L. Gopal is weakly in favour of private ownership (noting aberrant views and condemning a compromise view) at 'Ownership of agricultural land in ancient India', J.E.S.H.O. IV/3 (1961), 240-63. D. N. Jha, *Revenue System in Post-Maurya and Gupta Times* (Cal. 1967), ch. 2, The classical sources give information of gifts of the kingdom: *Ātharvaṇa-pariśiṣṭa* 72 (4.7)

(*Mahādbhutāni*) (Kane, *H.D.* V/2, 770); M.Bh. XIV.91,7-13; and *mīmāṃsā* is countering fashion : *dakṣiṇā* shall be other than the land and the property of Brāhmaṇa-s (Śat. Br. XIII.6.2,18). Bhaṭṭasvāmī, *Pratipadapañcikā* on Kauṭ. II.24.18 clearly says that stretches of water and irrigation-works belong to the king (who can charge a water-rate), for the king is lord of land and water (s. edn. by K. P. Jayaswal at J.B.O.R.S. XII (1925-6), 138). Jagannātha gives his opinion at I, 314, 316-7 (Madras edn.).

p. [88], n. 318, end. Also his add. n. at *Aspects of Ancient Indian Economic Thought* (Benares, 1934), 179-182 and references there.

p. [89], n. 324. Medh. on M.VIII.163 (trans., p. 210) is good on this.

p. [90], n. 327. Inf. vol. III.

p. [90], n. 327, l. 5. Kamalākara, *Nirṇaya-sindhu* III, *dattaka-grahaṇa*, says that anyone who denies a man's ownership in his son is a fool — a hit at Nīlakaṇṭha. Kane, *H.D.* I, 440, n. 1100.

p. [90], n. 329. But n. a line quoted by Medh. on M.IX.131 : *saudāyikaṃ dhanaṃ prāpya strīṇāṃ svātantyam iṣyate*.

p. [91], n. 331. Medh. on M.VIII.29 says relations who appropriate the assets of women should be punished as thieves: on a variety of pretexts they do this, thinking, *asvatantraiṣā strī, kiṃ dadāti, kiṃ vā bhuṅkte? vayam atra svāminaḥ*.

p. [92], l. 10. A daughter stands to her father in two relations, father-daughter and owner-owned: Medh. on M.IX.27 (trans., p. 36) until puberty (IX.93, p. 77). Nār. IV.22 (Ratnākara, 62, Jhā, HLS, I, 211): a wife is a dead man's property. Medh. on M.III.27 (trans., p. 53-4) says the wife is a special kind of property to be used only as 'wife'. Marrying creates a particular form of ownership: Ibid., IX.135 (trans., p. 19). Ownership passes at the time of choice of the bridegroom: ibid., V.149. A contract for the sale of wife and/or children is *dharma-bāhya* (unrighteous): ibid., VIII.164. But, though M.IX.46 says that a wife is not freed from her husband by *sale* or abandonment, the ideal must be seen against 'ugly realities'. Yāska, *Nirukta* III.4: *strīṇāṃ dāna-kriyātisargā vidyante, na puṃsaḥ*, 'it happens that women are given away or abandoned, but not a man', P. Thieme, *Z. vergl. Sprachforschung* LXXVIII (1963), 206 n. 1. The theory of the wife's propertyness partly explains the *śāstra's* unwillingness to contemplate widow-remarriage: Medh. on M.IX.70 (p. 56) (see M.IX.71).

p. [92], n. 334, l. 17. S. last n.

p. [93], l. 13. For slavery in ancient India see Y. Bongert, 'Rélexions sur le problème de l'esclavage dans l'Inde ancienne', *Bull. École Fr. Extrême-Orient* LI/1 (1963), 143-194.

p. [94], l. 30. *mamatā* is the subjective right of property, used by Bhār. on M.XI.25.[26] Deities do not have it.

p. [102], n. 356. S. sup., vol. I, 314-15.

p. [104], n. 359. I have subsequently found a little article by S. N. Dasgupta, 'An analysis of the epistemology of the New School of Logic in Bengal', *Malaviya Commemoration Volume* (Benares Hindu University, 1932), 459-67, useful for one contemplating this jargon.

p. [105], n. 362. S. sup., vol. I, 355 n. 2.

p. [106], l. Aristotle defines things owned as things I have power to alienate, and he adds specifically that by alienation he understands gift as well as sale: Arist., *Rhet.* I.5,7.

p. [118], n. 415. On Rāmajaya s. now Derrett, R.L.S.I., 254, 270. He is slightingly referred to by S.C. Vidyābhūṣaṇa at *Vyavahāra Chandrikā* I (1878), xliii n.

p. [123], n. 420. Ordinary śāstric language allows property to *pass* or to *be carried*: Bṛh. XIV.14 (Aiy., p. 139) as read by Kane, *H.D.* III, n. 823, is an example.