SHYAM SUNDER PRASAD SINGH & ORS. A

v.

STATE OF BIHAR & ORS.

July 22, 1980

[P. N. BHAGWATI, A. P. SEN AND E. S. VENKATARAMIAH, JJ.] B

Hindu Law—Interpretation of ancient texts of Smritis and commentaries on Hindu Law, care to be taken—"Putrika Putra" (appointed daughter's son who by agreement or adoption becomes the son of the father), practice of—Applicability in Benaras and Mithila schools of law during the time of Raja Dhrub Singh—Whether the said practice was permissible by the Mitakshara law—Rule of desuetude or obsolescence, explained. C

Raja Ugra Sen, who was governed by the Benaras School of Mitakshara law established "Bettiah Raj" in or about the middle of 17th century. It was known as Riyasat of Sirkar Champaran consisting of four Perghunnas known as Majhwa, Simrown, Babra and Maihsi and an impartible estate. After the death of his great grand son, Raja Dhrub Singh dying issueless in 1762, Raja Jugal Kishore Singh, son of Raja Dhrub Singh's daughter Benga Babui, entered into possession of the estate of "Bettiah Raj". The East India Company D officers seized the estate from him and later allotted only the zamindari of Majhwa and Simrown, while those of Maihsi and Babra were allotted to Srikishen Singh and Abdhoot Singh. The last male holder of Raja Jugal Kishore Singh was Maharaja Bahadur Narendra Kishore Singh who died issueless on March 26, 1893, leaving behind him two widows Maharani Sheo Ratna Kuer and Maharani Janki Kuer, who succeeded him one after the other. During the lifetime of Maharani Sheo Ratna Kuer, two suits were filed claiming the E estate but they were lost in all courts including the Privy Council. In 1897, the management of the estate was taken over by the court of Wards Bihar and the Government of Uttar Pradesh in respect of the areas falling in these two States. Maharani Janki Kuer died on November 27, 1954. The State of Bihar, therefore, made an application before the Board of Revenue, Bihar, praying that the estate of Maharaja Narendra Singh which was held by late Maharani Janki Kuer as a limited owner but managed by the Court of Wards be handed over to the State of Bihar by virtue of the rule of escheat. The Board of Revenue pub- F lished a Notification calling upon interested parties to prefer the claim, if any, to the properties comprised in the estate. Since there were several claimants taking inconsistent pleas, the Board of Revenue declined to release the estate in favour of any of the claimants and as per its order dated January 18, 1955 directed that the properties would be retained by the Court of Wards until the dispute as to its succession was determined by competent Civil Court. The title suit having been lost. the appellants have come up in appeals by certificate. G The State of Bihar which claimed title by the rule of escheat also preferred appeals.

Dismissing Civil Appeals Nos. 114-119 of 1976, the Court

HELD: (1) While interpreting the ancient texts of Smritis and commentaries on Hindu Dharmasastra, it should be borne in mind the dynamic role played by learned commentators who were like Roman Juris Consults. The H

A commentators tried to interpret the texts so as to bring them in conformity with the prevailing conditions in the contemporary society. That such was the role of a commentator is clear even from the Mitakshara itself at least in two places—first, on the point of allotment of a larger share at a partition to the eldest son and secondly on the question of right of inheritance of all agnates. [56F-H]

(2) Etymologically, the word 'putrika' means a daughter (especially a B daughter appointed to raise male issue to be adopted by a father who has no sons), and 'putrika-putra' means a daughter's son who by agreement or adoption becomes the son of her father [20C-D]

A careful reading of the ancient texts—Manu, Yajnavalkya, (Mitakshara) (Vijnanesvara) and Apararka (Aparaditya) Baudhayana Dharmasutra, Vishnu Dharmasastra, Vasishtha Dharmasutra, Parasara Madhava, Smriti Chandrika of Devannabhatta, Dattaka-Chandrika and Dattaka Mimansa by Nanda Pandita— C leads to the inference that the institution of "Putrika Putra" had become obsolete and not recognised by Hindu society for several centuries prior to the time when Smriti-Chandrika or Dattaka Chandrika were written and these two commentaries belong to a period far behind the life time of Raja Dhrub Singh [32B-C]

Further, absence of cases before courts within living memory in which a claim had been preferred on the basis of application in "Putrika-Putra" form showed that the said practice had become obsolete. [34A]

D *Thakoor Jeebnath Singh* v. *The Court of Wards,* (1875) 2 I.A. 163 (PC), quoted with approval.

Sri Raja Venkata Narasimha Appa Row Bahadur v. *Sri Rajah Saraneni Venkata Purushothama Jaganadha Gopala Row Bahadur & Ors.*, I.L.R. (1908) 31 Mad 310; *Babui Rita Kuer* v. *Puran Mal,* A.I.R. 1916 Patna 8 approved.

Tribhawan Nath Singh v. *Deputy Commissioner, Fyzabad & Ors.*, A.I.R. 1918 Oudh 225, overruled.

E

(3) All digests, lectures and treatises support the view that the practice of appointing a daughter as a putrika and of treating her son as "putrika-putra" had become obsolete several centuries ago. And, the reason for the abandonment of the practice of appointing a daughter to raise a son by the Hindu society is clear from the following situation. [46C, 49F]

In ancient times, the daughter and daughter's son were given preference F over even the widow of a person in the matter of succession. Ancient commentators like Madhathithi and Haradatta had declared that the widow was no heir and notwithstanding some texts in her favour, her right was not fully recognised till Yajnavalkya stated that the widow would succeed to the estate of a sonless person. In Yajnavalkya Smriti, the order of succession to a male was indicated in the following order (1) son, grandson, great grandson, (2) putrika-putra, (3) other subsidiary or secondary sons, (4) widow and (5) daughter. It was not expressly stated that daughter's son would succeed, but the parents G were shown as the successors. Vijnanesvara, however, interpreted the word "cha", which meant "also" in "Duhitaraschaiva" in the text of Yajnavalkya laying down the compact series of heirs as referring to daughter's son. But for this interpretation a daughter's son would have come in as an heir after all agnates (gotrajas), as the daughter's son is only a cognate (Bandhu). As a result of this interpretation, the daughter's son was promoted in rank next only to his maternal grand-mother and his mother whose interest in the estate was H only a limited one. [48H, 49A-C, E-F]

When a person had two or more daughters, the appointment of one of them would give her primacy over the wife and the other daughters (not so appointed) and her son (appointed daughter's son) would succeed to the exclusion of the wife and other daughters and their sons and also to the exclusion of his own uterine brothers (i.e. the other sons of the appointed daughter). Whereas in the case of plurality of sons all sons would succeed equally, in the case of appointment of a daughter, other daughters and their sons alongwith the wife would get excluded. To prevent this kind of inequality which would arise among the daughters and daughter's sons, the practice of appointing a single daughter as a putrika to raise an issue came to be abandoned in course of time when people were satisfied that their religious feelings were satisfied by the statement of Manu that all sons of daughters whether appointed or not had the right to offer oblations and their filial yearnings were satisfied by the promotion of the daughter's sons in the order of succession next only to the son as the wife and daughters had been interposed only as limited holders. [49F-H, 50A-C]

Ghanta Chinna Ramasubbayya & Anr. v. *Moparthi Chenchuramayya*, 74 I.A. 162, followed.

(4) It is incorrect to suggest that the theory of "a practice once recognised by law becoming obsolete" was unknown and that it would continue to be in existence until it was taken away by a competent legislature. The court can declare it to be so. [53G]

Shiromani & Ors. v. *Hem Kumar & Ors.*, [1968] 3 S.C.R. 639, applied.

(5) The contention that the rule against the appointment of a daughter by a Hindu to beget an issue for himself in Kali age enunciated by Saunaka and others should be treated as only directory and if any person appointed a daughter for that purpose in contravention of that rule still her son would become "putrika-putra" of the person so appointing, with all the privileges of a putrika putra is highly tenuous. Where there is predominant opinion of commentators supporting its non-existence in the last few centuries extending to a period, in the instant case, prior to the life of Raja Dhrub Singh and there are good reasons for the Hindu Society abandoning it, it would be inappropriate to resurrect the practice. [58E-F, 61A-C]

Sri Balusu Gurulingaswami v. *Sri Balusu Ramalakshmamma & Ors.* [1899] 26 I.A. 113, dissented from.

(6) The evidence on record makes it clear that the family of Raja Dhrub Singh was governed by the Benaras School of Hindu Law and not by the Mithila School. Further, the material on record is not sufficient to lead to the conclusion that the institution of putrika putra was in vogue during the relevant time even amongst persons governed by the Mithila School. Throughout India including the area governed by the Mithila School, the practice of appointing a daughter to raise an issue (putrika putra) had become obsolete by the time Raja Dhrub Singh was alleged to have taken Raja Jugal Kishore Singh as putrika putra. In fact Raja Dhrub Singh as found by the High Court, had not appointed his daughter as a putrika to beget a putrika putra for him. It follows that the appellants who claim the estate on the above basis cannot succeed. [62F-G, 63F]

The applicability of the above rule to Nambuderies of Kerala is however not decided. [62G-H]

A CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 114—119 of 1976.

From the Judgment and Decree dated 15-12-1972 of the Patna High Court in F.A. Nos. 130, 85, 86, 87, 131, and 134 of 1966.

D. V. Patel, S. S. Johar and *S. N. Mishra* for the Appellants in B CA Nos. 114-119 of 1976.

V. M. Tarkunde, U. R. Lalit, K. K. Jain, D. Goburdhan and *P. P. Singh* for Respondents 5-22 in CA Nos. 114-115/76.

L. M. Singhvi (Dr.), U. P. Singh and *S. S. Jha* for the Respondents in CA 114-119/76.

C

The Judgment of the Court was delivered by

VENKATARAMIAH, J. The above six appeals by certificate and Civil Appeals Nos. 494-496 of 1975 arise out of a common judgment dated December 15, 1972 of the High Court of Judicature at Patna passed in First Appeals Nos. 85 to 87, 130, 131 and 134 of 1966. D After the above six appeals and Civil Appeals Nos. 494-496 of 1975 were heard together for sometime, we found that the above six appeals i.e. Civil Appeals Nos. 114-119 of 1976 could be disposed of by a separate judgment. We, therefore, proceeded with the consent of the learned counsel for the parties to hear fully Civil Appeals Nos. 114-119 of 1976. By this common judgment, we propose to dispose of E the above six appeals. The further hearing of Civil Appeals Nos. 494-496 of 1975 is deferred.

The question which arises for our consideration in the above Civil Appeals Nos. 114-119 of 1976 is whether the appellants and others either claiming under the appellants or alongwith them are entitled F to an estate popularly known as 'Bettiah Raj' which was under the management of the Court of Wards, Bihar. The last male holder of the said estate, Maharaja Harendra Kishore Singh Bahadur died issueless on March 26, 1893 leaving behind him two widows, Maharani Sheo Ratna Kuer and Maharani Janki Kuer. Maharani Sheo Ratna Kuer who succeeded to the estate of Maharaja Harendra Kishore Singh G on his death as his senior widow died on March 24, 1896 and on her death Maharani Janki Kuer became entitled to the possession of the estate. Since it was found that Maharani Janki Kuer was not able to administer the estate, its management was taken over by the Court of Wards, Bihar in the year 1897. Maharani Janki Kuer who was a limited holder of the estate died on November 27, 1954. On her death, H disputes arose amongst several persons who were parties to the suits

out of which the above appeals arise regarding the title to the 'Bettiah Raj' estate. The State of Bihar, however, claimed that none of the claimants was the heir of the last male holder and that since there was no heir at law as such at the time when the limited estate of Maharani Janki Kuer came to an end on her death, the entire estate alongwith the net income which the Court of Wards had realized from it became the property of the State of Bihar by virtue of the rule of escheat. We shall refer to the respective submissions of the parties at a later stage.

It is not disputed that Raja Ugra Sen, the founder of the 'Bettiah Raj' was governed by the Benares School of Mitakshara law as his family had migrated from the South Western part of the present State of Uttar Pradesh to the State of Bihar although in the course of the pleadings, there is a suggestion that the family was also being governed by the Mithila School of Mitakshara which was in force in the State of Bihar.

The question for decision in the instant case may no doubt ultimately appear to be a simple one but in order to determine the said question, it is necessary to relate the facts which spread over nearly three centuries and refer to a number of Smritis, commentaries and decisions.

The major part of the estate of 'Bettiah Raj' is situated in Champaran District of the State of Bihar. Some of its properties are situated in the State of Uttar Pradesh also. The principality known as 'Bettiah Raj' was established by Raja Ugrasen in or about the middle of the 17th century. It was then known as Reasut of Sirkar Champaran consisting of four pergunnahs known as Majhwa, Simrown, Babra and Maihsi. It was an impartible estate. Raja Ugrasen was succeeded by his son, Raja Guz Singh in the year 1659. Raja Dalip Singh, son of Raja Guz Singh came to the gaddi in the year 1694 and he was succeeded by his son, Raja Dhrub Singh in the year 1715. Raja Dhrub Singh died in 1762 without a male issue but leaving a daughter by name Benga Babui, who had married one Raghunath Singh, a Bhumihar Brahmin of Gautam gotra. It is said that he had another daughter also, but it is not necessary to investigate into that fact in these cases. On the death of Raja Dhrub Singh who was a Jethoria Brahmin of the Kashyap gotra, his daughter's son (Benga Babui's son), Raja Jugal Kishore Singh entered into possession of the estate of 'Bettiah Raj' and was in possession thereof at the date when the East India Company assumed the Government of the province. On the assumption of the Government of Bengal by the East India Company, Raja Jugal Kishore Singh offered some resistance to their

A authority and the Company's troops were despatched to enforce his submission. Raja Jugal Kishore Singh fled into the neighbouring State of Bundelkhand and his estates were seized and placed under the management of the Company's officers. During the absence of Raja Jugal Kishore Singh, Sri Kishen Singh and Abdhoot Singh who were respectively sons of Prithi Singh and Satrajit Singh, younger B brothers of Raja Dalip Singh, found favour with the East India Company. After some negotiations, the Government decided to allot the zamindari of Majhwa and Simrown pergunnahs which formed part of 'Bettiah Raj' estate to Raja Jugal Kishore Singh and to leave Babra and Maihsi in possession of Srikishen and Abdhoot Singh. On his return, Raja Jugal Kishore Singh accepted the decision of the East C India Company which was formally announced on July 24, 1771 in the following terms :—

> "The Committee of Revenue having approved of the reinstatement of Raja Jugal Kishore, we have now granted to him the zamindari of Majhwa and Simrown pergunnahs, and have settled his revenue as follows....."

D

Accordingly, Raja Jugal Kishore Singh executed a kabulyat in accordance with the terms imposed by the Government under the grant and got into possession of pergunnahs Majhwa and Simrown. He was again dispossessed in the following year as he failed to pay the Government revenue. Srikishen and Abdhoot refused to execute a kabulyat for E the two other pergunnahs alone and they were also dispossessed. The entire Sirkar thus passed into the possession of the Government and was held by farmers of revenue on temporary settlements until the year 1791. Raja Jugal Kishore Singh received an allowance for maintenance from the Government and died in or about the year 1783 leaving a son, Bir Kishore Singh. Thereafter on October 10, 1789, F Mr. Montgomerie, the then Collector, initiated fresh proceedings regarding the settlement of Sirkar Champarun, the estate in question, and on September 22, 1790, the Governor-General-in-Council (Lord Cornwallis) addressed the following letter to the Board of Revenue :—

> "It appearing from our proceedings that the late Raja Jugal Kishore was driven out of the country for acts of rebellion, and G upon his being allowed to return into the company's dominions, that the late President and Council thought proper to divide the zamindari of Champarun, allotting to Jugal Kishore the districts of Majhwa and Simrown, and to Srikishen Singh and Abdhoot Singh those of Maihsi and Babra, we direct that the heirs of the late Raja Jugal Kishore and Srikishen Singh and Abdhoot Singh H be respectively restored to the possession and management of the

above districts (with the exception of such parts thereof as may belong to other zamindars or taluqdars, being the proprietors of the soil, who are to pay their revenues immediately to the Collector of the district), and that the decennial settlement be concluded with them agreeably to the General Regulations." A

All the parties were dissatisfied with the above decision. Bir Kishore Singh who claimed to be entitled to the entire Sirkar Champarun, however, in obedience to the orders of the Governor-General took possession of the two pergunnahs Majhwa and Simrown allotted to him and gave in his agreements for the settlement of them and at the same time prayed that he might be put into possession of the other two pergunnahs also. Srikishen and Abdhoot also claimed the entire estate on the ground that Raja Jugal Kishore Singh was not a member of the family and had no title to the estate as "by the Hindu Shastra the female branch is not entitled to a share of the estate, much less the whole." They accordingly at first refused to give in their kabulyats for the pergunnahs Maihsi and Babra; but on Mr. Montgomerie's advice they ultimately did so under protest and were placed in possession of those two pergunnahs. Separate dowl settlements of Government revenue on the mahals in pergunnahs Majhwa and Simrown and on those in pergunnahs Maihsi and Babra were made with and accepted by Bir Kishore Singh and by Srikishen and Abdhut respectively. The Sirkar Champarun was thus divided *de facto* into distinct zamindaris to be held by the grantees at revenues allotted to each of them separately. Then started the first phase of judicial proceedings which even now continue to be devil the estate which Raja Bir Kishore Singh acquired pursuant to the orders of Governor-General-in-Council. On the 6th day of May, 1808, Ganga Prasad Singh, the eldest son of Raja Srikishen Singh, who had died by then, instituted a suit in the Zila Court of Saran claiming upon a plea of title by inheritance to recover from Raja Bir Kishore Singh possession of pergunnahs Majhwa and Simrown and certain salt mahals all of which were formerly part of Sirkar Champarun on the following allegations; that in the year 1762 upon due consideration of right to succession as established in the family, Raja Dhrub Singh had made over while he was still alive the rajgy of the Sirkar of Champarun to his father, Raja Srikishen Singh, son of Prithi Singh and at the same time executed in his favour a deed of conveyance of the rajgy and the milkeut of the estate comprising the whole of the Sirkar aforesaid and gave him entry into the zamindari. He further alleged that when in the year 1763 the British Government was established, the lands comprised in the said Sirkar were attached but that Raja Srikishen Singh continued to receive the malikana and other rights annexed to B C D E F G H

A the zamindari upto 1770 and that in the following year, the settlement of the whole Sirkar was made with him and from the year 1772 to 1790 although the business of the Sirkar was conducted by the Amins and Mootahdars appointed for the purpose and Commissioner appointed temporarily for the collection of the revenue and at other times, his father, Raja Srikishen received the malikana. He then proceeded to B state the manner in which, upon the formation of the decennial settlement in 1790, Raja Srikishen was deprived of the possession of the pergunnahs which he claimed to recover and alleged certain fraudulent practices whereby possession had been obtained by Raja Bir Kishore Singh. The suit was transferred from the Zillah Court of Saran to the Provincial Court of Patna. The suit was contested by Raja Bir C Kishore Singh. In the course of the written statement, his counsel *inter alia* pleaded :—

> "The whole of the above statement of plaintiff is both false and fraudulent for the real fact is that the Majhwa, Simrown, Maihsi and Babra pergunnahs forming the Champarun Sirkar were D the rajgy, the zamindary, and the milkeut of Raja Dhrub Singh, an ancestor of my client and the said Raja held the sole possession of them without foreign interference or participation. It is necessary to state that he had no son born to him; but Raja Jugal Kishore Singh, the father of my client was his grandson and the issue of a daughter he had by his senior Rani, Raja Dhrub Singh E aforesaid having adopted Raja Jugal Kishore Singh, the father of my client, at the time of his birth, conducted the ceremonies of his adoption and marriage in the usual manner, and having afterwards given him the tilak he established him upon the rajgy of the whole of the Champarun Sirkar".

