susceptibilities of individuals can be allowed to override such rights." We entirely agree with those remarks, and we think they apply with great force to the present case. To justify an order under section 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some "wrongful" act that may probably occasion a breach of the peace. In our judgement there was no reason to believe that any of the applicants were about to do any of these things. If the order was intended (as we think it was) absolutely to prevent the applicants and their co-religionists from killing cows the order was not justified and is illegal. The Magistrate says:—"To prevent them doing overt acts likely to cause a breach of the peace, &c., it seems to me necessary to bind the leading and more influential men among them under section 107."

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We allow the application and set aside the order. Bail bonds, &c., will be discharged.

Application allowed.

APPELLATE CIVIL.

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May 5.

Before Mr. Justice Richards and Mr. Justice Tudball.

BHAGIRATHI (DEFENDANT) *v.* JOKHU RAM UPADHIA AND OTHERS (PLAINTIFFS) AND RAM NANDAN AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Alienation by father—Lawful family necessity—Second marriage of member of the family—Marriage in the Asura form.

The first marriage of a member of a Hindu joint family is a lawful family necessity for which an alienation of family property will be justified. *Sundrabai* v. *Shivnarayana*, (1) followed. Every second marriage, however, is not a legal necessity. But where a Hindu's wife died while he was 28 years of age, leaving a son about 9 years old at that time, and he married a second time and for that purpose alienated family property: *Held* that the alienation under the circumstances was for lawful necessity and was binding on the son.

Per RICHARDS, J.—Bearing in mind that this (*asura*) form of marriage is quite common and that the purchase of a bride in this sense is quite common, it

* Second Appeal No. 704 of 1909, from a decree of W. R. G. Moir, District Judge of Jaunpur, dated the 13th of April, 1919, modifying a decree of Harbandhan Lal, City Munsif of Jaunpur, dated the 7th of November, 1908.

(1) (1907) I. L. R., 32 Bom., 81.

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cannot be held that the money which was raised was not part of the expen a legal marriage.

THE facts of this case were as follows:—

One Bhagwati Singh was a member of a joint Hindu family. The appellant was his son by his first wife. That wife having died, Bhagwati Singh married again. For this marriage, which was in the *asura* form, he had to pay Rs. 170 to the bride's father. A loan for this amount was obtained from the plaintiff, and joint family property was mortgaged by Bhagwati Singh and his uncle, Bindeshri Singh, to secure this loan. Bhagwati Singh was about 28 years of age at the time of his second marriage. The plaintiff sued on foot of his mortgage; the appellant objected that the debt was not binding upon him as it was not contracted for a legal necessity and he had not been benefited by it, and that the purpose of the debt was one which was opposed to public policy. Both the lower courts overruled these objections and decreed the suit. Hence this appeal.

Munshi *Haribans Sahai*, for the appellant:—

The purchase of a wife by a Hindu widower having issue by the former wife is not an object which under the Hindu Law would validate a mortgage of the family property. By "purchase" I mean a marriage in the *asura* form, in which the father of the bride is paid a sum of money as the consideration for his giving his daughter in marriage, and not merely as a voluntary present to the bride's relations made at the time of the marriage; in the present case the money was paid to the father as a condition precedent to the marriage. An agreement to pay such a sum of money has been held to be immoral and opposed to public policy. *Kalavagunta Venkata Kristnayya* v. *Kalavagunta Lakshmi Narayana* (1), *Dholidas Ishvar* v. *Fulchand Chhagan* (2), and *Baldeo Sahai* v. *Jumna Kunwar* (3). Such payment being immoral and opposed to public policy is not a legal necessity and would not be binding upon the son. The "marriage expenses" of a member of a joint Hindu family may be a legal necessity, but they would not include the price paid for the girl. J. C. Ghose: *Principles of Hindu Law*, 2nd edn., p. 672.

(1) (1908) I. L. R., 32 Mad., 185. (2) (1897) I. L. R., 22 Bom., 658.
(3) (1901) I. L. R., 23 All., 495.

case of *Sundrabai Javji* v. *Shivnarayana*, (1) lays down that the marriage expenses of a son constitute a legal necessity; but there is no authority for the proposition that a second marriage of a father constitutes a legal necessity.

In another case it was even held that an alienation by a Hindu father to defray the expenses of the marriage of his son would not be binding upon his sons; *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya*, (2). There are observations in my favour in the case of *Durbar Khachar Shri Odha Ala* v. *Khachar Harsur Oghad* (3).

