

4. A special association among persons other than the relations here enumerated, is not to be acknowledged as a reunion of parceners : for the enumeration would be unmeaning.

5. Other particular rules, which have been set forth under the head of partition among brothers, must be observed in this case also.

6. Thus has the right of reunited parcener been explained.

CHAPTER XIII.

On the distribution of effects concealed.

1. The distribution of that, which was concealed at the time of partition and is afterwards discovered, shall be now taught. On that subject MANU says, "When all the debts and wealth have been justly distributed according to law, any thing, which may be afterwards discovered, shall be subject to an equal distribution."*

2. The division of it should be precisely similar to that which had been previously made ; and a less share is not to be given, nor no share, to the person who concealed the property, as a punishment of his concealment. Such is the meaning of the sentence

ANNOTATIONS.

5. *Other particular rules*] Wealth, acquired without use of the joint stock, belongs to the acquirer exclusively, and is not shared by the rest : but, in the instance of the gains of science, such of the brethren as are equally or more learned participate ; and, in the case of wealth acquired with the use of the joint stock, all partake. These and other special rules, set forth under the head of partition among the brethren, must be observed also in the case of partition after reunion. SRIKRISHNA.

2. *For there is no reason.*] Since the text is significant as obviating a supposition, that the withholder of the effects shall have a smaller share, or none, it is illogical to make it a restriction of the precept for allowing a deduction of a twentieth part and so forth to the eldest &c. SRIKRISHNA.

Since the sentence, "shall be subject to an equal distribution," is pertinent as grounded on the reasons here stated ; it is wrong to make it a restriction of a different text. ACHYUTA.

* MANU, 9. 218.

“shall be subject to an equal distribution.” Nor is the text intended to enjoin the allotment of equal shares of the property to all the parceners : for there is no reason for prohibiting the deduction in favour of the eldest, and so forth ; and it would follow, that brothers belonging, one to the sacerdotal, another to the military, and the rest to other tribes, would have equal shares.

3. Thus YAJNYAWALOYA says, “Effects, which have been withheld by one coheir from another, and which are discovered after the separation, let them again divide in equal shares : this is a settled rule.”*

4. So CATYAYANA declares [by the close of the following text, †] that a division shall be again made of that which has been distributed in an undue manner. “What has been concealed by one of the coheirs, and is afterwards discovered, let the sons, if the father be deceased, divide equally with their brethren. Effects, which are withheld by them from each other, and property which has been ill distributed, being subsequently discovered, let them divide in equal shares. So BHRIGU has ordained.”

5. But the maxim, “Once is the partition of inheritance made,” ‡ relates to the case of a fair distribution.

6. “Being subsequently discovered.”] The meaning is, that what has been already divided, is not to be again distributed.

7. So CATYAYANA says, “Effects, which have been taken by a kinsman, he shall not be compelled by violence to restore : and the consumption of unseparated kinsmen, they shall not be required to make good.” By gentle means, and not by violence, a kinsman shall be made to restore the effects taken by him. But what has been consumed by a coheir during coparcenary over and above his due proportion, he shall not be required to make good.

8. In answer to those authors, who contend, that, in this case, as there is the property of another in the common effects, he, who embezzles them, is a thief and of course a sinner ; the following argument is propounded : since the received import of the term conveys, that a thief is he, who usurps a right in the property of

ANNOTATIONS.

If a younger brother be the person who withholds the effects, the eldest, though faultless, would have less than his regular share, and the youngest more. This objection is also to be understood, RAGH, on *Daya-bhāga*.

The *Mitāoshara*, SULAPANI, CULLUCA-BHATTA and others maintain the doctrine which is here opposed. RAGH. *Ibid*.

* YAJNYAWALOYA, 2. 127.

† SRIORISHNA.

‡ MANU, 9. 47.

another, without a title [by gift, sale or other act of the owner,*] being clearly conscious, that the thing belongs to another ; but, in the present case, the person cannot distinguish 'this is mine and that is another's,' for the goods are undivided ; therefore, as donation is complete then only, when the owner, conscious that the thing is his, relinquishes it with a view to its becoming the property of another person, and that other person is sensible of the property, apprehending 'this is become mine ;' but that cannot occur in respect to common goods, and therefore common property is pronounced unfit to be given ; so theft likewise is complete by the consciousness that 'this is not mine, but another's ;' therefore the crime of theft is not imputable to the act of embezzling what is common.

9. But the term embezzlement or withholding (*apahara*) signifies concealment ; and concealment is not exactly theft ; for the word theft is in use for an unconcealed taking. Thus CATYAYANA says, "The taking of another's goods, whether privately or openly, by night or by day, is termed theft." Accordingly [since the concealment of common property is not theft,†] it has been before declared, that the withholder of the goods shall not be compelled by violence to restore them. (§ 7.) But, if it were a theft [in him who withholds common property,‡] then, under the text which directs, that "Having compelled the thief to restore the stolen goods, the king should smite him by various modes of con-dign punishment :"[§] admitting even that he should be made to restore the goods by gentle means, still the smiting of him would be indispensable.