F The Provincial Court dismissed the suit by its judgment dated December 29, 1812 solely on the ground of limitation whereupon Raja Dindayal Singh (the legal representative of the original plaintiff, Raja Ganga Prasad Singh, who died in the meanwhile) filed an appeal before the Sadar Diwani Adalat during the pendency of which Raja Bir Kishore Singh died (in 1816) and was succeeded by his elder son, G Raja Anand Kishore Singh. The appeal was dismissed on July 9, 1817. In its elaborate judgment, the Sadar Diwani Adalat rejected the case of the plaintiff in that suit relating to the conveyance of the rajgy by Raja Dhrub Singh in favour of Raja Srikishen Singh holding that the document relied upon was a forgery. The above decision of the Sadar Diwani Adalat was affirmed by the Judicial Committee of H the Privy Council in *Rajah Dundial Singh & Ors.* v. *Rajah Anand*.

Kishore Singh(1) by its judgment dated December 5 and 7, 1837. The Judicial Committee affirmed the judgment of the courts below on the sole ground of limitation. A

Raja Anand Kishore Singh continued on the Gaddi and in 1837, the hereditary title of Maharaja Bahadur was conferred upon him. Upon his death in 1838, without any issue, he was succeeded by his younger brother, Maharaja Bahadur Nawal Kishore Singh. Maharaja Bahadur Nawal Kishore Singh had two sons, Rajendra Kishore Singh and Mahendra Kishore Singh and upon his death in the year 1855, Maharaja Bahadur Rajendra Kishore Singh succeeded to the estate. Maharaja Bahadur Rajendra Kishore Singh died in 1883 and his brother Mahendra Kishore Singh having pre-deceased him, he was succeeded by Maharaja Bahadur Harendra Kishore Singh who as stated earlier was the last male holder of the estate and died issueless on March 26, 1893 leaving behind him two widows, Maharani Sheo Ratna Kuer and Maharani Janki Kuer. So great was the esteem in which Maharaja Harendra Kishore Singh was held by the Government that the Lt. Governor of Bengal came to Bettiah personally to offer his condolence. The occasion was used by Raja Deoki Nandan Singh (one of the great grandsons of Raja Srikishen Singh) to put forward his claim to the Bettiah Raj. On April 11, 1893, he presented a memorial to the Lt. Governor claiming that the late Maharaja was his "Gotra Sapinda". In the memorial, he stated thus: B C D

> "Raja Dhrub Singh had no issue. Therefore, according to the provisions of the Hindu Law he converted his daughter's son Jugal Kishore Singh who belonged to the Gautam Gotra to Kashyap Gotra and then adopting him as his son appointed him to be his successor. The Maharaja Bahadur was in the 5th lineal descent from Jugal Kishore Singh, the petitioner is in the 4th lineal descent from Raja Srikishen Singh..... That under the provisions of Kulachar law Your Honour's humble petitioner is the legal heir and successor of the deceased Maharaja and.....fully capable of managing the Raj." E F

A reading of the above extract of the memorial shows that the case put forward by Raja Deoki Nandan Singh was directly contrary to the case put forward by his predecessor in the suit of 1808. Whereas in the earlier suit, his predecessor had pleaded that Raja Jugal Kishore Singh was the daughter's son of Raja Dhrub Singh and was not, therefore a member of the family of Raja Dhrub Singh, Raja Bir Kishore Singh had pleaded that Raja Jugal Kishore Singh having been adopted by G

(1) (1936-37) 1 Moo. I.A. 482. H

A Raja Dhrub Singh was a member of the family of Raja Dhrub Singh. In the above said memorial, it was pleaded by the successor of the plaintiff in the suit of 1808 that Raja Jugal Kishore Singh who belonged to Gautam Gotra had been adopted by Raja Dhrub Singh who belonged to Kashyap Gotra and had been appointed by him as his successor.

On the death of Maharaja Harendra Kishore Singh, the estate
B came into the possession of his senior widow, Maharani Sheo Ratna Kuer. Within about two years from the date of the death of Maharaja Harendra Kishore Singh, a suit was instituted in Title Suit No. 139 of 1895 on the file of the Subordinate Judge of Tirhoot by Ram Nandan Singh, fifth in descent from Raja Ganga Prasad Singh (who was the plaintiff in the suit of 1808) against Maharani Sheo Ratna Kuer claim-
C ing the estate of Raja Harendra Kishore Singh. The main pleas raised by him in the suit were that the succession to the Bettiah Raj was governed by the custom of male linear primogeniture; that females were excluded from succeeding to the Raj; that Raja Jugal Kishore Singh had been adopted by Raja Dhrub Singh as his son and that he being an agnate was entitled to the possession of the estate of
D Maharaja Harendra Kishore Singh. Another suit viz. Title Suit No. 108 of 1896 was filed by Girja Nandan Singh whose father Deo Nandan Singh had submitted the memorial to the Lt. Governor of Bengal on April 11, 1893. This Girja Nandan Singh was fourth in descent from Doostdaman Singh, a younger brother of Raja Ganga Prasad Singh and while supporting the stand of the plaintiff, Ram Nandan Singh
E in the Title Suit No. 139 of 1895 on the point of Raja Jugal Kishore's adoption by Raja Dhrub Singh and exclusion of females from succession to the Raj, he pleaded that he was entitled to succeed to the Raj by the rule of propinquity, as all the branches of the family were joint in status, there being no custom of male linear primogeniture as put forward in the suit of Ram Nandan Singh i.e. in the Title Suit No. 139
F of 1895.

Both the suits were contested by Maharani Sheo Ratna Kuer. During the pendency of the two suits, she died and Maharani Janki Kuer, the second widow of Maharaja Harendra Kishore Singh was brought on record as the defendant in both the suits.

Title Suit No. 139 of 1895 was decreed by the trial Court but
G on appeal by Maharani Janki Kuer, the said decree was set aside and the suit was dismissed by the High Court of Judicature at Fort William in Bengal by its judgment dated April 14, 1889. Against the decree of the High Court, Ram Nandan Singh filed an appeal before the Privy Council. The Privy Council affirmed the decree of the High Court in *Ram Nandan Singh* v. *Janki Kuer*(1) The Privy

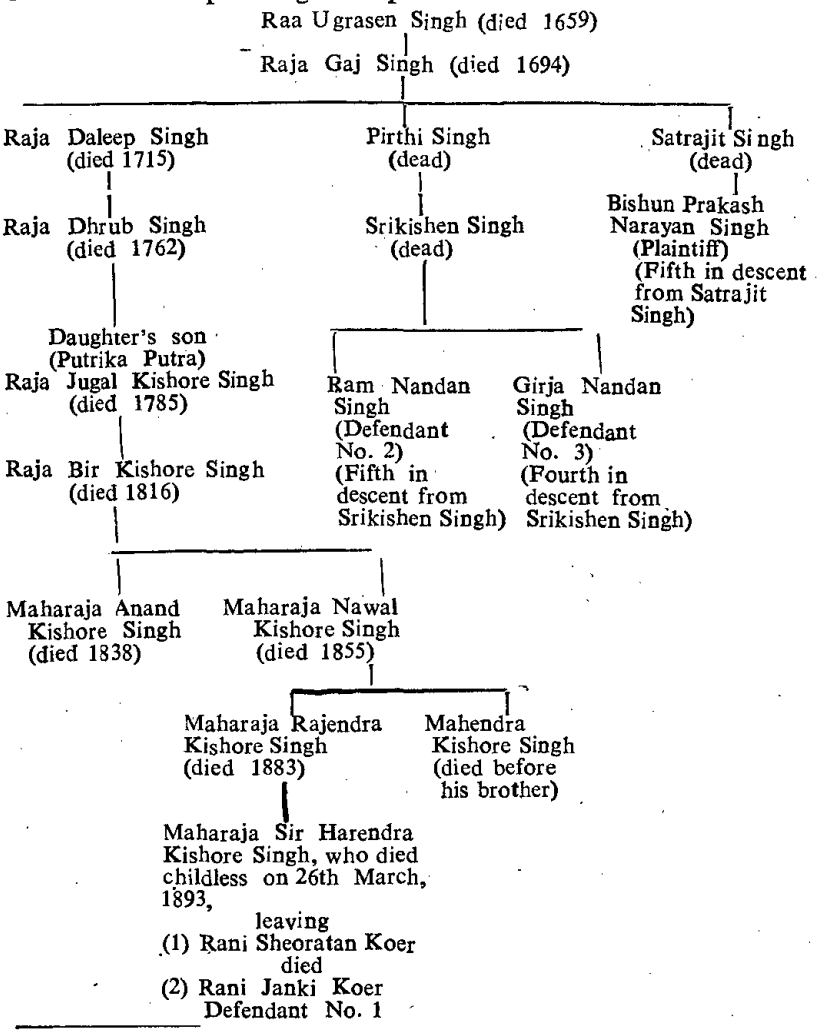
H (1) [1902] I. L. R. 29 Cal. 328-29 I. A. 178.

Council held that the two pergunnahs Majhwa and Simrown which were granted pursuant to the orders of Lord Cornwallis to Raja Bir Kishore Singh became the separate property of Raja Bir Kishore Singh free from any coparcenery right of succession of the branches of the family then represented by Srikishen and Abdhoot. They held that from the letter of Lord Cornwalis dated September 22, 1790 extracted above, it was clear that Raja Jugal Kishore Singh had been driven out from the country for the acts of rebellion and that the Government was at liberty to divide the Sirkar into two portions and to grant one portion to Raja Bir Kishore Singh and another portion to Srikishen and Abdhoot in direct exercise of sovereign authority. It further held that the grants so made by the Government proceeded from grace and favour alone. It was further held that the estate which was granted in favour of Raja Bir Kishore Singh became his separate and self-acquired property though with all the incidents of the family tenure of the old estate as an impartible Raj. Consequently, the plaintiff was not entitled to claim it on the basis of the custom of male linear primogeniture. The Privy Council also held that there was no inconsistency between a custom of impartibility and the rights of females to inherit and therefore, Maharani Sheo Ratna Kuer and after her Maharani Janki Kuer could succeed to the estate of their husband, Maharaja Harendra Kishore Singh and remain in possession thereof. The Privy Council, however, declined to decide the question whether Raja Jugal Kishore Singh had been adopted by his maternal grandfather, Raja Dhrub Singh or became his son and a member of his family by some customary mode of affiliation i.e. as Putrika Putra and left the question open in the following terms :—

> "There remains only the issue whether Raja Jugal Kishore was adopted by his maternal grandfather Raja Dhrub Singh, or became his son and a member of his family by some customary mode of affiliation. The determination of this issue against the appellant would be fatal to his case, because in that case he would not be able to prove that he was of the same family as the late Sir Harendra. The learned judges have not found it necessary for the decision of the present case to decide this issue, and their Lordships agree with them in thinking that it is the better course not to do so, because the same issue may hereafter arise for decision between different parties."

The other suit i.e. Title Suit No. 108 of 1896 which was filed by Girja Nandan Singh was dismissed by the trial court and the appeal filed by him before the High Court of Judicature at Fort William in Bengal (Calcutta) was also dismissed on April 14, 1889, the same day on which the High Court had disposed of the appeal in the other suit.

A few years later, one Bishun Prakash Narain Singh, fifth in descent from Abdhoot Singh also filed a suit in Title Suit No. 34 of 1905 in the court of the Subordinate Judge of Chapra, claiming title to the estate of Maharaja Harendra Kishore Singh on the footing that his branch of the family was joint in status with Maharaja Harendra Kishore Singh and so he was entitled to succeed to him under the rules of survivorship. That suit failed in all the courts including the Privy Council whose judgment is reported in *Rajkumar Babu Bishun Prakash Maraain Singh* v. *Maharani Janki Kuer & Ors.*(1) The genealogy of the family relied on in the above suit which is found at page 858 in 24 Cal. W. N. is given below to facilitate the understanding of the relationship amongst the parties :—



(1) 24 Cal. W. N. 857

It should be mentioned here that in none of the suits—Title Suit No. 139 of 1895, Title Suit No. 108 of 1896 and Title Suit No. 34 of 1905 referred to above, the question whether Raja Jugal Kishore Singh had become a member of the family of Raja Dhrub Singh either by virtue of adoption or as Putrika Putra (appointed daughter's son) was decided even though the plaintiff in each of the above suits had raised such a plea.

As mentioned earlier after Maharani Janki Kuer succeeded to the estate of Maharaja Harendra Kishore Singh on the death of Maharani Sheo Ratna Kuer, the management of the estate was taken over by the Court of Wards, Bihar in 1897, a declaration being made that Maharani Janki Kuer was incompetent to manage the estate. Since the properties of the estate were spread over both in the State of Bihar and in the State of Uttar Pradesh, the Bihar properties came to be managed by the Court of Wards, Bihar while those in Uttar Pradesh were being managed by the State of Uttar Pradesh through the Collector of Gorakhpur. Maharani Janki Kuer took up her residence at Allahabad where she eventually died childless and intestate on November 27, 1954. Shortly after her death on December 6, 1954, the State of Bihar made an application before the Board of Revenue, Bihar praying that the estate of Maharaja Harendra Kishore Singh which was held by Maharani Janki Kuer as a limited heir and managed by the Court of Wards and the Government of Uttar Pradesh, as stated above should be released from the management of Court of Wards and handed over to the Bihar State Government since the State of Bihar had become entitled to the estate by virtue of the rule of escheat, as there was no heir of the last male holder who could lay claim to it. Upon this application, the Board of Revenue directed the issue of a Notification which was published in the Official Gazette calling upon interested parties to prefer their claims, if any, to the properties comprised in the estate. In pursuance of this Notification about one dozen persons came forward, some of whom claimed to be entitled to the stridhana and personal properties of late Maharani, such as cash, jewellery etc.; some others claimed to be entitled to maintenance allowance out of the estate while some others claimed the entire estate on the footing that the title to the estate had passed to them by succession which opened upon the death of Maharani Janki Kuer. Amongst the persons who thus claimed title to the estate, mention may be made of Bhagwati Prasad Singh of village Baraini, in the District of Mirzapur (Uttar Pradesh) and Suresh Nandan Singh of Sheohar. The Board of Revenue, however, declined to release the estate in favour of any of the claimants and on January 18, 1955 passed an order to the effect that the Court of Wards would retain

A charge of the properties comprised in the estate until the dispute as to its succession was determined by a competent civil court. Thereafter one Ram Bux Singh instituted a suit being Title Suit No. 3 of 1955 on the file of the Civil Judge at Varanasi claiming title to the estate. That suit was, however, allowed to be withdrawn with the permission of the court.

B Subsequently came to be instituted Title Suit No. 44 of 1955 on the file of the Subordinate Judge at Patna by Suresh Nandan Singh. On his death, his son, Davendra Nandan Singh and his widow Ram Surat Kuer were brought on record as plaintiffs. That suit was dismissed alongwith two other suits with which alone we are concerned in these appeals reference to which will be made hereafter. Since C the plaintiffs in the above suit were also defendants in the said two other suits, the plaintiffs therein filed three First Appeals Nos. 169, 170 and 171 of 1966 before the High Court of Patna against the decrees passed in the three suits. All the aforesaid three appeals were dismissed for non-prosecution by the High Court. We are, therefore, not concerned with the claim of the plaintiffs in that suit D in these appeals.