Munshi *Gokul Prasad*, for the respondents:—

The marriage of a Hindu is a *sanskara*; the existence of a wife is necessary for the performance of certain religious ceremonies, for example, *agnihotri*, which cannot be performed unless there is a wife. Siromani; *Hindu Law*, p. 156, 158. A second marriage of a Hindu is therefore necessary and enjoined by the *shastras*. For secular purposes, too, the marriage was desirable and proper. The age of the widower was only 28 and he had a child to be looked after. As to the *asura* form of marriage, all that *Manu* lays down is that one should not take anything as the price of his daughter. The marriage, though condemned, is quite valid. The father of the bride is prohibited from taking money for the marriage, but the bridegroom is not prohibited from making a payment. In the *arsha* form of marriage, which is an approved form, the payment is made in kind instead of in cash; that is the only difference which is not one of principle but of detail. The loan was expressed to be taken for "marriage expenses" (*bazarurat anjam kar shadi*). That would be a legal necessity; and the creditor was not bound to see to the application of the money. In the case of *Jairam Nathu* v. *Nathu Shamji* (4) it was held that the expenses of the marriage of younger brothers were a legal or family necessity. The uncle, Bindeshri Singh, as head of the joint family, was bound to perform the marriage of his nephew Bhagwati Singh. There is no essential difference between a first and a second marriage. The religious ceremonies are the same in both cases.

(1) (1907) I. L. R., 32 Bom., 81.
(2) (1903) I. L. R., 27 Mad., 206.
(3) (1903) I. L. R., 32 Bom., 348.
(4) (1906) I. L. R., 31 Bom., 54.

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Munshi *Haribans Sahai*, in reply :—

The necessary *sanskara* of marriage of a Hindu is performed and completed when he is married for the first time. A second marriage is neither necessary nor required by the *shastras*. Marriage is the last sacrament connected with the life of a Hindu. When once the sacrament is performed, no further religious ceremonies are required. Especially, when a son is begotten by him, he is deemed by the *shastras* to have performed all the pious obligations imposed upon him in this connection. Colebrooke *Digest of Hindu Law*, p. 302. The son is not bound to pay the price paid by his father for the second wife. If it is a prohibited form of marriage, then the borrowing of money to bring about such a marriage is opposed to public policy.

RICHARDS, J.—This appeal arises out of a suit to enforce a mortgage. The facts are that one Madho Singh and one Bindesri Singh were own brothers. Bhagwati Singh was the son of Madho Singh. Bhagwati Singh married for the first time and had a son named Bhagirathi Singh, who is the principal defendant in the suit and the sole appellant in this Court. The first wife of Bhagwati having died, he married a second time. At the time of this marriage Bhagwati Singh and Bindeshri Singh as managing members of a joint Hindu family, executed the bond which is the foundation of the present suit. The property mortgaged was joint family property, and it has been found by the courts below that the money which was raised on the bond was applied in making a payment to the father of the second wife of Bhagwati Singh. In other words it was the price paid for the bride. Both the courts below decreed the suit. It has been contended on behalf of the appellant, first, that the marriage expense of a member of a joint Hindu family is not a legal necessity for which the family property can be pledged; secondly, that, even if the first marriage can be regarded as a family necessity, a second marriage cannot be so regarded, and thirdly, that, even assuming that a first and second marriage can be regarded as family necessities, money raised for the purpose of purchasing a bride can, under no circumstances, be considered a family necessity. The first point was not very strongly pressed, and the only authority was the case of

Adarazulu Narasimham v. *Devarabhotla Venkatanarayya* (1). In that case a Bench of the Madras High Court held that an alienation by a Hindu father for the purpose of defraying the marriage expenses of one of his four sons was invalid. This ruling was considered by the Bombay High Court at the case of *Sundrabai* v. *Shivnarayana* (2). The judgement of the Court was delivered by Mr. Justice CHANDAVARKAR, and the learned Judge points out that the Madras High Court proceeded on a misinterpretation of the texts relied on in their judgement. He also points out that the sacraments were not complete until after the marriage of the son had been duly celebrated. I entirely agree with the judgement of the learned Judge. He was, however, dealing with the case of a first marriage, and it has been contended that where a member of a joint Hindu family has been legally and properly married for the first time, all the sacraments enjoined by the Hindu religion have been performed, and that a second marriage, no matter how desirable, is no longer necessary for the celebration of these sacraments, and that, therefore, even admitting that the ruling of the Madras High Court cannot be supported, a second marriage is not a family necessity. At page 95 of the judgement reported in I. L. R., 32 Bom., 81, the learned Judge says:—"After this I need perhaps hardly add, that to those who are familiar with the usages of joint Hindu families, the proposition that the marriage of a coparcener in such a family does not constitute a family purpose so as to make all the coparceners liable for the expenses of the marriage, must appear startling. The very idea of a joint Hindu family is that it must be kept up and continued as long as the family is joint and all the coparceners wish to continue joint in estate; in the marriage of each coparcener for that purpose every other coparcener is interested; and so far as I am aware, it is upon that principle that the mutual relations of coparceners in Hindu families have been regulated up to this day." Although the learned Judge was dealing with the case of a first marriage, it seems to me that the view expressed in the passage above quoted, coming as it does from a very learned Hindu Judge, is entitled to very great weight. There can be no

(1) (1903) I. L. R., 27 Mad., 206. (2) (1907) I. L. R., 32 Bom., 81.