10. This too [namely that such is the definition of theft,§] appears from the sages authorizing the allotment of a share even to the withholder of common property.

11. Accordingly it is observed by VISWARUPA, 'The crime of theft is not here imputable ; for the recital of the text obviates that supposition.' His meaning is, because the sense of the verb to steal is not applicable to the case.

12. Hence also it is remarked by JITENDRIYA, in the chapter on expiation and penance, that 'if a man seize gold appertaining

ANNOTATIONS.

12. *Consequently there is not in this case a complete theft.*] RAGHUNANDANA contests this reasoning, without however materially differing as to the result. He says, 'It is the doctrine of JITENDRIYA, and of the authors of the *Daya-bhaga*

* SRICRISHNA.

§ YAJNYAWALOYA.

† SRICRISHNA.

|| AOJYUTA and SRICRISHNA.

‡ SRICRISHNA.

to another by mistake for iron or other matter [of little value ;] or something which is not gold, mistaking it for this substance ; or a thing resembling some chattel of his own but belonging to another person, by mistake for his own ; in all these cases there is not a complete seizure [or wilful taking of the gold :] for, in these several instances, there is not a knowledge of its belonging to another person, being such as the thing in fact is.' In like manner, in the present instance also, [viz. in that of common property,*]

 ANNOTATIONS.

property,*]

and *Prayasohitta-Vivoca*, that, if goods be taken knowing them to be another's the crime of theft is committed ; but that crime is not imputable to one who uses them by a mistake as to the substance. Their assertion, that the appropriation of another's property by mistake for his own is not theft, appears unsatisfactory : for it is at variance with the story of NRIGA in the *Bhagavata*. "A cow, belonging to a certain eminent priest, strayed into my herd of kine, and being confounded with them was given by me, ignorant of the circumstance, to a man of the sacerdotal tribe. The owner, seeing her led away, claimed her for his own ; and the other replied, she is mine by gift ; NRIGA gave her to me. The priests contending, addressed me setting forth their claims : you are the giver, said the one, the lawless taker, said the other. Hearing this, I was confounded. For that sin was I transformed into a lizard ; since which time I have seen myself, O prince, in this degraded form."†

‘But, if many rings belonging to divers persons be mixed together it is no theft if one sell another's ring by mistake for his own, in consequence of their similarity for they were placed together under the conviction, that, in the case of many articles which have no discriminative mark, as cowries or the like, belonging to different persons, being intermixed, no offence is committed if they be reciprocally used by a sort of barter ; else a person would not do so, [he would not place them together,‡] under the apprehension of offence. The following passage of the *Matsyapurana* relates to this case : "The man, who, through ignorance, makes a sale of another man's chattels, is faultless ; but, wilfully doing so, he merits punishment as a robber." Therefore, the disposal of chattels belonging exclusively to another person, without such person's consent and with the reflexion, "this is mine and shall be disposed of according to my pleasure," is theft. Sometimes it is mental, being a resolution only. In other instances it is corporeal, as an actual gift or sale. But such [a theft§] cannot happen in the case of the goods of undivided brethren ; for it cannot be distinctly ascertained "this is mine and that is another's." Accordingly [since there is no theft,||] CATYAYANA says, "Effects

* SRICRISHNA. † SRI-BHAGAVATA, 10, 64. ‡ CASIRAMA.
§ CASIRAMA. || CASIRAMA.

the same holds good : for, previous to partition, a discriminative property, referrible to particular persons relatively to particular things, is not perceived. Consequently there is not in this case a complete theft.

13. Or, admitting that it is a theft, the guilt of robbery is not incurred : for the text allows a share even to the person who embezzles the property. Else, in the case of embezzling gold or other valuable effects, the offender, being degraded from his tribe, would have no allotment.

14. If it be alleged, that, since there is no text expressly authorizing the allotment of a share to the thief who has embezzled gold to an amount sufficient to cause his degradation from his tribe, the rule for the allotment of a share is presumed to be applicable to the case of theft of other effects : but why may not the law, which forbids the stealing of gold or the like, be the rather considered as relating only to goods appertaining to another, and not common? Still, however, there is no proof or authority on which to ground the selection [of one of these restrictions in preference to the other.] The answer to this alleged objection is as follows : in the legal definition, "the taking of another's goods is

ANNOTATIONS.

which have been taken &c." (§ 7) Here taken [or more literally embezzled] is used metaphorically.

'Thus also there is no offence in taking a treasure which is found. For it is a thing of which the owner is lost.