The two other suits that were filed were Title Suit No. 25 of 1958 and Title Suit No. 5 of 1961. Title Suit No. 25 of 1958 was filed by Ambika Prasad Singh and others claiming the estate on the basis that Raja Jugal Kishore Singh succeeded to the gaddi of Sirkar Champarun as the adopted and affiliated son and successor of Raja E Dhrub Singh and not as his daughter's son as alleged subsequently by some others; that the last male holder of the estate was Maharaja Harendra Kishore Singh, the great great grandson of the said Raja Jugal Kishore Singh and that plaintiff No. 1 in the suit, Ambika Prasad Singh being nearest in degree among the reversioners to the last male holder to Maharaja Harendra Kishore Singh as the descendent F of Satrajit Singh, the full brother of Raja Dalip Singh was the legal heir to the estate in question. It was pleaded that plaintiffs Nos. 2 and 4 to 8 and 10 to 13 being next in degree to the plaintiff No. 1 and plaintiff No. 14 being the wife of plaintiff No. 7 and plaintiff No. 9 being the mother of plaintiffs Nos. 10 to 13 had also joined the suit in order to avoid multiplicity of suits and conflict of interest. G It was also alleged that there was an agreement amongst some of the plaintiffs entered into on September 22, 1955 to claim the estate jointly and that subsequently the said agreement had been repudiated and a fresh family arrangement had been entered into by the plaintiffs which was bonafide settling their claims to the estate. Under the said family arrangement, it had been agreed that the estate in the H event of their succeeding in the suit should be distributed amongst

them in accordance with the terms contained therein. They claimed that in any event, the plaintiffs in the said suit alone were entitled to the estate and no others.

The next suit with which we are concerned in these appeals is Title Suit No. 5 of 1961 which was filed by Radha Krishna Singh and others. The case of the plaintiffs in this suit was that Raja Dhrub Singh died leaving behind him two daughters viz. Benga Babui and Chinga Babui; that Benga Babui was married to Babu Raghunath Singh of Gautam Gotra who was by caste a Bhumihar; that Raja Dhrub Singh had become separated from his other agnatic relations, namely the heirs of Prithvi Singh of village Sheohar and Satrajit Singh of village Madhubani; that on his death which took place in 1762, Raja Jugal Kishore Singh succeeded him as his daughter's son and that plaintiffs 1 to 8, sons of Bhagwati Prasad Singh who belonged to the family of Raghunath Singh were the nearest heirs of the last male holder, Maharaja Harendra Kishore Singh. In substance, their case was that Raja Jugal Kishore Singh who succeeded to the estate of Raja Dhrub Singh continued to be a member of his natural father's family and had not become either by adoption or by affiliation a member of the family of Raja Dhrub Singh. It was further alleged that plaintiffs 1 to 8 were men of poor means and could not arrange for money to fight out the litigation and they, therefore, had conveyed one-half of their right in the suit estate under a registered sale deed dated December 12, 1958 in favour of plaintiffs 9 to 15. In view of the said deed, according to the plaintiffs in the said suit, plaintiffs 1 to 8 were entitled to one-half of the suit estate and the other half belonged to plaintiffs 9 to 15. On the above basis, Title Suit No. 5 of 1961 was filed by the plaintiffs therein for a declaration of their title. The plaintiffs in Title Suit No. 44 of 1955 were impleaded as defendants in Title Suit No. 25 of 1958 and Title Suit No. 5 of 1961. The plaintiffs in Title Suit No. 25 of 1958 were impleaded as defendants in the other suits. Similarly the plaintiffs in Title Suit No. 5 of 1961 were impleaded as defendants in the two other suits. The State of Bihar which had preferred its claim on the basis of the rule of escheat was also impleaded as defendant in each of the three suits. The defendants in each of the suits other than the State of Bihar denied the claim of the plaintiffs in that suit. The State of Bihar pleaded in all the three suits that none of the plaintiffs was an heir of the last male holder. The Additional Subordinate Judge, Patna who tried all the three suits together dismissed all of them by his judgment dated February 15, 1966. The principal issues which arose for decision before the trial court were :

(1) Was Raja Jugal Kishore Singh the Putrika-Putra of Raja Dhrub Singh by appointed daughter and affiliated as such as

A alleged by the plaintiffs in Title Suit No. 44 of 1955 and Title Suit No. 25 of 1958?

(2) Was succession to Bettiah Estate governed by the Mithila or the Benares School of Hindu Law?

(3) Was the Bettiah Estate self-acquired or the joint property of Raja Jugal Kishore Singh?

B (4) Was the succession to the Bettiah estate governed by the rule of primogeniture?

(5) Whether any of the plaintiffs was the heir of the last male holder; and

(6) Has the Bettiah estate vested in the State of Bihar by escheat?

C At the conclusion of the trial, the trial court held that the custom of taking a son as Putrika-Putra had become obsolete by the time Raja Dhrub Singh was alleged to have taken Raja Jugal Kishore Singh as the Putrika-Putra and, therefore, Raja Jugal Kishore Singh was not the Putrika-putra of Raja Dhrub Singh; that the succession to the estate of Maharaja Harendra Kishore Singh was governed by D the Benares School of Hindu law; that the estate having been acquired by force of arms was the self-acquired property of Raja Jugal Kishore Singh; that the succession of the Bettiah estate was not governed by the rule of primogeniture; that in view of the finding that Raja Jugal Kishore Singh was neither putrika-putra nor was he affiliated to of family of Raja Dhrub Singh by adoption in any form, the E plaintiffs in Title Suit No. 25 of 1958 and Title Suit No. 44 of 1955 could not claim to be the heirs of the last male holder; that the plaintiffs in Title Suit No. 5 of 1961 had not established that they were the reversioners to the estate and as none of the plaintiffs in the three suits had established that they were entitled to the estate, it had vested in the State of Bihar by virtue of the rule of escheat.

F It is already stated that the three First Appeals Nos. 169 to 171 of 1966 filed on the file of the High Court by the plaintiffs in Title Suit No. 44 of 1955 were dismissed for non-prosecution. Aggrieved by the decree of the trial court, the plaintiffs in Title Suit No. 25 of 1958 filed First Appeals Nos. 130, 131 and 134 of 1966 on the file of the High Court of Patna and the plaintiffs in Title Suit No. 5 of 1961 G filed First Appeals Nos. 85, 86 and 87 of 1966 on the file of the said Court. The above said six appeals were heard by a Bench of three learned Judges of the High Court viz. G. N. Prasad, J., A. N. Mukherji, J. and Madan Mohan Prasad, J., G. N. Prasad, J. held that the custom of taking a son as Putrika-Putra had become obsolete by the time Raja Dhrub Singh was alleged to have taken Raja Jugal H Kishore Singh as putrika-putra and so Raja Jugal Kishore Singh had

not become a member of the family of Raja Dhrub Singh and that the plaintiffs in Title Suit No. 25 of 1958 had not therefore established their claim to the estate. He agreed with the finding of A. N. Mukherji, J. that the plaintiffs in Title Suit No. 5 of 1961 had established their title to the estate. A. N. Mukherji, J. held that the plaintiffs in Title Suit No. 5 of 1961 were entitled to succeed in their action and agreed with the finding of G. N. Prasad, J. that Raja Jugal Kishore Singh had not become a member of the family of Raja Dhrub Singh either as a putrika-putra or by adoption for the reasons given by G. N. Prasad, J. Madan Mohan Prasad, J. agreed with the opinions of G. N. Prasad and A. N. Mukherji, JJ. that the institution of putrika-putra had become obsolete during the life-time of Raja Dhrub Singh and that Raja Jugal Kishore Singh had not been taken as putrika-putra or in adoption by Raja Dhrub Singh. He however, did not agree with the opinion expressed by A. N. Mukherji, J. which had the concurrence of G. N. Prasad. J. that the plaintiffs in Title Suit No. 5 of 1961 had established that the plaintiffs 1 to 8 in Title Suit No. 5 of 1961 were the nearest reversioners entitled to the estate. In view of the aforesaid opinions, the appeals filed by the plaintiffs in Title Suit No. 25 of 1958 were dismissed since all the three Judges were unanimously of opinion that Raja Jugal Kishore Singh had not become a member of the family of Raja Dhrub Singh either as putrika-putra or by adoption and all the appeals filed by the plaintiffs in Title Suit No. 5 of 1961 were allowed. In the result, Title Suit No. 5 of 1961 was decreed as prayed for. Consequently the claim of the State of Bihar was negatived. Aggrieved by the decree passed in the six appeals referred to above, the plaintiffs in Title Suit No. 25 of 1958 applied to the High Court for the issue of a certificate to prefer appeals to this Court. The State of Bihar also made a similar application. It should be mentioned here that in the course of the hearing of the appeals before the High Court, one of the contentions urged by the parties other than the plaintiffs in Title Suit No. 25 of 1958 was that the decision of the Privy Council in *Ghanta Chinna Ramasubbayya & Anr.* v. *Moparthi Chenchuramayya, Minor & Ors.*(1) was binding on the courts in India and that it was not open to the plaintiffs in Title Suit No. 25 of 1958 to urge that Raja Dhrub Singh could take Raja Jugal Kishore Singh as putrika-putra. G. N. Prasad, J. with whom A. N. Mukherji, J. agreed had held relying on the above decision of the Privy Council that the institution of putrika-putra had become obsolete during the relevant period. It was contended by the plaintiffs in Title Suit No. 25 of 1958 that the decision of the Privy Council in *Ghanta Chinna Ramasubbayya & Anr.* v.

(1) 74 I. A. 162.

A *Moparthi Chenchuramayya, Minor & Ors.* (supra) was not binding on Indian courts after India became a Republic. The Division Bench which heard the applications for the issue of certificates being of opinion that the case of the plaintiffs in Title Suit No. 25 of 1958 involved a substantial question of law as to the interpretation of the Constitution viz. whether the decision of the Privy Council in B *Ghanta Chinna Ramasubbayya & Anr.* v. *Moparthi Chenchuramayya, Minors & Ors.* (supra) was binding on the Indian Courts after India became a Republic issued a certificate in favour of the plaintiffs in Title Suit No. 25 of 1958 under Article 132(1) of the Constitution. On the applications filed by the State of Bihar, the High Court issued a certificate under Article 133 of the Constitution certifying that the C case involved substantial questions of law of general importance which in the opinion of the High Court needed to be decided by the Supreme Court. On the basis of the above certificates, plaintiffs in Title Suit No. 25 of 1958 filed Civil Appeals Nos. 114-119 of 1976 and the State of Bihar filed Civil Appeals Nos. 494-496 of 1975. After the above appeals were filed the respondents in Civil Appeals Nos. 114-D 119 of 1976 who had succeeded in the High Court filed a petition before this Court to revoke the certificate issued by the High Court under Article 132(1) of the Constitution. When the above appeals were taken up for hearing alongwith the petition for revocation of the certificate, the appellants in Civil Appeals Nos. 114-119 of 1976 filed a Special Leave Petition under Article 136 of the Constitution requesting this Court to grant them leave to canvass questions other E than those relating to the interpretation of the Constitution in support of their case. We have heard the parties on the above Special Leave Petition also. As mentioned earlier, we propose to dispose of by this Judgment Civil Appeals Nos. 114-119 of 1975 and the Special Leave Petition referred to above.

F At the outset it is to be noted that the appellants in Civil Appeals Nos. 114-119 of 1975 can succeed only if they establish that Raja Jugal Kishore Singh had become the son of Raja Dhrub Singh in a manner known to law. In the instant case even though there was some amount of ambiguity at some early stages of these proceedings in the trial court as to the true case of the appellants, finally they G took the position that Raja Jugal Kishore Singh had become the son (putrika-putra) of Raja Dhrub Singh as the latter had appointed his daughter i.e. the mother of the former as his putrika for the purpose of begetting a son who would be his (latter's) putrika-putra. The State of Bihar and the other contesting parties claimed that the practice of appointing a daughter to beget a son who would be putrika-putra H had become obsolete by the time such appointment was alleged to

have taken place in this case; that even if such a practice was in vogue, Raja Dhrub Singh had in fact not made any such appointment and lastly the appellants who claimed on the above basis were not the nearest reversioners of the last male holder. From the pleadings relevant for the purpose of these appeals, three questions arise for consideration :—

(1) Whether the practice of appointing a daughter as putrika for begetting a son who would be putrika-putra was in vogue during the life-time of Raja Dhrub Singh?

(2) If the answer to question No. (1) is in the affirmative, whether Raja Dhrub Singh had in fact appointed his daughter (the mother of Raja Jugal Kishore Singh) as his putrika? and

(3) If the answers to questions Nos. (1) and (2) are in the affirmative, whether the appellants were the nearest reversioners to the last male holder—Maharaja Harendra Kishore Singh, if he had lived till the date on which the limited estate ceased i.e. till the death of Maharani Janki Kuer which took place on November 27, 1954?

From the points formulated above, it is evident that if the appellants in these appeals i.e. plaintiffs in Title Suit No. 25 of 1958 establish that Raja Jugal Kishore Singh was the putrika-putra of Raja Dhrub Singh, the plaintiffs in Title Suit No. 5 of 1961 have to fail but if the appellants fail to establish that fact, they fail irrespective of the result of the dispute between the plaintiffs in Title Suit No. 5 of 1961 and the State of Bihar. It is in these circumstances, we proposed to dispose of these and the connected appeals in two parts.

In order to determine whether the practice of taking a son as putrika-putra was prevalent at the time when Raja Dhrub Singh is alleged to have taken Raja Jugal Kishore Singh as putrika-putra, we have to examine the several texts and practices prevailing in India at the relevant point of time. According to Yajnavalkya, the sources of Hindu Dharma are those enumerated in the following text :—

श्रुति स्मृतिः सदाचारः स्वस्य च प्रियमात्मनः ।
सम्यकसङ्कल्पजः कामो धर्म्ममूलमिदं स्मृतम् ।।

(The sources of Dharma are described to be (1) the Vedas, (2) the Smritis, (3) the practices of good men, (4) what is acceptable to one's own soul, and (5) the desire produced by a virtuous resolves).

While interpreting the Smritis one difficulty which has to be encountered is the uncertainty about their chronology. Another difficulty felt by many jurists while interpreting them is the existence

A of conflicting texts, sometimes in the same Smriti. This appears to be on account of the successive changes in the views of society, which may have taken place over several centuries. Very often the prevailing practices and customs at a given point of time might be quite different from those obtaining some centuries before that time. Maxims which have long ceased to correspond with actual life are B reproduced in subsequent treatises, as pointed out by John. D. Mayne, either without comment or with a non-natural interpretation. "Extinct usages are detailed without a suggestion that they have become extinct from an idea that it is sacrilegious to omit anything that has once found a place in the Holy Writ. .....Another inference is also legitimate that while some Smritis modified their rules to provide for later usages C and altered conditions of society, other Smritis repeated the previous rules which had become obsolete, side by side with the later rules. (See Mayne's Treatise on 'Hindu law and Usage" (1953 Edition) pp. 20-21).

Etymologically, the word 'putrika' means a daughter (especially a daughter appointed to raise male issue to be adopted by a father D who has no sons), and 'putrika-putra' means a daughter's son who by agreement or adoption becomes the son of her father (Vide Sanskrit-English Dictionary by Sir M. Monier--Williams). According to Hemadri, the author of Chaturvarga Chintamani (13th Century), a 'Putrika-putra' can be of four descriptions. The following passage appearing at page 1046 in Volume II, Part (4) of the Collection of E Hindu Law Texts—Yajnavalkya-Smriti with the commentaries of the Mitakshara etc. (translated by J. R. Gharpure) refers to the four kinds of putrika-putras :

"The putrika-putra is of four descriptions. (1) The first is the daughter appointed to be a son. (See Visishtha XVII. 15" F पुत्रिकैवेति) (2) The next is her son. He is called "the son of an appointed daughter", without any special contract. He is, however, to be distinguished from the next i.e. the third class. He is not in the place of a son, but in the place of a son's son and is a daughter's son. Accordingly he is described as a daughter's son in the text of Sankha and Likhita : "An appointed daughter is G like unto a son, as Prachetasa has declared : her offspring is termed a son of an appointed daughter: he offers funeral oblations to the maternal grand-father and to the paternal grandsire. There is no difference between a son's son and a daughter's son in respect of benefits conferred." (3) The third description of a son of an appointed daughter is the child born of a daughter who was given H in marriage with an express stipulation as stated by Vasishtha

XVII.17. He appertains to his maternal grandfather as an adopted son. (4) The fourth is a child born of a daughter who was given in marriage with a stipulation in this form "the child who shall be born of her, shall perform the obsequies of both." He belongs as a son to both grandfathers. But in the case where she was in thought selected for an appointed daughter, she is so without a compact, and merely by an act of the mind. (Manu Ch. IX 127 and 136), Hemadri quoted in Colebrocke."

A

B

It is well known that in the ancient Hindu law, the right of a person to inherit the property of another depended principally on his right to offer pinda and udaka oblations to the other. The first person who was so entitled was the son. As time passed the concept of sonship was modified and by the time of Manu thirteen kinds of sons were known—aurasa son who was begotten on a legally wedded wife and twelve others who were known as secondary sons (putra prathinidhis) and Manu omits any reference to putrika-putra as such although in another place he observes :

C

अपुत्रोऽनेन विधिना सुतां कुर्वीत पुत्रिकाम् ।
यदपत्यं भवेदस्याः समेपुत्रो भवेदिति ॥

D

(He who has no son may make his daughter in the following manner an appointed daughter (Putrika saying to her husband) 'the male child born of her shall be my son').

Another reading of the same sloka gives the second part of the above sloka as 'यदपत्यं भवेदस्या तन्ममस्यात् स्वधाकरम्' (The (male) child born of her shall perform my funeral rites).

E

यथैवात्मा तथा पुत्रः पुत्रेण दुहितासमा ।
तस्यामात्मनि तिष्ठन्त्याम् कथमन्यो धनंहरेत् ॥

Manu IX 130

F

(A son is even as one's self, a daughter is equal to a son, how can another (heir) take the estate while (such daughter who is) one's self lives).

Yajnavalkya says that twelve sons including the legitimate son who is procreated on the lawfully wedded wife were recognized by law. Of them, it is said, the legitimate son is considered to be the primary son and others as secondary sons. The relevant text reads thus :

G

औरसोधर्म्मपत्नीज स्तत्समः पुत्रिकासुतः ।
क्षेत्रजः क्षेत्र जातस्तु सगोत्रेणेतरेण वा ॥
गृहे प्रच्छन्न उत्पन्नो गूढजस्तु सुतः स्मृतः ।
कानीन कन्यकाजातो मातामह सुतोमतः ॥

H

A अक्षतायां क्षतायाम्बा जातः पौनर्भवः सुतः ।
दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत् ॥
क्रीतश्च ताभ्यां विक्रीतः कृत्रिमः स्यात्स्वयंकृतः ।
दत्तात्मा तु स्वयं दत्तो गर्भेविन्नः सहोढजः ॥
उत्सृष्ठो ग्रह्यते यस्तु सोऽपविद्धो भवेत्सुतः ॥

B The above text is translated by S. S. Setlur in his book entitled 'A complete Collection of Hindu law Books on Inheritance' thus :—

"The legitimate son is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter. The son of the wife is one begotten on a wife by a sagotra of her husC band, or by some other relative. One, secretly produced in the house, is son of hidden origin. A damsel's child is one born of an unmarried woman : he is considered as son of his maternal grandsire. A child, begotten on a woman whose first marriage had not been consummated, or on one who had been deflowered before marriage, is called the son of a twice-married woman. He D whom his father or his mother gives for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by a man himself. One, who gives himself, is self given. A child accepted, while yet in the womb, is one received with a bride. He who is taken for adoption having been forsaken by his parents, is a deserted son."

E 'Aurasa' is the son procreated by a man himself on his wife married according to sacramental forms prescribed by Sastra. 'Putrikaputra' is the son of an appointed daughter. 'Kshetraja' is the son begotten on the wife of a person by another person—sagotra or any other. 'Gudhaja' is the son secretly born in a man's house when it F is not certain who the father is. 'Kanina' is the son born on an unmarried girl in her father's house before her marriage. 'Paunarbhava' is the son of a twice married woman. 'Dattaka' is the son given by his father or mother. 'Krita' is the son bought from his father and mother or from either of them. 'Kritrima' is the son made (adopted) by a person himself with the consent of the adoptee only. 'Svayamdatta' G is a person who gives himself to a man as his son. 'Sahodhaja' is the son born of a woman who was pregnant at the time of his marriage. 'Apavidha' is a person who is received by another as his son after he has been abandoned by his parents or either of them. There is one other kind of son called 'Nishada' who is the son of a Brahmin by a Sudra who is not referred to in the above quoted text of Yajnavlkya. H While commenting on the above text, Vijnanesvara explains 'putrika-

putra' in the Mitakshara (composed between 1070-1100 A.D.) as follows :— A

तत्समः पुत्रिकासुतः तत्समः औरससमः पुत्रिकायाः सुतः पुत्रि कासुतः अतएवौरससमः । यथाह वसिष्ठः अभ्रातृकां प्रदास्यामि तुभ्यं कन्यामलङ्कृताम् अस्यां यो जायते पुत्रःसः मे पुत्रो भवेदितीति अथवा पुत्रिकैव सुतः पुत्रि कासुतः सोऽप्यौरससमएव पित्रवयवानामल्पत्वात् मात्रावयवानां बाहुल्याच्च । यथाह वसिष्ठः तृतीय पुत्रि कैवेति तृतीयः पुत्रः पुत्रिकैवेत्यर्थः । B

(The son of an appointed daughter (putrika-putra) is equal to him; that is equal to the legitimate son. The term signifies 'son of a daughter'. Accordingly he is equal to the legitimate son as described by Vasishtha: "This damsel, who has no brother, I will give unto thee, decked with ornaments: the son who may be born of her shall be my son."; Or that term may signify a daughter becoming by special appointment a son. Still she is only similar to a legitimate son; for she derives more from the mother than from the father. Accordingly she is mentioned by Vasishtha as a son, but as third in rank. "The appointed daughter is considered to be the third class of sons.") (Vide S. S. Setlur on 'A complete collection of Hindu Law Books on Inheritance' p. 30). C D

Proceeding further Vijnanesvara comments on the following text of Yajnavalkya :

पिण्डदोंशहरश्चेषां पूर्वाभावे परः परः E

Among these, the next in order is heir and presents funeral oblations on failure of the preceding) as under :—

एतेषां पूर्वोक्तानां पुत्राणां द्वादशाणां पूर्वस्य पूर्वस्याभावे उत्तरः पिण्डदः श्राद्धदोंऽ शहरो वेदितव्य : । F

(Of these twelve sons abovementioned, on failure of the first, respectively, the next in order, as enumerated, must be considered to be the giver of the funeral oblation or performer of obsequies, and taker of a share or successor to the effects.).

Then Vijnanesvara says with reference to what Manu Smritis has stated about the right of the primary and secondary sons to succeed to the estate of a person thus : G

"Manu, having promised two sets of six sons, declares the first six to be heirs and kinsmen; and the last to be not heirs, but kinsmen :

"the true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin, and H

A one rejected are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a Sudra woman, are six not heirs but kinsmen."

Thereafter he deals with the right of a woman to inherit the estate of one, who leaves no male issue. He says "that sons, principal and B secondary, take the heritage, has been shown. The order of succession among all on failure of them, is next declared." And then quotes the following text of Yajnavalkya :—

पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत् सुता गोत्रजा बन्धुः शिष्य सब्रह्मचारिणः ।।
C एषामभावे पूर्वस्य धनभागुत्तरोत्तरः ।
स्वर्यातस्य ह्यपुत्रस्य सर्ववर्णेष्वयं विधिः ।।

(The wife, and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student : on failure of the first among these, the next in order is indeed heir to the D estate of one who departed for heaven leaving no male issue. This rule extends to all classes).

Commenting on the above text, Vijnanesvara says :

मुख्यगौणसुता दाय गृह्णन्तीति निरूपितम् तेषामभावे सर्वेषां दायादक्रम उच्यते । पूर्वोक्ता द्वादश पुत्रा यस्यं न सन्ति असावपुत्रः तस्यापुत्रस्य स्वर्यातस्य E परलोकं गतस्य धनभाक् धनग्राही एषां पत्न्यादीनामनुक्रान्तानां मध्ये पूर्वस्य पूर्वस्याभावे उत्तर उत्तरो धनभागिति सम्बन्धः

(He, who has no son of any of the twelve descriptions above-stated is one having 'no male issue'. Of a man, thus leaving no male progeny, and departing for another world, the heir, or successor, is that person, among such as have been here enumerated (the wife and F the rest) who is next in order, on failure of the first mentioned respectively. Such is the construction of the sentence).

From the foregoing, it is obvious that in the course of the passages extracted above, Vijnanesvara was only commenting upon the relevant text of Yajnavalkya which laid down the practice prevalent G in ancient times. He also notices that according to Manu only six of the twelve sons were entitled to succeed to the estate and the remaining six were not heirs but kinsmen. We have not been shown any Commentary of Vijnanesvara that at the time when the Mitakshara was written, all the twelve kinds of sons described by Yajnavalkya were in fact entitled to succeed to the estate of the deceased and that H the wife of the deceased succeeded to his estate only when none of the

twelve kinds of sons was existing. Certainly that has not been the practice for several centuries. In the absence of a son, grandson or great grandson (aurasa or adopted) the wife succeeds to the estate of her husband. The other kinds of sons including putrika-putra are not shown to have preceded the wife.

Baudhayana who belonged to the Krishna Yajurveda School and who composed the Baudhayana Dharma Sutra long prior to the Mitakshara refers to the twelve kinds of sons and divides them into two classes—one being entitled to share the inheritance and the other to be members of the family only :

औरसं पुत्रिकापुत्रं क्षेत्रजं दत्तकृत्रिमौ ।
गूढजं चापविद्धं च रिक्थभाजः प्रचक्षते ॥

कानीन च सहोढं च क्रीतं पौनर्भवं तथा ।
स्वयंदत्तं निषादं च गोत्रभाजः प्रचक्षते ॥

In regard to this they quote also (the following verses):—

They call the legitimate son, the son of an appointed daughter, the son begotten on a wife, the adopted son, the son made, the son born secretly, and the son cast off, entitled to share the inheritance.

The spinster's son, the son taken with a bride, the son bought, the son of a twice-married woman, the self-given son, and the Nishada—(these) they call members of (their father's family) (Vide West & Buhler on 'Hindu Law—Inheritance' at p. 317).

That some of the secondary sons were not entitled to succeed according to Baudhayana may be noticed here and this statement does not agree with the Mitakshara's Commentary that all the principal and secondary sons succeed before the wife. This shows that the statement in the Mitakshara refers partly to historical facts and partly to existing facts.

Vishnu Dharmasastra which according to Dr. Jolly belongs to the third century A.D. describes 'putrika-putra' as follows:—

पुत्रिकापुत्रस्तृतीयः
यस्त्वस्याः पुत्रः स मे पुत्रो भवेदिति या पित्रा
दत्ता सा पुत्रिका
पुत्रिकाविधिनाऽप्रतिपादितापि भ्रातृविहीना पुत्रिकैव ॥

(The third is the son of an appointed daughter. She is called an appointed daughter, who is given away by her father with the words, 'The son whom she bears, be mine'. A girl who has no brother is

A considered an appointed daughter, though she be not given away according to the rule of an appointed daughter) (Vide West & Buhler on 'Hindu Law—Inheritance' at p. 338).

In this text what needs to be noticed is that a brotherless daughter becomes a putrika even if she is not given according to the prescribed procedure.

B

Vasishtha who according to Dr. Jolly must have composed his Dharma Sutra several centuries before Christ describes 'putrika' as follows :—

तृतीय पुत्रिका । विज्ञायते । अभ्रातृका पुंसः पितृनभ्येति
C प्रतीचीनं गच्छति पुत्रत्वम् ।
अभ्रातृकां प्रदास्यामि तुभ्यं कन्यामलंकृताम् ।
अस्यां यो जायते पुत्रः स मे पुत्रो भवेदिति ॥

(The third is an appointed daughter. It is known that "the girl who has no brother comes back to the males of her own family, to her father and the rest, returning she becomes their son." Here follows
D the verse to be spoken by the father when appointing a daughter, "I shall give thee to the husband, a brotherless damsel, decked with ornaments; the son whom she may bear, he be my son." (Vide West & Buhler on 'Hindu Law—Inheritance' at p. 331).

In the above text "the girl who has no brother comes back to
E the males of her own family, to her father and the rest, returning she becomes their son" apparently refers to the following Shloka in Rig-Veda :—

अभ्रातेव पुंस एति प्रतीची
गर्तारुगिव सनये धनानाम्
F जायेव पत्य उशती सुवासा
उषा हस्रेव निरिणीते अप्सः

—Rig Veda, I, Sukta 124, Stanza 7.

(She goes to the West, as (a woman who has) no brother (repairs) to her male (relatives), and as one ascending the hall (of justice) for
G the recovery of property. (She mounts in the sky to claim her lustre) and like a wife desirous to please her husband, Ushas puts on becoming attire, and smiling as it were, displays her charms).

Apararka or Aparaditya was a king who ruled in the twelfth century. His commentary on the Yajnavalkya Smriti is considered to be
H of paramount authority and is referred to with respect in many of the

later Digests. After referring to the primary and secondary sons enumerated by Yajnavalkya, Apararka observes :— A

पुत्रप्रतिनिधीनां मध्ये दत्तक एवं कलियुगे ग्राह्यः ।
अतः एव कलौ निवर्तन्त इत्यनुवृत्तौ शौनकेनोक्तम्
"दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः" इति ।

(Of the different kinds of substitutes for son, only the Dattaka is valid during the Kaliyuga. Therefore Shaunaka says: "the acceptance of sons other than Datta and Aurasa" is prohibited in the Kaliyuga.) (Vide Ghose on 'Hindu Law' Vol. II at p. 254). B

The verse of Shaunaka quoted by Apararka is found in the verses on Kalivarjya collected and printed at page 1013 of Vol. III of P. V. Kane's History of Dharmasastra. The 17th verse reads "दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः" (The acceptance of sons other than datta or aurasa) is one of the acts not to be done in Kaliyuga. C

We find the following text in 'Parasara Madhava' which is believed to have been written by Madhavacharya, the prime minister of the Vijayanagara kings in or about the year 1350: D

दत्तव्यतिरिक्तानां गौणपुत्राणां ऋक्थभाक्त्व
प्रतिपादकानि वाक्यानि युगान्तरविषयाणि
कलौ युगे तेषां पुत्रत्वेन परिग्रहणस्य स्मृत्यन्तरे
निषिद्धत्वात् ।

"दत्तौरसेतरेषान्तु पुत्रत्वेन परिग्रहः । E
देवरेण सुतोत्पत्तिः वानप्रस्थाश्रमग्रहः ॥
कलौ युगोत्विमान् धर्मान् वर्ज्यानाहुर्मनीषिणः इति

(The texts establishing the right to inherit of the subsidiary sons other than the Dattaka or the adopted son were applicable in past ages (and have no force now) because in another Smriti their being taken as sons is prohibited in the Kali Yuga: 'The acceptance as sons of other than the Dattaka and Aurasa sons,' the procreation of a son by Niyoga by the husband's younger brother and adopting the life of the Vanaprastha in old age are prohibited by the wise.) (Vide Ghose on 'Hindu Law' Vol. II at p. 626). F

The quotation in the above Commentary is stated to be from Aditya Purana. G

The Smriti Chandrika of Devannabhatta according to Dr. Julius Jolly is a remarkable book on Hindu Dharmasastra for its originality and for its early date. Though following Mitakshara on most points of importance, it introduces a great deal of new matter as well particularly with regard to the rights of woman over Stridhana, relying upon H

A many Smriti texts not referred to in the Mitakshara. It is believed that the Smriti Chandrika was written in the thirteenth century for the author quotes Apararka (12th century) and he in his turn is quoted by Mitramisra (14th century).

In the chapter entitled 'On partition of wealth received through secondary fathers", Smriti Chandrika states :

B

एवं निरूपितगौणपुत्राणां सर्वेषां युगान्तरे पुत्रत्वेन परिग्रहः । कलौ तु दत्तकस्यैकस्य "दत्तौरसेतरेषां तु पुत्रत्वेन परिग्रहः" इति । कलेरादौ धर्मगुप्त्यर्थं महात्मभिर्दत्तकौरसे तरेषां पुत्रत्वेन परिग्रह निवारणात् । पुत्रिकाकरणमप्यस्मादेव वाक्यात्कलौ निवारितम् । दत्तौरसेतरत्वात्पुत्रिकायाः । एवं च कलावौरसपुत्रपौत्रयोरभावे दत्तक एव गौणपुत्रो भवति नान्य इत्यनुसन्धेयम् ।

C

(The secondary sons thus enumerated had all been recognised as sons in former ages; but, in the Kali age, adopted son alone is recognized. By the text : "None is to be taken as a son except a son of the body or one who is adopted." the learned have, in the early period

D of the Kali age, prohibited the recognition of any other son than the legitimate and the adopted, with the view of maintaining virtue in the world.

The appointment of a daughter to raise up a son to her father must also be considered by the same text to be prohibited in the

E Kali age, such a son not being either one of the body or adopted. The conclusion hence is that, in the Kali age, in default of a legitimate son or grandson, the adopted son alone and none else is recognised as a subsidiary son. (Vide Setlur on 'Hindu Law Books on Inheritance' at page 272).

It is no doubt true that in some earlier decisions to which a

F detailed reference at this stage is not necessary some statements found in Smriti Chandrika which were directly in conflict with the Mitakshara were not accepted and the Mitakshara was given the preference but still as observed by Mayne there can, however, be little doubt that its general authority is fairly high on points on which it does not come into conflict with the Mitakshara and that it is a work which

G is referred to throughout India with great respect—by Nilakantha, Mitramisra and others.

Dattaka-Chandrika which is a recognised treatise on the law of adoption declares in paragraphs Nos. 8 and 9 of section 1 thus :

"8. A substitute. Now such is of eleven descriptions, the son

H of the wife and the rest. Thus Manu (ordains) : "Sages declare

these eleven sons (the son of the wife and the rest) as specified to be substitutes for the real legitimate son; for the sake of preventing a failure of obsequies." Vrihaspati also. "Of the thirteen sons who have been enumerated, by Manu in their order, the legitimate son and appointed daughter are the cause of lineage. As oil is substituted by the virtuous for liquid butter; so are eleven sons by adoption substituted for the legitimate son and appointed daughter."