'There is not similar [innocency*] in the case of associated traders : for no text indicates it. On the contrary, it is directed by a passage of YAJNYAWALOKYA (2, 264.) that a fraudulent partner shall be dismissed without profit. Trader have not, as in the instance of inherited effects, a property vested in several persons relatively to the same chattel. But, by reason of intermixture, the property in the goods is uncertain.'

14. *An oblation such as is presented at the full of the moon, intends particularly the offering of a cake of ground rice.*] Two sorts of oblations are commonly used at different sacrifices. One, which is the simplest, consists of clarified butter only ; the other, termed *purodasa*, is a cake of ground rice kneaded with hot water into the form of a tortise and roasted on a specific number of potsherds before one of the consecrated fires ; it is then smeared with clarified butter, and presented as a burnt offering in the second consecrated fire.

* ACHYUTA.

theft,"* "another's" signifies appertaining to a different person to the utter exclusion of any right of his own; for, of two sorts of property common and several, the notion of several property is most readily presented. Therefore the proposition is similar to that which provides for the previous performance of a sacrifice, [preparatory to the sacrifice with the acid *asclepias*,†] where an oblation, such as is presented at the full of the moon, intends particularly the offering of a cake of ground rice, as used at the *Agnishoma* [one of the ceremonies performed at that period,] and not the oblation of liquid butter, as practised at the *Upansu-yaga*, for this is common to the *Agnishoma* and to sacrifices bearing other denominations.

15. Accordingly [since it is not theft,‡] there is no censure any where expressed in BALOGA on such a subject [viz. in regard to the taking of common property.§]

16. It is a remark of BALA, that, as in the instance of green and of black kidney beans|| in relation to sacrifices, where it might be supposed, that black kidney beans would be a fit substitute when green kidney beans are not procurable, but the use of such beans is prohibited by an express passage of scripture which declares that black kidney beans are unfit to be employed at sacrifices; so, notwithstanding the taking of that which is, and that which is not, his own, [being common,] is permitted, still the taking of what exclusively is not his own is forbidden: this is puerile; for the definition of theft, as above explained, is not applicable [to the case of embezzlement of common property.¶] It cannot be

ANNOTATIONS.

15. *Accordingly since it is not theft.*] The author has, in this disquisition, relied on the doctrine of those who maintain a general property vested in the coparceners over the aggregate estate. But, according to his own doctrine of several rights to portions of the estate, it is difficult, even with all this laborious argument, to obviate the inference of theft. SRIORISHNA.

16. *It is a remark of BALA.*] In the silence of the commentators, it appears uncertain whether this be the name of an author: and whether the person noticed in the preceding paragraph under the name of BALOGA, be intended: or whether the meaning be, 'it is the remark of a child (*bala*): it is puerile.

* CATTAYANA. Vide Supra, § 9. † ACHYUTA. ‡ SRIORISHNA.

§ ACHYUTA and SRIORISHNA.

|| *Mudga*, *Phaseolus Mungo*, green kidney beans. *Masha*, *Phaseolus maw. v. radiatus*; black kidney beans.

¶ SRIORISHNA.

affirmed, that black kidney beans are unemployed in sacrifices ; although ground particles of green beans, intermixed with black beans, be employed ; for, in such case, mixed black beans appear to be used at the sacrifice.

17. Thus has partition of effects concealed by coparceners from each other, been discussed.

CHAPTER XIV.

On the ascertainment of a contested partition.

1. The determination of a doubt, regarding the fact of a partition having been made, is next explained. On that subject NARADA says, "If a question arise among coheirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by the separate transaction of affairs."*

2. The mention of kinsmen is intended to show, that, if such be forthcoming, other persons should not be made witnesses. Accordingly [since a recourse to other witnesses is forbidden when kinsmen are forthcoming,†] YAJNYAWALOYA says, "when partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives and witnesses, and by written proof ; or by separate possession of house or field."‡

ANNOTATIONS.

As in the instance of green and of black kidney beans.] The author here adverts to the reasoning contained in the *Mimansa*, 6. 3. 6. Vide *Mitashara*, C. I. Sect. 9, § 11.

1. *By the record of the distribution.]* ACHYUTA and SRIORISHNA notice a variation in the reading of the text, *bhoga-lekhyena*, in place of *bhaga-lekhyena*. Their exposition of that reading is 'by occupancy or by a writing.' In the various quotations of this passage in numerous compilations, no other hint of such a reading has been found : except in BALAM-BHATTA'S commentary on the *Mitashara*.

JIKUTA-VAHANA makes subsequent mention (§ 5) of another unauthorized variation of the text.

* NARADA, 13. 35.

† SRIORISHNA.

‡ YAJNYAWALOYA, 2. 150.