9. Of these however in the present age, all are not recognised. For a text recites :— "Sons of many descriptions who were made by ancient saints cannot now be adopted by men,—by reason of their deficiency of power;" and against those other than the son given, being substitutes, there is a prohibition in a passage of law wherein after having been promised,— "The adoption, as sons of those other than the legitimate son and son given,"—it is subjoined,— "These rules sages pronounce to be avoided in the Kali age."

(See 'Hindu Law Books' edited by Whitley-Stokes in 1865 at page 630).

Dattaka Mimansa written by Nanda Pandita between 1595-1630 states :

"64. "Sons of many descriptions who were made by ancient saints cannot now be adopted by men by reason, of their deficiency of power etc.", on account of this text of Vrihaspathi and because, in this passage ("There is no adoption, as sons, of those other than the son given and the legitimate son etc.") other sons, are forbidden by Saunaka, in the Kali or present age, amongst the sons however (who have been mentioned) the son given, and the legitimate son only are admitted."

(See 'Hindu Law Books' edited by Whitley-Stokes in 1865 at page 547).

In *Bhagwan Singh* v. *Bhagwan Singh & Ors.*(1) a Full Bench of the Allahabad High Court had to consider the authority of Dattaka Chandrika and Dattaka Mimansa as sources of Hindu Law. Since some doubts had been expressed about it by Mandlik, Golapchandra Sarkar and Dr. Jolly who were themselves reputed writers on Hindu Law, after an elaborate discussion about several earlier decisions and treatises on Hindu Law published by that time, the majority of the Full Bench (Edge, C.J., Knox, Blair and Burkitt, JJ.) expressed the

(1) [1895] I.L.R. 17 All. 294.

A view that Dattaka Mimansa was not on questions of adoption an 'infallible guide' in the Benares School of Hindu Law. But the minority (Banerji and Aikman, JJ.) held that Dattaka Mimansa and Dattaka Chandrika were works of paramount authority on questions relating to adoption in the Benares School also. The Privy Council in the appeal filed against the judgment of the Full Bench observed in
B *Bhagwan Singh & Ors.* v. *Bhagwan Singh (Minor)*(1) *& Ors.* thus :

> "Their Lordships have mentioned in the prior adoption cases the views of Knox, J. as to the authority of the two Dattaka treatises just quoted. In the present case the learned Chief Justice Edge takes even more disparaging views of their authority; denying,
C if their Lordships rightly understand him, that these works have been recognised as any authority at all in the Benares School of Law. If these were anything to show that in the Benares School of Law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu Law, founded on the Smritis as the source from whence all Schools of Hindu Law derive their precepts.
D In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: "The Dattaka Mimansa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based." Both works have been received in courts of law, including this Board, as high authority. In *Rangama* v. *Atchama* (4 Moore's Ind. Ap. Ca. 97) Lord Kingsdown says:
E "They enjoy, as we understand, the highest reputation throughout India." In 12 Moore, p. 437, Sir James Colvile quotes with assent the opinion of Sir William Macnaghten, that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern jurists, while the Mimansa is held to be an infallible guide in the Provinces of
F Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland, and of West and Buhler, seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they become embedded in the general law."

G The writings of Sir William Macnaghten, Morley, Colebrooke, Sir Thomas Strange, Babu Shyama Charan Sarkar and J. S. Siromani supports the above view. In *Rajendra Narain Lahoree* v. *Saroda Sonduree Dabee,*(2) *Uma Sunker Moitro* v. *Kali Komul Mozumdar*(3),

(1) [1898] 26 I.A. 153 at p. 161.

(2) 15 W.R. 548.

H (3) I.L.R. 6 Cal. 256 at p. 265.

Lakshmappa v. *Ramava*(1), *Waman Raghupati Bova* v. *Krishnaji Kashiraj Bova*(2), *Minakshi* v. *Ramananda*(3), *Tulshi Ram* v. *Behari Lal*(4) & *Beni Prasad* v. *Hardai Bibi*(5), the Indian High Courts have accepted the authority of Dattaka Mimansa and Dattaka Chandrika. The Privy Council has also taken the same view in the *Collector of Madura* v. *Moottoo Ramalinga Sethupathy*(6).

In *Abhiraj Kuer* v. *Debendra Singh*(7) this Court has dealt with the value to be attached to Dattaka Chandrika and Dattaka Mimansa as follows :—

> "Learned Counsel has emphasised that great authority attaches to all statements of law as regards adoption that are contained in Dattak Mimansa. There is no doubt that for many years now the Dattak Chandrika of Kuvera and Dattak Mimansa of Nanda Pandit have been recognised to be of great authority on all questions of adoption. It is true that Prof. Jolly in his Tagore Law Lectures had in no uncertain terms characterised the latter to be of little value; and eminent scholars like Dr. Mandlik and Golap Chandra Sarkar while writing in the latter part of the last century subjected many of Nanda Pandit's views to unfavourable criticism. Inspite of all this the Privy Council in *Bhagwan Singh* v. *Bhagwan Singh* (1899) L.R. 26 I.A. 153, 161 did recognise that both the Dattak Mimansa and Dattak Chandrika had been received in courts of law including the Privy Council as high authorities and after drawing attention to Lord Kingsdown's statements as regards these in *Rungama* v. *Atchama* (1846) I.A. 1, 97 and Sir James Colvile's statement in *Collector of Madura* v. *Moottoo Ramlinga Sethupathy* (1868) 12 M.I.A. 397, 437, stated thus:—"To call it (i.e. Dattak Mimansa) infallible is too strong an expression, and the estimates of Sutherland and of West and Buhler, seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law." While saying this mention must also be made of the observations of the Privy Council in *Sri Balusu Gurulingaswami* v. *Shri Balasu Ramalakshmamma* (1899) L.R. 26 I.A. 113, 136 decided on the same date (March 11, 1899) but

(1) 12 Bom. H.C. Rep. 364.
(2) I.L.R. 14 Bom. 249.
(3) I.L.R. 11 Mad. 49.
(4) I.L.R. 12 All. 328 (342).
(5) I.L.R. 14 All. 67 at 108.
(6) 12 Moo. I.A. 397.
(7) [1962] 3 S.C.R. 627 at p. 630-631.

A immediately before *Bhagwan Singh's* case, was decided, expressing their concurrence with the view that caution was required in accepting the glosses in Dattaka Mimansa and Dattak Chandrika where they deviate from or added to the Smrities."

Even when they are read with care it is not possible to disbelieve the statement of law with which we are concerned since they are in B conformity with many other writings discussed above.

A careful reading of the texts extracted above leads to an inference that the institution of putrika-putra had become obsolete and not recognised by Hindu society for several centuries prior to the time when Smriti Chandrika or Dattaka Chandrika were written and these two C Commentaries belong to a period far behind the life time of Raja Dhrub Singh.

Some of the decisions relied on by the parties may now be considered. The decision in *Nursingh Narain & Ors.* v. *Bhuttun Loll & Ors.*(1) (compiled by D. Sutherland) was not a case where the claim D of a putrika-putra as it was understood in Hindu Law was upheld. In that case, the Court had to decide whether a sister's daughter could become an appointed daughter and her son a putrika-putra. The claim was rejected with the following observations :—

"There is no doubt that, in ancient times, there were many legal substitutes for the sons of the body (Auras). Manu (Chapter E 9, V, 180), and Yagnyavalkya (Mitakshara, Chapter I, Section 2) enumerate no less than twelve including the legitimate son of the body; and the latter authority ranks the son of an appointed daughter ("putrika-putra") next to the legitimate son, and equal to him. It is contended by the appellant in this case that a sister's daughter may be adopted under this authority, and become "an F appointed daughter", and her son a "putrika-putra", but we do not see the slightest resemblance between the two cases. The daughter appointed to raise up issue for her father must, according to the old Hindoo Law books, be a man's own daughter, the child of his own loins; and it is solely on the ground of this near relationship that the son of the daughter, viz. the "putrika-putra" G is classed in the same rank with the lawful son of the body.

It is true that, in default of an "aurasa" daughter,—a daughter of the body, that is,—a man could, under the old Hindoo Law, adopt a subsidiary daughter as a substitute for her; but these adoptions were "for the sake of obtaining the heaven-procured by

H (1) (1864 Weekly Reporter 194).

the daughter's son" (vide Dattaka Mimansa, page 138, section 18), and not for the purpose of obtaining a "putrika-putra," an adopted son by means of an appointed daughter. ..... We think, therefore, that the appellant in the present case is not a "putrika-putra," that is, he is not the son of an appointed daughter in the proper sense of the term, and has, according to ancient Hindoo Law, no status in the family of Holas Narayan. A B

Taking this view of the case, it is not necessary for us to enter at any great length into the second point. All the great authorities on Hindoo Law admit that, except the Dattaka and Kritrima, no other forms of adoption are allowable in the present age." C

The last para of the above quotation is of some significance so far as these appeals are concerned.

In *Thakoor Jeebnath Singh* v. *The Court of Wards*(1) the plaintiff laid claim to an impartible raj, raj of Ramgarh on the ground that he being the father's sister's son of the last holder, Rajah Trilokenath, who died unmarried was entitled to the estate in preference to the defendant who was a distant agnate of the last holder. Ordinarily the plaintiff being a bandhu could not exclude the defendant who was a sagotra sapinda of the last holder. He therefore, put forward the plea that as his mother was the appointed daughter of Maharaj Sidnath Singh, the paternal grandfather of the last holder and he as putrika-putra should be treated as a son of Maharaj Sidnath Singh entitled to succeed to the estate. Two questions arose before the Judicial Committee of the Privy Council in that case as in the present appeals— (1) whether the practice of taking a 'putrika-putra' was in vogue and (2) whether the mother of the plaintiff had in fact been an 'appointed daughter'. On the first question, the Privy Council observed that it was not necessary to give a finding but on the other it held that the plaintiff had not shown that his mother was in fact an 'appointed daughter'. Even so, after referring to the statements found in the books of Sir Thomas Strange and Sir William Macnaghten, the Privy Council observed that it appeared that the practice of having a 'putrika-putra' had become obsolete. In that connection, it observed thus :— D E F G

"It is not necessary in this case to decide that this is so, although there certainly does not appear to have arisen in modern times any instance in the courts where this custom had been considered."

(1) [1875] 2 I.A. 163. H

A Absence of cases before courts within living memory in which a claim had been preferred on the basis of affiliation in putrika-putra form showed that the said practice had become obsolete.

The contention based on the theory that a person could take a son as 'putrika-putra' was rejected by the Madras High Court in the year 1908 in *Sri Raja Venkata Narasimha Appa Row Bahadur* v. B *Sri Rajah Saraneni Venkata Purushothama Jaganadha Gopala Row Bahadur & Ors.*(1) in the following words :—

> "Mr. Seshagiri Ayyar on behalf of the appellant contended, first, that on a proper construction of the will the testator's daughter was 'appointed' by her father to raise a son for him in accordance with a practice which is now generally reputed to be obsolete. We C need not determine whether in any event the language of the will could be made to bear this construction; it clearly could be so construed only if there were in existence a living custom to which the words can be referred. It is not such language as could be interpreted as indicating the testator's intention to revive a dead custom, or create a new kind of heir for himself, unknown to D the law of the present day, supposing him to have the power to do either of those things."

In *Nagindas Bhagwandas* v. *Bachoo Hurkissaondas*(2) while rejecting the contention that the position of an adopted son in the family of the adoptive father was not that of a coparcener, the Privy E Council observed :—

> "It was endeavoured to establish that proposition by reference to the place which was assigned by Manu and other early authorities to the twelve then possible sons of a Hindu. As to this contention it is sufficient to say that, whatever may have been the position and rights between themselves of such twelve sons F in very remote times, all of those twelve sons, except the legitimately born and the adopted, are long since obsolete."

A Division Bench of the Patna High Court in *Babui Rita Kuer* v. *Puran Mal*(3) while holding that defendant No. 2 in that case who was alleged to have been appointed as putrika by her father had not in fact been so appointed, observed (but without actually deciding) : G

> "However, the case of *Thakoor Jeebnath Singh* v. *Court of Wards* (1874-75) 2 I.A. 163, a Privy Council case, is important in this connexion. The whole argument addressed to us is based

(1) I.L.R. 31 Mad. 310.

(2) 43 I.A. 56 at p. 67.

H (3) A.I.R. 1916 Patna 8.

upon the effect of this custom of adoption of a daughter as putrika. Now the Privy Council have laid it down that all Hindu text-writers unanimously concur in holding the appointment of a daughter as a son to raise up issue to a sonless father is now obsolete; and no recent authority can be found within modern times where the custom has received judicial sanction. In the Privy Council case referred to above a grave doubt is thrown upon the validity of such a custom, and it is there distinctly stated that if this custom is ever to be revived, it can only be on the clearest and most conclusive evidence. To a like effect is the case of *Sri Rajah Venkata Narasimha Appa Row Bahadur* v. *Sri Raja Suraneni Venkata Purushothama Jaganadha Gopala Rao Bahadur* (1908) 31 Mad 310, where the custom alleged is considered not to be a living custom. Mr. Mayne says at p. 93, Edn. 8, of his treatise on Hindu Law that the usage had become obsolete from time immemorial, and was so decided by the Civil Courts. However, if this custom or usage is relied on in any given case it must be conclusively and undeniably proved. I should be slow indeed to hold, if this obsolete custom can be established, that all the duties and obligations imposed on a Hindu son to discharge the debts of his father under Mitakshara Law would apply or attach to a daughter appointed as a putrika to raise issue to a sonless father the attention of the High Court.

The above case is from the State of Bihar itself. If the practice of appointment of a putrika was in vogue, it would not have missed the attention of the High Court

It is true that some observations made in *Lal Tribhawan Nath Singh* v. *Deputy Commissioner, Fyzabad & Ors.*(1) support the theory that the institution of putrika-putra was in vogue even now. Two of the questions involved in that case were whether Sir Pratap Narain Singh was the Putrika-putra of Sir Man Singh who was the former holder of an impartible estate, known as taluka Ajudhia and whether the practice of appointing a daughter to bear a son to a Hindu was permitted by the Mitakshara and was enforceable. Stuart, A.J.C. who delivered the leading judgment in that case with whom Kanhaiya Lal, A.J.C. agreed held that Sri Pratap Narain Singh was not the putrika-putra of Sir Man Singh although the practice of appointing a daughter to bear a son to a Hindu was permitted by the Mitakshara and was enforceable. It is seen that the above case had a history. Maharaja Pratap Narain Singh himself had earlier instituted a suit which ultimately ended up in an appeal before the Privy Council in *Maharajah*

(1) A.I.R. 1918 Oudh 225.

A *Pertab Narain Singh* v. *Maharanee Sudhao Kooer*(1). In that case, his plea was that he (who was also known as Dadwa Sahib) was the son of a daughter of Maharajah Man Singh; that he had been treated by Maharajah Man Singh 'in all respects as his own son' within the meaning of clause 4 of section 22 of Act I of 1869; that a will made by Maharajah Man Singh on April 22, 1864 had been revoked B orally on a subsequent date and that he had become entitled to the estate of Maharajah Man Singh. The Privy Council held that the will had been revoked and Maharajah had died intestate and that Maharajah Pratap Singh was the person who under clause 4 of section 22 of Act I of 1869 was entitled to succeed to the taluk, and that he had made out his claim to a declaratory decree to that effect. The C Privy Council further held that the declaration was limited to the taluk and what passed with it but it did not affect the succession to the personal property or property not properly the parcel of the talukdaree estate which was governed by the ordinary law of succession. It is significant that no claim had been preferred by Maharaja Pratap Narain Singh on the ground that he was a putrika-putra of Maharajah D Man Singh. He merely claimed that he was a statutory heir under clause 4 of section 22 of Act I of 1869 which was passed at the request of Talukdars including Maharajah Man Singh as can be seen from the decision of the Privy Council in *Maharajah Pertab Narain Singh's* case (supra) which observed thus :—

> "So matters stood when the Maharajah, as one of the leading E members of the British India Association of Talukdars, went down to Calcutta in order to take part in the discussions and negotiations which resulted in the passing of Act I of 1869. This must have been in the latter half of 1868.
>
> Imtiaz Ali, the vakil concerned in the drafting and preparation of this Act on the part of the talukdars, has sworn that clause 4 F of the 22nd section originated with the Maharajah; that it was opposed by some of the talukdars, but finally approved of by the Select Committee of the Governor-General's Legislative Council on the bill and passed into law. He also says that he was told by the Maharajah that his object in pressing this clause was to provide for the Dadwa Sahib."

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(NOTE :'Maharajah' referred to above is Maharajah Man Singh and 'Dadwa Sahib' is Maharajah Pratap Narain Singh).

If the practice of appointing a daughter to bear a son was in vogue then Maharajah Man Singh need not have taken the trouble to

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(1) [1877] 4 I.A. 228.

request the British Government to get Act I of 1869 passed and if Maharajah Pratap Narain Singh was a putrika-putra, he would not have refrained from putting forward that case. Moreover the Privy Council also clarified the object of introducing clause 4 of section 22 of Act I of 1869 thus :—

> "Their Lordships are disposed to think that the clause must be construed irrespectively of the spiritual and legal consequences of an adoption under the Hindu Law. They apprehended that a Hindu grandfather could not, in the ordinary and proper sense of the term adopt his grandson as a son. Nor do they suppose that, in passing the clause in question, the Legislature intended to point to the practice (almost, if not wholly, obsolete) of constituting, in the person of a daughter's son, a "putrika-putra", or son of an appointed daughter. Such an act, if it can now be done, would be strong evidence of an intention to bring the grandson within the 4th clause, but is not therefore essential in order to do so. Moreover, it is to be observed that the 4th, like every other clause in the 22nd section, applied to all the talukdars whose names are included in the second or third of the lists prepared under the Act, whether they are Hindus, Mahommedans, or of any other religion; and it is not until all the heirs defined by the ten first clauses are exhausted that, under the 11th clause, the person entitled to succeed becomes determinable by the law of his religion and tribe."

Triloki Nath who failed before the Privy Council thereafter filed a review petition before it. That petition was dismissed in *Pertab Narain Singh* v. *Subhao Kooer*(1) but he was permitted if he so desired to reopen by suit in India the question whether he had been properly represented in the previous litigation in the Indian Courts. Accordingly a suit was filed in 1879. That ultimately was dismissed by the Privy Council in *Perturbarain Singh* v. *Trilokinath Singh*(2) holding that the previous proceedings were binding on Trilokinath Singh. Another suit which had been filed in the meanwhile in the year 1882 for possession of the estate by Trilokinath Singh was also dismissed finally by the Privy Council in *Triloki Nath Singh* v. *Pertab Narain Singh*(3) with the following observations :—

> "Their Lordships, therefore, merely declared Pratap Narain Singh's title to the taluks and whatever descended under Act I of

(1) [1879] 5 I.A. 171.
(2) [1885] 11 I.A. 197.
(3) [1888] 15 I.A. 113.

A 1869. As to other property which was not included in that Act, Pratap Narain would not have been the heir to the Maharaja during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act 1 of 1869."

B Thus ended the first series of litigation. Now reverting to the case of *Lal Tribhawan Nath Singh* (supra) it should be stated that the suit out of which the said appeal arose was instituted after the death of Maharaja Pratap Narain Singh in 1906 by Tribhawan Nath Singh, grandson of Ramadhin, the eldest brother of Maharaja Man Singh in the year 1915 for a declaration that he was entitled to the estate as the C heir of Maharaja Pratap Narain Singh under clause 11 of section 22 of Act I of 1869 which provided that on the failure of persons referred to in the first ten clauses, the ordinary heirs under personnal law of the last holder of the taluk was entitled to succeed. He pleaded that the widows of Maharaja Pratap Narain Singh were disentitled to the estate on the ground of unchastity and that he was the nearest heir D living at that time. The above case was filed on the assumption that Maharaja Pratap Singh was the putrika-putra of Maharaja Man Singh and hence the plaintiff being an agnate of Maharaja Man Singh was entitled to succeed. (Note: The claim was almost similar to the claim in these appeals). The defendants in that suit denied all allegations of the plaintiff set up in the case and pleaded that one Dukh Haran E Nath Singh had been adopted by one of the widows of Maharaja Pratap Narain Singh and that even if they were not entitled to the estate, the estate had to go to the family of Narsingh Narain Singh i.e. the natural family of Maharaja Pratap Narain Singh. The trial court dismissed the suit. In the appeal, the Oudh Judicial Commissioner's Court after specifically recording a finding that Maharaja Pratap Narain Singh was not the putrika-putra of Maharaja Man Singh F held that the practice of appointing a daughter to bear a son to a Hindu was permitted by the Mitakshara and was enforceable.

Reliance is now placed before us on the above decision of the Oudh Court to establish that even now it is possible to have a son in the putrika-putra form. We have carefully read the two judgments G of the two Additional Judicial Commissioners, Stuart and Kanhaiya Lal. We feel that the question whether the practice of taking a son in putrika-putra form was in vogue at the relevant time has not been considered in detail in the two judgments. The approach to this question appears to be bit casual even though the judgments on other material issues appear to be quite sound. Since they had held that H no ceremony constituting the mother of Maharaja Pratap Narain Singh

had been performed, they might not have gone into the question of law in depth. They just proceeded on the basis of some ancient texts including the Mitakshara without devoting attention to the practice having become obsolete. All that Kanhaiya Lal, A.J.C. says on the above question at page 259 is "The case with which a son could be obtained by adoption has had the effect in course of time of rendering affiliation in the form of putrika-putra more or less uncommon, but it has by no means become obsolete, for the Mitakshara gives the putrika-putra the second or predominant position after the legitimate son and treats him in every respect as his substitute."

The learned Additional Judicial Commissioner treats, we feel inappropriately, the institution of an illatom son-in-law in vogue in Malabar or Khanadamad recognised in Punjab as but relics of the institution of putrika-putra. We have dealt with elsewhere in this judgment some of the text books referred to by the learned Additional Judicial Commissioner. It is to be noticed that the Oudh Court did not refer to any specific case where a claim based on the putrika-putra title had been upheld. The following remark made by Stuart, A.J.C. at page 230 is significant :—

> "What reason then could he have had to be the only person in Oudh known to history who employed a practice by which he set aside his daughter to bear him a male heir?"

We feel for the reasons given by us elsewhere in this judgment that the view expressed by the Oudh Court on the question of prevalence of putrika-putra form of affiliation cannot be accepted as correct.

We shall now advert to some of the digests, lectures and treatises on 'Hindu Law'. In Colebrooke's Digest of Hindu Law (1874 Edition) Volume II, page 416, preface to the first edition of which was written in 1796, it was observed thus:

> "Among the twelve descriptions of some begotten in lawful wedlock and the rest, any others but the son of the body and the son given are forbidden in the Cali age. Thus the Aditya purana, premising "the filiation of any but a son lawfully begotten or given in adoption by his parents", proceeds: "These parts of ancient law were abrogated by wise legislators, as the cases arose at the beginning of the Cali age..... In the like manner sufficient reasons may be assigned or the prohibition of appointing a daughter and so forth. Again, by the term "powers" in the text of Vrihaspati is meant, not only devotion, but the consequence of it, namely, command over the senses.

A Among these twelve descriptions of sons, we must only now admit the rules concerning a son given in adoption and one legally begotten. The law concerning the rest has been inserted, to complete that part of the Book, as well as for the use of those who, not having seen such prohibitory texts, admit the filiation of other sons. Thus, in the country of O'dry (O'risa), it B is still the practice with some people to raise up issue on the wife of a brother."

Sir F. W. Macnaghten who was a judge of the Supreme Court of Judicature at Fort William in Bengal writes in his book entitled 'Considerations on the Hindu Law, as it is current in Bengal' (1824 Edition) at page 129:

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"Vrihaspati speaks "of the thirteen sons, who have been enumerated by Meru in their order". And with reference to this we find in the Dattaca Chandrika, 'of these however, in the present age, all are not recognized. For a text recites, 'sons of many descriptions, who were made by the ancient Saints, D cannot now be adopted by men, by reason of their deficiency of power;' and against those, other than the son given, being substitutes, there is a prohibition in a passage of law, wherein, after having been premised—"The adoption, as sons of these other than the legitimate son, and the son given," it is subjoined. 'This rule, sages pronounce to be avoided in the Kali age.' "Upon the E words, "in a passage of law" there is the following note; This passage, which is frequently cited, is attributed to the Aditya purana, and in its complete state is thus, 'The adoption, as sons of those other than the legitimate son, and son given; the procreation of issue by a brother-in-law; the assuming the state of an anchoret; these rules, sages pronounce to be avoided in the F Kali age.' "

Sir Thomas Strange, a former Chief Justice of Madras observes in his book on 'Hindu Law' (published in 1830) Volume I at pages 74-75 as under:

"……whence the different sorts of sons enumerated by diffe- G rent authorities, all resolving themselves, with Menu, into twelve; that is, the legally begotten, and eleven subsidiary ones,—reckoning the son of the appointed daughter (putrika-putra) as the same in effect with the one legally begotten, and therefore not to be separately accounted; all formerly, in their turn and order, capable of succession, for the double purpose of obsequies, and H of inheritance; six (reckoning, with Menu, the legally begotton,

and the son of the appointed daughter as one), deriving their pretensions from birth, six, from distinct adoptions; the first of the twelve, namely, the issue male of the body lawfully begotten, being the principal one of the whole, as the son given in adoption was always the preferable one, among those obtainable expressly in this mode. And now, these two, the son by birth, emphatically so called, (Aurasa), and (Dattaca) the son by adoption, meaning always the son given, are, generally speaking, the only subsisting ones, allowed to be capable of answering the purpose of sons,—the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose, at the beginning of the present, the Cali age."

Sir Ernest John Trevelyan, a former Judge of the High Court of Calcutta in his book entitled "Hindu Law as administered in British India" (Third Edition) states at page 107 thus:

"In ancient times the Hindu law recognised the following descriptions of sons as legitimate sons, viz.

1. Aurasa, ...
2. Kshetraja, ...
3. Putrika-putra, or son of an appointed daughter. In ancient times a man could appoint his daughter to raise up issue to him. The practice is obsolete. Shastri Golap Chunder Sarkar, without giving any instances of its application, contends that there is no reason why it should not be now applied.
4. (to) 13. ... ...

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

Dr. Jullius Jolly in his Tagore Law lectures delivered in 1883 entitled "Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption" states in his Lecture VII at page 144 thus:

"The early history of the Law of Adoption may be traced in those enumerations of subsidiary or secondary sons, which occupy such a prominent place in the Indian Law books. Nearly all these substitutes for real sons are now long since obsolete, but they are deserving of attention, not only from a historical, but from a practical point of view, because the rules regarding

A them, being earlier in time, have in a measure formed the basis on which adoption in the proper sense of the term has been framed by the writers of the medieval and modern Indian Digests."

That the enumeration of twelve or thirteen and even fifteen B kinds of sons in ancient Smritis owes its origin to the tendency of ancient writers to deal with exhaustively all possible sons a man could conceive of irrespective of the fact that all of them might not have received legal sanction in the contemporary society is obvious from the inclusion in the list of fifteen sons of a son called यत्क्वाच-नोत्पादित (Yatrakvachanotpadita) (son produced in any other manner C than the sons previously enumerated). Referring to such a son, Dr. Jolly observes at page 146 thus:

"Beginning with the son procreated anywhere, who comes in as the last of all, I may observe that the only other text in which this kind of son is referred to occurs in the Vishnu-smriti; coming in, as it does, at the end of the whole list, the D term Yatrakvachanotpadita seems to mean produced in any other manner than the sons previously enumerated," and may owe its origin to the systematizing sprit of a later age which wished to exhaust all sorts of sonship that might occur anyhow."

After referring to the relevant texts of Apararka, Smriti Chandrika, E Battaka Chandrika, Madhava, Visvesvara Bhatta, Vivada Chintamani, Dayabhaga, Dattaka Mimansa, Nirnaya Sindhu of Kamalakara Vyavahara Mayukha of Nilkantha and the Dharma Sindhu of Kasi Natha, Shri Rajkumar Sarvadhikari states in 'the Principles of the Hindu Law of Inheritance' (Tagore Law Lectures, 1880) at pages 407-409 as follows:—

F "This catena of texts will prove to you that the practice of affiliating different kinds of sons has become obsolete at the present day. The only exception is the dattaka, or the son given by his parents.

It may be said that the Mitakshara, the Dayabhaga, and the G Vivada Chintamani the leading authorities in the Benares, the Bengal, and the Mithila Schools—seem still to countenance the practice. That these schools do not recognise such a custom is proved beyond question by the other text-writers of these schools, who have followed the lead of Vijnanesvara, Jimutavahana and Vachaspati Misra. The authority of Visvesvara Bhatta, Madhava, H Kamalakara, Nanda Pandita, and Jagannatha is quite enough to

show that the ancient practice of affiliating different kinds of sons has fallen into desuetude in this age. A

The dictum of Jagannatha of the Bengal School establishes beyond question the fact that the practice of affiliating daughters in default of male issue, and the other forms of adoption enumerated by Manu, has become wholly obsolete in the present age. B

The same may be said also of the Benares School, Visvesvara Bhatta, Madhava, Nirnaya Sindhu, and Dharma Sindhu give plain and unequivocal answers on this point—"the practice is forbidden in the present age".

The authority of Visvesvara Bhatta is highly respected in the Mithila School. The words of Madhava and Kamalakara carry universal weight. The Dattaka Mimansa and the Dattaka Chandrika, the two standard treatises on adoption, are the reigning authorities in all the schools; and we have seen that both of them strongly denounce the practice. C

The Smriti Chandrika and the Vyavahara Mayukha have forbidden the practice in the Dravira and the Maharashtra Schools. D

It is plain, therefore, that the adopted son is the only secondary son recognised in the present age.

It may reasonably be asked, however, "how is it, if the practice of affiliating secondary sons be obsolete in the present age, that Vijnanesvara, Vachaspati Misra, and Jimutavahana devote such a large space in their treatises in discussing the rights of subsidiary sons?" E

The question may be answered in the words of Jagannatha: "They did so to complete that part of the book. They did so simply to show the nature of the practice as it existed in former ages. They merely gave a historical review of the subject, and did not enjoin the practice in the present age. The fact is, the practice was still lingering in some parts of the country when the authors of the Mitakshara, Chintamani, and the Dayabhaga promulgated their laws. The discussion of the rights of secondary sons, then was, in the language of Jagannatha, for the benefit of those who "not having seen the prohibitory texts still admitted the filiation of the subsidiary sons". We can by no means admit that the practice universally prevailed at the time of Vijnanesvara, Vachaspati Misra, and Jimutavahana. F G H

A It was strongly denounced by Vrihaspati and others. But it is not improbable that the custom was at its last gasp at the time of Vijnanesvara. Aprarka, Devandara, and Madhava, coming after the author of the Mitakshara, abolished it altogether. The custom might have partly revived in some parts of India at the time of Vachaspati Misra and Jimutavahana, and that might B have been partly the reason of their discussing the nature of the custom in their works. Apart from the question whether such a practice prevailed at the time of Vijnanesvara, Vachaspati Misra, and Jimutavahana, there is not the shadow of a doubt that the practice is obsolete at the present days. Our authority for making this statement is the opinion of Devananda, Kamala- C kara, Nanda Pandita, Nilakantha and Jagannatha. The last four authors are the most recent authorities on the subject, and their evidence as to the non-existence of the custom at the present day cannot be questioned. Their words authoritatively settle the point that the custom has been entirely abrogated in the present age."

D After quoting the text of Vrihaspati:

अनेकधाः कृताः पुत्रा ऋषिभिर्येऽपुरातनः ।
न शक्यन्तेऽधुना कर्तुं शक्तिहीनैरिदन्तनैः ।।

(Sons of many descriptions who were made by ancient saints cannot now be adopted by men, by reason of their deficiency of E power).

Jogendra Smarta Siromani observes in his Commentary on the 'Hindu Law' (1885 edition) at page 112 thus:

"All the secondary sons, with the exception of the Dattaka, have not only become obsolete, but according to the Shastras, F they are not sons at all in the present age."

At page 148 in the same book, he further observes:

"The Kritrima form of adoption prevails only in Mithila, Nanda Pandita recognizes it as legal notwithstanding the text of Adita Purana which declares that in the present age all the G secondary sons have become obsolete with the exception of the Dattaka (see Mimansa, section II, para 65)."

John D. Mayne, the author of 'Mayne's Treatise on Hindu Law and Usage' (11th Edition) states at page 114:—

H "The truth is that there were only two kinds of sons, the aurasa and the adopted son. The list of twelve or thirteen sons

was obviously due to the systematising habit of Sanskrit writers." A

In 'Mulla's Principles of Hindu Law' (14th Edition), it is stated at page 115 thus:

"The daughter's son occupies a peculiar position in the Hindu law. He is a bhinna-gotra sapinda or bandhu, but he comes in before parents and other more remote gotraja sapindas. The reason is that according to the old practice it was competent to a Hindu who had no son to appoint a daughter to raise up issue to him. Such a daughter, no doubt was the lawful wife of her husband, but her son, called putrika putra, becomes the son of her father. Such a son was equal to an aurasa or legitimate son, and took his rank, according to several authorities, as the highest among the secondary sons. *Although the practice of appointing a daughter to raise up issue for her father became obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance and even now he takes a place practically next after the male issue, the widow and the daughters being simply interposed during their respective lives."* B C D

The portion underlined in the above extract is quoted with approval by the Privy Council in *Ghanta Chinna Ramasubbayya & Anr.* v. *Moparthi Chenchuramayya Minor & Ors.* (supra). E

N. R. Raghavachariar on 'Hindu Law Principles & Precedents' (5th Edition) writes at page 78:

"But with the settlement of the society to peace and order and the recognition and enforcement by some superior power of the mutual rights of the people, the idea of family relationship received a better refinement and definition, and all the sons excepting the Aurasa, the Dattaka and the son by a permanently and exclusively kept concubine (Dasiputra) have become obsolete. But the Putrika putra form of adoption, perfectly natural and consistent with the feelings of affection which a Hindu has towards his daughter's son, is still prevalent in Malabar, though in other parts of India it has become obsolete". F G

We find a detailed discussion of the aurasa and eleven or twelve kinds of subsidiary sons mentioned by ancient smriti writers in 'History of Dharmasastra' (Vol. III) by P. V. Kane at pages 643 to 661. At page 657, the learned author writes— H

A "In modern times the courts generally recognize only two kinds of sons, viz. aurasa and dattaka, the other kinds of sons being held to be long since obsolete. Vide *Nagindas* v. *Bachoo* (43 I. A. 56 at p. 67). But two more kinds of sons have been recognized in modern times in certain provinces only, viz. the kritrima in Mithila (modern Tirhoot) and the putrikaputra among B the Nambudri brahmanas of Malabar, both of which will be dealt with below."

At page 659 in the same book, Shri P. V. Kane says:

"The putrikaputra is no longer recognised anywhere in India C except among the Nambudri brahmanas of Malabar."

All the above digests, lectures and treatises support the view that the practice of appointing a daughter as a putrika and of treating her son as putrika putra had become obsolete several centuries ago.

D Whereas passages in the text books referred to above point out that the practice of appointing a daughter to raise an issue had become obsolete, we find the following passage in 'A Treatise on Hindu Law' by Golapchandra Sarkar Sastri (Third Edition) at pages 124-125 striking a slightly different note:—

E "Putrika-putra: It is most natural that a person destitude of male issue, should desire to give a grandson by daughter the position of male issue. The appointed daughter's son is not regarded by Manu as a secondary son, but is deemed by him as a kind of real son. This form of adoption appears to prevail in the North-Western Provinces, and neighbouring district. F The Talukdars of Oudh submitted a petition to Government for recognising the appointed daughter's son; and accordingly in the Oudh Estates Act "son of a daughter treated in all respects as one's own son" is declared to be heir, in default of male issue. This sort of affiliation appears to be most desirable and perfectly consistent with Hindu feelings and sentiments; there is no reason G why it should not be held valid, when actually made by a Hindu. The Dattaka-Mimansa appears to have been written on purpose to invalidate the affiliation of a daughter's son, for the benefit of agnate relations."

We do not think that the above passage in any way supports the H case of the appellants. The author of the above book appears to make a special plea for reintroducing the institution of putrika putra. He does not refer to any prevailing practice of affiliation of a putrika putra

in accordance with Hindu Sastras. The reference to the passing of the Oudh Estates Act instead of supporting the case of the appellants weakens it. We have dealt with this point in detail while dealing with the case of *Lal Tribhawan Nath Singh* (supra). Sir E. J. Trevelyan also does not approve of this statement of Golapchandra Sarkar Sastri.

Jogendra Chunder Ghose in his book entitled 'The Principles of Hindu Law' (1903 Edition) observes at pages 77-78 :

> "It remains to record the changes in the Hindu Law brought about by the ingenuity of the Judges and lawyers of our modern Courts. The position of the son, grandson, and great-grandson remains unchanged. The Putrika and the Putrika-Putra are not recognized in spite of all the Rishis and all the Commentators. The daughter takes after the widow according to the text of Yajnavalkya, but she is given a life-interest against all authority, and for reasons invented by the Bengal lawyers. The daughter's sons come next, and they are declared to take *per capita* against all the Rishis and all the Commentators who have dealt with that question."

From the above passage it is clear that the institutions of putrika and putrika-putra have become obsolete. But the tirade against Bengal lawyers is uncharitable. They are not responsible for the change. In fact it is Hindu society which brought about such a change. We shall presently deal with the reasons which were responsible for such a change.

In the course of the arguments learned counsel for the appellants strongly contended that there was no justification to deny the right to a Hindu to take a son in the putrika putra form when it had been sanctioned by Yajnavalkya in his Smriti and by Vijnanesvara in his Commentary, the Mitakshara. It was contended that merely because there were no instances where the said practice was followed in the immediate past, it could not be held that it had ceased to be a part of Hindu law. It is seen from the several texts of commentaries extracted in the course of this judgment that the practice of taking a son in putrika-putra form had become obsolete in modern times and there are good reasons in support of that view. Before dealing with such reasons, we should keep in our view one of the statements of Vrihaspati which says thus:—

धर्ममपि लोक विरुष्टं
न कुर्यात् लोक विरुद्धं
नाचरेत्

(Even if a rule is propounded by the Smritis, it should not be practised if it is rejected by the people or is opposed to their will). A

A rule of interpretation lays down that if there is a clear usage to the contrary, the Shastra has to yield. (शास्त्रात् रूढिगरीयसी). If there is divergence of opinion amongst the Smritis, a Judge should consult the prevailing practice among the people while deciding a case. (स्मृत्योविरोधे न्यायस्तु बलवान व्यवहारत:) There is another injunction of Vrihaspati which is very salutary :

B

केवलं शास्त्रमाश्रित्य ।
नकर्तव्यो हि निर्णय: ॥
युक्ति हीनें विचारेतु ।
धर्म हानि: प्रजायते ॥

C (The decision (in a case) should not be given by merely relying on the Sastras, for in the case of a decision devoid of reasoning loss of dharma results).

We shall now examine the reason for the abandonment of the practice of appointing a daughter to raise a son by the Hindu society.
D Originally according to a vedic text cited by Lakshmidhara, a daughter was like a son, and a daughter's son was like a son's son. (द : त पुत्रकल्पा च पौत्रा: दौहित्रक स्मृता:) Manu prescribed that he who had no son might make his daughter in the following manner an appointed daughter (putrika) saying to her husband 'The (male) child born of her, shall perform my funeral rites'

E

अपुत्रोऽनेन विधिना
सुतां कुर्वीत पुत्रिकाम्
यदपत्यं भवेदस्या:
तन्ममस्यात् स्वधाकरं

F According to Manu 'A son is even as one's self, daughter is equal to a son, how can another (heir) take the estate, while (such daughter who is) one's self, lives. The daughter's son shall take the whole estate of his maternal grand-father who leaves no male issue. Between a son's son and the son of a daughter, there is no difference according to law. But if, after a daughter has been appointed, a son be born
G (to her father) the division (of the inheritance) must in that (case) be equal, for there is no right of primogeniture for a woman". Apastamba declared 'The daughter may take the inheritance of a sonless man'. Yajnavalkya said 'The son of a putrika is equal to him (the son). Narada stated 'in failure of a son, the daughter succeeds because she continues the lineage just like a son'.

H From the above texts, it is obvious that in ancient times, the daughter and the daughter's son were given preference over even the widow of a person in the matter of succession. It is said that ancient

commentators like Medha-thi-thi and Haradatta had declared that the widow was no heir and not-withstanding some texts in her favour, her right was not fully recognised till Yajnavalkya stated that the widow would succeed to the estate of a sonless person. In Yajnavalkya Smriti, the order of succession to a male was indicated in the following order: (1) son, grandson, great grandson (2) putrika-putra (3) other subsidiary or secondary sons, (4) widow and (5) daughter. After daughter, it was not expressly stated that daughter's son would succeed, but the parents were shown as the successors. Vijnanesvara, however, interpreted the word 'च' (cha), which meant 'also' in दुहितरश्चैव (Duhitaraschaiva) in the text of Yajnavalkya laying down the compact series of heirs as referring to daughter's son. The relevant text of Yajnavalkya has been quoted above. Vijnaneswara interpreted the word 'cha' (च) referred to above as follows:—

> च शब्दाद्दुहित्रभावे दौहित्रे धनभाक् यथाह विष्णुः अपुत्र पौत्रसन्ताने दौहित्रा धनमाप्नुयुः । पूर्वेषान्तु स्वधाकारे पौत्रा दौहित्रका मता'' इति । मनुरपि अकृता वाकृता वापि यं विन्देत् सदृशा सुतं पौत्री मातामहस्तेन दद्यात् पिण्डं हरेद्धनमिति ।

(By the import of the particle, 'also', the daughter's son succeeds to the estate on failure of daughters. Thus Vishnu says "If a man leaves neither son, nor son's son, nor wife, nor female issue, the daughter's son shall take his wealth. For in regard to the obsequies of the ancestors, daughter's sons are considered as son's son. Manu likewise declares 'By that male child, whom a daughter whether formally appointed or not shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation and possess the inheritance.) It may be noticed that but for the above interpretation of the word 'cha'(च) a daughter's son would have come in as an heir after all agnates (गोत्रजा as the daughter's son is only a cognate (Bandhu). As a result of the above interpretation, the daughter's son was promoted in rank next only to his maternal grand-mother and his mother whose interest in the estate was only a limited one. Viewed from this situation, the reason for abandoning the practice of appointing a daughter as putrika and treating her son as putrika putra becomes clear. When a person had two or more daughters, the appointment of one of them would give her primacy over the wife and the other daughters (not so appointed) and her son (appointed daughter's son) would succeed to the exclusion of the wife and other daughters and their sons and also to the exclusion of his own uterine brothers (i.e. the other sons of the appointed daughter). Whereas in the case of plurality of sons all sons would succeed equally, in the case of appointment of a daughter, other daughters and their sons alongwith the wife would get excluded. It is

A probably to prevent this kind of inequality which would arise among the daughters and daughter's sons, the practice of appointing a single daughter as a putrika to raise an issue must have been abandoned when people were satisfied that their religious feelings were satisfied by the statement of Manu that all sons of daughters whether appointed or not had the right to offer oblations and their filial yearnings were B satisfied by the promotion of the daughter's sons in the order of succession next only to the son as the wife and daughters had been interposed only as limited holders.

In *Ghanta Chinna Ramasubbayya & Anr.* v. *Moparthi Chenchuramayya, Minor & Ors.* (supra), the Privy Council after quoting with C approval a passage in D. F. Mulla's Book on Hindu Law (p. 40, 9th Edition) where it had been stated that although the practice of appointing daughter to raise up issue had become obsolete, the daughter's son continued to occupy the place that was assigned to him in the order of inheritance observed thus:

D "The daughter's son owes much to Vignaneshwara for his place in the scheme of the law of inheritance for, in the subjoined important text of Yajnavalkya, which forms the entire basis of the Mitakshara law of succession the daughter's son is not expressly mentioned. "The wife, and the daughters also, both parents, brothers likewise and their sons, cognates, a pupil and a E fellow student: on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all persons and classes," Colebrook, Mit. Ch. ii s. 1, v. 2. By interpreting the particle "also" in the above text, Vignaneshwara gave the daughter's son a place in the law of inheritance. "By the import of F particle 'also' (sects. 1 and 2) the daughter's son succeeds to the estate on failure of daughters. Thus Vishnu says 'if a male leave neither son, nor son's son nor (wife nor female) issue the daughter's son shall take his wealth for in regard to obsequies daughter's sons are considered as son's sons. .....'," Colebrook, Mit. Ch. ii, s. 2, v. 6. It is interesting to note the remark of Mandlik on the G above interpretation by Vignaneshwara. He says: "After the word daughter's son in the above text occurs the particle (Chaiva) 'also', to give some sense to which Vignaneshwara introduces here, the daughter's son in conformity with a text of Vishnu, 'the wealth of him' who has neither sons nor grandsons goes to daughter's son, for .....' " Compare Manu ch. IX; v. 136. (Mandlik's trans- H lation, p. 221). By the above ingenious exposition, the famous compiler of the Mitakshara shaped the law into conformity with the needs of the day without appearing to make any change and

thus gave the daughter's son his present place in the law of inheritance". A

Dr. Nares Chandra Sen-Gupta in his Tagore Law Lectures, 1950 on 'Evolution of Ancient Indian Law' also subscribes to the view that the institutions of putrika and putrika-putra had become obsolete several centuries ago and observes at pages 146-148 thus:— B

"In later Smritis, the Putrika has lost all her importance. For already the daughter as such is mentioned by them as heir, irrespective of her being a Putrika, after the sons and the widow. Manu too, while he begins by giving the formula by which a girl could be made a Putrika, in the immediately following slokas, says that a daughter and a daughter's son as such inherit to a sonless person. In Yajnavalkya the Putrika is barely mentioned, but the inheritance of the daughter after the widow is well settled. C

Obsolesence of Putrika

Now if a daughter and her son inherit as such and if every daughter's son, and not merely the Putrika's son inherits and, as in Baudhayana, offers oblations to the maternal grand-father as such; all practical utility of Putrika disappears, and the institution naturally ceases to exist. D

The obsolescence of this custom in the time of Manu and Visnu and others appears from the absence of further details about this institution in any of these Smritis. E

Manu, indeed, true to its character as an encyclopedaeic digest of all texts gives us several texts relating to the Putrika, which belong to different strata of the history of law. It is singular, however, that in his enumeration of the twelve kinds of secondary sons (IX, 159, 160) he omits any reference to the Putrika or her son. In another place (IX, 123 et seq.) however he deals with the Putrika's son, but his treatment of the subject is mixed up with that of the daughter's son generally. As already pointed out, he lays down the law that a Putrika is made by a contract at the time of marriage (IX, 127), but, immediately after that, he follows with a text laying down that a daughter's son as such inherits to a sonless person and offers pindas both to the father and the maternal grand-father (IX, 132). This he emphasizes by saying that the son's son and the daughter's son (not Putrika's son alone) are equal in all respects (IX, 133, 136, 139). In IX, 140 he lays down the order in which the Putrika's son offers pindas to his maternal ancestors, while in IX, 135 he says that on the Putrika dying sonless, her husband inherits to her, thus indicating F G H

A that a true husband-wife relation for spiritual and legal purposes now exists between her and her husband. If we remember that the present text of the Manusamhita was essentially a compilation of all the texts of law which were current at the date of compilation in the name of Manu and that accordingly many texts are incorporated in it which had long become obsolete at that date, B we shall be able to assess these texts at their proper value. It will then be seen that these texts, so far as the Putrika's son goes, do not lay down anything which was not already laid down by Gautama, Vasistha and Baudhayana. The other texts, however, which give to the son of the daughter "akrita va krita va'pi"— C "whether appointed or not" the same status as a Putrika's son, belong to a later stratum already indicated in Vishnu. These texts practically nullify the provisions about Putrikaputra who had evidently ceased to be an institution of any practical utility, so much so that he finds no place in Manu's enumeration of the twelve secondary sons. Later Smritis, beyond occasionally D mentioning the Putrikaputra among the twelve kinds of sons do not speak of them at all.

The zeal upon the obsolescence of the Putrika along with the various other kinds of secondary sons, except the Dattaka, was set by the text of the Adityapurana which gives an index expurgatorius of laws forbidden in the Kali Age and mentions E among others the recognition of sons other than Aurasa and Dattaka. This text, as the Smritichandrika, Parasara, Madhava and others observe, makes the institution of Putrika void in the Kali Age. From the historical point of view we can only look upon this as a record of the contemporary fact, that this practice F had gone out of vogue."

We are broadly in agreement with the following passage occurring in Mayne's Hindu Law (1953 Edition) at pages 181-182 which while dealing with the reason for putrika-putra losing importance and the emergence of the adopted son as the only other son recognised by modern law states:— G

"Apart from the exceptional kshetraja son, the prominence of the putrika-putra or the son of an appointed daughter is an indication of the prevailing usage which was all in his favour. His equality in status with the aurasa son both for spiritual and temporal purposes was established from the earliest times and he had H to offer pindas both to his father and to his maternal grandfather and he took the estate of his own father if he left no other son. In many respects therefore, he was like the son of two fathers and

it must have been increasingly felt that his father should not be deprived of the continuance of his own line. The son of the appointed daughter, in offering pindas to his mother, had to recite the gotra of his maternal grandfather, as in the putrikakarana marriage the gift of the girl was not complete. For religious purpose, this anomalous position of a son of two fathers must have been found to be unsatisfactory and, as a consequence, there was the repeated injunction not to marry brotherless maidens, which would make it difficult to secure suitable bridegrooms if the institution of putrikaputra was insisted upon. There was also the injustice to his uterine brothers who were excluded by their appointed brother from the enjoyment of their maternal grandfather's property. Besides, the daughters other than the appointed daughter appear to have come into their own by the time of the Arthasastra of Kautilya. This must have led to the gradual recognition as heirs to the maternal grandfather of sons of daughters without any appointment, while at the same time the putrikaputra's duty to offer pinda to the maternal ancestors was imposed also on the daughter's son. But as the daughter's son was only a bhinnagotra sapinda, it became necessary that an adoption of a son should be made whenever a continuation of the direct line was desired either for spiritual or temporal purposes. All these reasons must have powerfully operated to bring the adopted son into a new prominence. Accordingly, Manu provided for the identity of the adopted son with the family into which he was adopted."

Now that the practice of appointment of a daughter as putrika has become obsolete, all daughters and their sons stand in the same position. This perhaps is the reason as to why such practice was given up.

It was in the alternative contended that when once it was established that at the time of the ancient Smritis, a Hindu had the right to appoint a daughter for the purpose of raising a son for him that right would continue to be in existence until it was taken away by a competent legislature—a law making body as we understand today. It is also argued that the theory of a practice once recognized by law becoming obsolete was unknown. In support of the above submission, strong reliance was placed on the decision of the High Court of Madras in *Pudiava Nadar* v. *Pavanasa Nadar & Ors.*(1) In that case, the question before the High Court was whether the rule of Hindu law which excluded a congenitally blind person from inheritance had

(1) (1922) I.L.R. 45 Mad. 949.

A become obsolete or not. The case was referred to a Full Bench as there was an earlier ruling of that Court in *Surayya* v. *Subbamma*[1] which had taken the view that the said rule had become obsolete and doubts had been entertained about the correctness of that view. In *Surayya's* case (supra) Sadasiva Ayyar, J. observed: "I need not say that a rule becomes obsolete when the reason of the rule disappears B through change of circumstances and environments in the society which was governed by that rule", while Napier, J. who agreed with him said that owing to improved methods of education there was no reason why such a disqualification should still continue and that it was open to the Court to enunciate that rule by declaring it to be obsolete. Schwabe, C. J. who presided over the Full Bench which decided C *Pudiava Nadar's* case (supra) after observing:

> "The next question is whether, assuming a blind man's exclusion to have been the law at the date of the Mitakshara, it has since become obsolete. This, in my judgment, is a question of fact. A law does not cease to be operative because it is out of D keeping with the times. A law does not become obsolete because it is an anachronism or because it is antiquated or because the reason why it originally became the law, would be no reason for the introduction of such a law at the present time."

proceeded to state

E

> "In considering whether the custom has become obsolete in the sense of its having ceased to exist, the fact that it is an anachronism may be a proper matter to be taken into consideration, if there were evidence both ways, in weighing that evidence but otherwise it is of no importance. In this case, in my judgment, the evidence is all in favour of the custom having continued. There F is no oral evidence before the Court and no statement of any text writer or any judgment to which our attention has been called that this custom has become obsolete in the sense of its having been discontinued."

Oldfield, J. agreed with the Chief Justice. Coutts Trotter, J., the G third Judge delivered a separate but concurring judgment in which he observed thus:

> "To my mind, before allowing a mandate such as I conceive this to be, to be disregarded, it must either be proved by evidence to be actually disregarded in practice at the present time and as H I have already said there is no such evidence in this case—or it must be shown by an examination of the smritis and commentaries

(1) (1920) I.L.R. 43 Mad. 4.

to have been obsolete at the time they were written, and that the authors thereof merely repeated parrot-like the words of Manu and the Mitakshara as a maxim dignified by antiquity but not corresponding to the practice obtaining at the time either of the Mitakshara or of their own compilations. If it could be shown that commentators earlier than the Mitakshara had used language meaning or implying that the rule in this respect was obsolete, that might be a legitimate ground for the conclusion that the Mitakshara was merely repeating the words of Manu without inquiring whether the rule survived in force when the Mitakshara was written. If a commentator later than the Mitakshara used similar language, that might lead to a legitimate inference that, though in force at the date of the Mitakshara, the rule had subsequently become obsolete."

Ultimately the Full Bench held that the rule which excluded a congenitally blind person from inheritance had not been shown to have become obsolete and that in the twentieth century any amendment to that rule could only be done by a legislature. It is stated that the ratio of this decision has been dissented from in two subsequent decisions of the Madras High Court in *Amritammal* v. *Valli Mayil Ammal*(1) and in *Kesava* v. *Govindan*(2). We are not concerned with the said subsequent opinions. But the fact remains that both Schwabe, C.J. and Coutts Trotter, J. who decided the *Pudiava Nadar's* case (supra) did not state that a rule of Hindu law could not become unenforceable on the ground that it had become obsolete.

The rule of desuetude or obsolescence has been applied by this Court while interpreting Hindu law texts. In *Shiromani & Ors.* v. *Hem Kumar & Ors.*(3) one of the questions which arose for consideration was whether the practice of allowing a larger share of property to the eldest son which was known as 'Jethansi' or 'Jeshtbhagam' had become obsolete and therefore unenforceable. The claim of a party to such larger share was negatived by this Court by applying the principle that the rule though founded in the Sastras had become obsolete. In doing so, this Court relied on a passage in the Mitakshara, which when rendered into English read thus :

"Unequal division though found in the sastras (e.g. Manu IX, 105, 112, 116, 117, Yaj. II. 114) should not be practised because it has come to be condemned by (or has become hateful to) the people, since there is the prohibition (in Yaj. I. 156) that an

(1) (1942) I.L.R. Mad. 807 (F.B.).

(2) (1946) I.L.R. Mad. 452 (F.B.).

(3) [1968] 3 S.C.R. 639.

A action, though prescribed in the sastras, should not be performed when it has come to be condemned by the people, since such an action does not lead to the attainment of Heaven. For example, though Yaj. I. 109 prescribes the offering of a big ox or a goat to a learned brahmana guest, it is not now practised because people have come to hate it; or just as, although there is a Vedic B text laying down the sacrificing of a cow 'one should sacrifice a barren cow called anubandhya for Mitra and Varuna', still it is not done because people condemn it. And it has been said "just as the practice of niyoga or the killing of the anubandhya cow is not now in vogue, so also division after giving a special share (to the eldest son) does not now exist". C

There is another instance where an ancient rule regarding a form of marriage has been held to have become obsolete by courts. Gandharva form of marriage had been permitted and recognised in ancient times. Apart from Manu and some other Smritis recognising it, we D have the following sloka in Kalidasa's Abhijnana-Sakuntalam:—

गान्धर्वेण विवाहेन
बह्वयो राजर्षि कन्यका: ।
श्रूयन्ते परिणीतास्ता:
पितृभिश्चाभिनन्दिता: ।।

E (Many daughters of royal sages are heard to have been married by the ceremony called Gandharva, and (even) their fathers have approved them).

But in *Bhaoni* v. *Maharaj Singh*(1) and *Lalit Mohan* v. *Shyamapada Das*(2) it was held that the Gandharva form of marriage could F not be recognized as valid marriage as it had become obsolete.

While interpreting the ancient texts of Smritis and Commentaries on Hindu Dharmasastra, we should bear in mind the dynamic role played by learned commentators who were like Roman Juris Consults. The commentators tried to interpret the texts so as to bring them G in conformity with the prevailing conditions in the contemporary society. That such was the role of a commentator is clear even from the Mitakshara itself at least in two places—first, on the point of allotment of a larger share at a partition to the eldest son which is discussed above and secondly on the question of right of inheritance H of all agnates. The second point is elucidated by the Privy Council

(1) (1881) I.L.R. 3 All. 738.
(2) A.I.R. 1952 Cal. 771.

in the following passage in *Atmaram Abhimanji* v. *Bajirao Janrao & Ors.*(1) A

"It was however, recognized in course of time that the rule enunciated in the ancient texts, giving the right of inheritance to all agnates, however remote, and placing the cognates after them, was not in conformity with the feelings of the people; and B Vijnaneswara, when writing his commentary Mitakshara on the Smriti of Yajnavalkya, probably found that a usage had grown up restricting the samanodaka relationships to the fourteenth degree. He accordingly refrained from endorsing the all embracing rule of Yajnavalkya, and while mentioning it in the verse dealing with the subject, he gave prominence to the restricted C scope of the word, and supported it by citing Vrihad Manu. It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their D authority is recognized. As observed by this Board in *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1868) 12 Moo. I.A. 397, 436, the duty of a judge "is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has E to deal, and has there been sanctioned by usage. For under the Hindoo system of law, clear proof of usage will outweigh the written text of law." Indeed, the Mitakshara "subordinates in more than one place the language of texts to custom and approved usage": *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (1870) 13 F Moo. I.A. 373, 390. It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted."

The importance of the role of the commentators is explained by P. B. Gajendragadkar, J. (as he then was) in his article entitled G 'The Historical Background and Theoretic basis of Hindu Law' in the 'Cultural Heritage of India' (Vol. II) at page 427 published by the Ramakrishna Mission Institute of Culture thus:—

"In due course of time, when the distance between the letter of the Smritis and the prevailing customs threatened to get wider, commentators appeared on the scene, and by adopting H ingenious interpretations of the same ancient texts, they achieved

(1) 62 I.A. 139 at p. 143.

A the laudable object of bringing the provisions of the law into line with popular usages and customs. The part played by Vijnanesvara in this connection deserves special mention. The fiction of interpretation is seen in the three systems of jurisprudence known to us, the Roman, the English, and the Hindu system. But as Mr. Sankararama Sastri points out, there is an B interesting distinction among the three systems on this point. Whereas the authority of the English case law is derived from the Bench, that of the Roman *Responsa Prudentium* and the Sanskrit commentary is derived from the Bar. While in England the development of law is left entirely to the exigencies of C disputes acutally arising for adjudication, in India and at Rome, it was possible for the jurist to evolve and homogeneous body of Laws without reference to actually contested cases. In this connection, it may be interesting to refer to the observations of Bentham that a legal fiction is a "wilful falsehood having for its object the stealing of legislative power by and for hands D which could not and durst not openly claim it—and but for the delusion thus produced could not exercise it. Nevertheless, the legal fiction of interpretation has played a very progressive part in the development of Hindu Law. It is because this process was arrested during the British rule in this country that Hindu Law came to be fossilized, as judges relied mainly on the commen- E tators without taking into account the changing customs and usages in the Hindu community."

It was next contended by the learned counsel for the appellants that the rule against the appointment of a daughter by a Hindu to beget an issue for himself in Kali age enunciated by Saunaka and F others should be treated as only directory and if any person appointed a daughter for that purpose in contravention of that rule still her son would become putrika-putra of the person so appointing, with all the privileges of a putrika-putra. In support of the above contention, reliance was placed on the decision of the Privy Council in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma & Ors.*(1) in which G it had been held that the adoption of an only son though prohibited, having taken place in fact was not null and void under Hindu law. In that case, the Privy Council was faced with divergent opinions of the Indian High Courts on the interpretation of the relevant texts and was also probably moved by the creation of a number of titles which had been done on the basis of the opinions of some High Courts H which had taken the view that the textual prohibition was only directory and not mandatory by applying a rule of interpretation expound-

(1) [1899] 26 I.A. 113.

ed by Jamini, the author of 'Purva Mimansa' that all texts, supported by the assigning of a reason were to be deemed not as vidhi but as arthavada or recommendatory. The Privy Council had to reconcile in that case a number of inconsistent commentaries and judicial decisions. Ultimately it upheld the adoption with the following observations which were made with a lot of reservation:—

> "But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal, 1868) is grounded on a palpably unsound principle, and loses its weight. The second in time (Bombay, 1875) is grounded in part on the first, and to that extent shares its infirmity, and in part on texts of the Mitakshara, which are found to be misleading. So that it, too, loses its weight. The third (Bengal, 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in great measure on more solid ground, namely, an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara, which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning, then, in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts, or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the by ways of them, command their Lordships' assent. Upon their own examination of the Smritis, their Lordships find them by

A no means equally balanced between the two constructions, but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of B Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal."

Proceeding further, the Privy Council observed:

"A Court of Justice, which only declares the law and does C not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. D People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North West Provinces and E in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas, in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection F is a matter for the legislature, and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance."

In these appeals we are not faced with the situation with which G the Privy Council was confronted. No judicial decision of any court where a title had been upheld on the basis of putrika-putra form of adoption has been brought to our notice. If really such a practice was prevailing in recent centuries, persons with only daughters and no sons being not uncommon there should have arisen a number of cases. We may remember that the Privy Council while deciding the case of H *Thakoor Jeebnath Singh* (supra) observed that it was not necessary to decide the validity of the practice of appointment of a daughter to raise an issue 'although there certainly does not appear to have arisen

in modern times any instance in the courts where this custom has been considered'. The only case where such a title was set but not established was the case of *Lal Tribhuwan Nath Singh* (supra) which has been dealt with separately by us. Moreover we are not concerned in this case with the eligibility of a person being taken in adoption but the existence of the very institution of putrika-putra itself. When we have the predominant opinion of commentators supporting its non-existence in the last few centuries extending to a period prior to the life time of Raja Dhrub Singh and there are good reasons for the Hindu society abandoning it, it would be inappropriate to resurrect the said practice by placing reliance on the above argument of the learned counsel, which in the circumstances appears to be highly tenuous.

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At this stage, it should be stated that the High Court after considering in detail the evidence on record came to the conclusion that the family of Raja Dhrub Singh was governed by the Benaras School of Hindu law and not by the Mithila School (See para 64 of the judgment of G. N. Prasad, J. and paras 229 and 230 of Madan Mohan Prasad, J.). No ground was made out by the learned counsel for the appellants in these appeals to take a different view. We hold that the family of Raja Dhrub Singh was governed by the Benaras School of Hindu Law and there is no occasion to apply principles of the Mithila School of Hindu law to the present case.

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The question whether the family was governed by the Benaras School or by the Mithila School became relevant before the High Court as an attempt was made by the appellants herein relying on some commentaries which were considered as having local application to show that the practice of appointment of a daughter to raise an issue was in vogue amongst those governed by the Mithila School. The said commentaries on which reliance was placed by the appellants have been dealt with in detail by Madan Mohan Prasad, J. in paragraphs 204 to 215 of his judgment. Summarising his views on them, Madan Mohan Prasad, J. observes at paragraphs 214 and 215 of his judgment thus:—

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> "214. It will thus appear that of all the other writers of Mithila School mentioned earlier, Pandit Amarit Nath Jha is the only one who has unequivocally said that during the Kali age these four kinds of sons, viz. Aurasa, Dattaka, Kritrima and Putrika putra, can be made and recognised. It will, however, appear that he has taken no note of Saunaka and Adityapuran. Even though he has referred to Nanda Pandit and discarded the Kshetraj on account of the interpretation by Nanda Pandit, he

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A has not referred to the prohibition of Saunaka and the acceptance thereof by Nanda Pandit and naturally, therefore, he has given no reasons for differing with Nanda Pandit and the several other commentators who have been discussed earlier and who accepted the prohibition of Saunaka so as to include the Putrika Putra.

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215. The learned author of this book is a product of the 19th century. Whether the custom of Putrika Putra obtain in Mithila is a question which cannot be answered merely on the basis of the precept of this writer that even during the Kali age such sons should be made. It may be recalled that the Privy Council C in the case of Thakur Jeebnath said that for more than a century not a single case of adoption in the form of Putrika Putra was brought to their Lordship's notice. Barring the few cases of Narsing Narain, Thakur Jeebnath and Babui Rita Kuer no other case was brought to our notice even today where the custom of D Putrika Putra had been alleged or decided. Be that as it may, nobody has claimed any authority for Pandit Amrit Nath Jha, except with respect to the Mithila School. His authority will, therefore, lend support, if at all, to the case of the plaintiffs of Title Suit No. 25 of 1958, only if they are abloe to establish that the Bettiah Raj family was governed by the Mithila School of E Hindu law. I may state here that the conclusion which I have arrived at on this question is that the evidence in this case does not prove that the aforesaid family was governed by the Mithila School; on the other hand it is clear that it was governed by the Benares School of Hindu Law and in view of that the authority of Pandit Amrit Nath Jha is of no avail to the plaintiffs."

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We are generally in agreement with his views and we add that the material placed before us is not sufficient to hold that the institution of putrika-putra was in vogue during the relevant time even amongst persons governed by the Mithila School. On a consideration of the entire matter, we hold that throughout India including the G area governed by the Mithila School, the practice of appointing a daughter to raise an issue (putrika-putra) had become obsolete by the time Raja Dhrub Singh was alleged to have taken Raja Jugal Kishore Singh as putrika-putra. We, however, do not express any opinion regarding the applicability of the above view to Nambudiris of Kerala. We should also record that the High Court has taken the H view on a careful analysis and consideration of the entire material before it that Raja Dhrub Singh had in fact not appointed his daughter as a putrika to beget a putrika-putra for him. Apart from the

evidence led in the case, the case of the appellants has become very weak by the inconsistent positions taken up by the parties from stage to stage in the case as can be gathered from paragraphs 68 to 73 of the judgment of G. N. Prasad, J. We find it appropriate to quote here paragraph 73 of the judgment of G. N. Prasad, J, which reads thus:—

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> "73. All these statements reveal a strange state of affairs. Ambika (plaintiff No. 1) thought the plea with regard to the Kritrim form of adoption to be correct, but Kamleshwari (plaintiff No. 6) thought it to be incorrect. Ambika had no knowledge of any plea of Dattak form of adoption having been set up on his behalf. Kamleshwari not only characterised that plea to be wrong but even disclaimed to have any such plea having been taken on his behalf. In other words, the plea of Dattak form of adoption was taken without the knowledge or authority of either of the two deposing plaintiffs, namely Ambika (D.W. 15) and Kamleshwari (D. W. 27), and it was evidently done at the initiative of the Karpardaz of the legal adviser of the plaintiffs of the title suit No. 25, who obviously could have no personal knowledge of the real facts, although, however, the plea of Dattak form of adoption was also given up at a later stage. The multiplicity of the various pleas cannot be lost sight of while dealing with the surviving plea of Putrika-Putra form of adoption, particularly when this also was not taken in the first instance. It seems to me that the entire case of adoption put forward on behalf of the plaintiffs of Title Suit No. 25 is the product of imagination of their legal advisers, having little relation with true facts."

B C D E

After giving our anxious consideration to all aspects of the case, we hold that the practice of appointing a daughter as a putrika to beget a son who would become the putrika-putra had become obsolete long before the life time of Raja Dhrub Singh and Raja Jugal Kishore Singh could not, therefore, in law be considered as putrika-putra of Raja Dhrub Singh. It follows that the appellants who claim the estate on the above basis cannot succeed. In view of the foregoing, it is not necessary for us to go into the question whether the decisions of the Privy Council rendered prior to the abolition of its jurisdiction over India were binding on the Indian Courts, which is precisely the question formulated in the certificate issued by the High Court.

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For the foregoing reasons, the appeals (Civil Appeals Nos. 114—119 of 1976) alongwith the Special Leave Petition therefore fail and are dismissed. In the circumstances of the case, we absolve the appellants from the liability to pay costs in all the courts.

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S.R. *Appeals dismissed.*