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doubt that it is desirable, and it is the natural condition of a adult male member of a joint Hindu family, that he should be married. In the case of a Hindu whose wife had died before the birth of a son it would be considered a great calamity if he could not marry a second time. So long as the family is joint, the marriage expenses must come out of the family property. The very essence of a joint undivided family is that all the property is joint. In the present case I think I am entitled to assume and ought to assume that a second marriage from the family point of view of Bhagwati Singh was desirable. He was apparently about 28 years of age and had only one son, the appellant, who must at that time have been a boy of nine years of age. It is true that there are no express findings on this subject, but I think the presumption is a fair presumption warranted by the circumstances of the case. The evidence on the point stands unrebutted. It seems to me therefore that the expenses of a second marriage of this nature is a proper family expense and such a family necessity as would warrant the managing member of the family in pledging the family estate.

The last point is the question whether, assuming all this, the raising of money for payment of the price for the bride can be regarded as a legitimate marriage expense. The form of marriage where money is paid for the bride is called the *Asura* form. There is no doubt that this is one of the forms of marriage which is not approved. On the other hand it cannot be argued for one moment that such a marriage is illegal or that the children of such a marriage are illegitimate. It has been conceded in argument that once such marriage is performed it is valid as any other form of marriage. It is also admitted that in many parts of India, particularly in those parts where the male population exceeds the female, this form of marriage is quite common even amongst Brahmins. At page 96 of Mayne's Hindu Law, 7th edition, the author quotes Manu:—"Let no father, who knows the law, receive a gratuity however small, for giving his daughter in marriage, since the man, who, through avarice, takes a gratuity for that purpose is a seller of his offspring." The learned vakil for the appellant also relied on a passage from Mayne's Hindu Law at pages 389 and 390 where the learned

...r refers to certain debts which are not payable by sons. One class of debt is said to be "Çulka," which is sometimes translated as toll. The author says "another meaning of the word 'Çulka,' translated toll, is a nuptial present given as the price of a bride, and this has been determined not to be repayable by the son, apparently on the ground that it constitutes the essence of one of the unlawful forms of marriage." We have been unable to find any authority for the above proposition. It seems to me that, bearing in mind that this form of marriage is quite common and that the purchase of a bride in this sense is quite common, we cannot hold that the money which was raised was not part of the expenses of a legal marriage. With regard to the text of Manu already cited, it is evident that the text of Manu has only been regarded as a disapproval of that particular form of marriage and not as forbidding it. Furthermore the injunction is an injunction to the father of the girl against receiving the money and not an injunction against the husband from paying it. I would dismiss the appeal.

TUDBALL, J.—I fully concur, and have very little to add. I do not think that in all cases of second marriage a court will be able to hold that the second marriage constitutes "lawful family necessity." A first marriage beyond all doubt does constitute a "lawful family necessity" for the reasons given by Mr. Justice CHANDAVARKAR in the case of *Sundrabai* v. *Shivnarayana* (1). But there are clearly cases in which a second marriage constitutes a family necessity equally with a first marriage in the eyes of Hindu society. There is an injunction on every male Hindu who enters the form of life of a house-holder that he should beget a son for very clear and definite purposes. There are religious ceremonies, *e.g.* the *agnihotri*, to be performed by a man which demand the active aid and assistance of his wife. There are many instances of a Hindu wife dying in her childhood and I think it would be repugnant to the ideas prevailing among Hindus to hold that a second marriage in such a case would not be an absolute necessity or to hold that the defraying of expenses of such a marriage would not be a lawful and proper charge on the family. A member of a joint Hindu family in

(1) (1907) I. L. R., 32 Bom., 81.

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such a situation, i.e., whose wife had died in childhood and wished to obtain a second wife would otherwise have to seek for partition and break up the joint family before he could do that which the Hindu Law enjoins on him as a duty. I have no hesitation in holding that in such a case as this, the carrying out of a second marriage would be the duty of the manager of the family, and he could, in order to meet the expenses, charge the family property. The circumstances of the present case in my opinion fully justify the expenditure which was incurred by the uncle of Bhagwati Singh. Bhagwati Singh was a young man whose wife had died leaving in his charge a young child. It was but natural that he should seek to obtain another wife. It was not a case of a man marrying a second wife while the first was alive, nor of an elderly man, with sons and grandsons alive, seeking to take to himself without justifiable reason a second wife. In the circumstances of the present case it would be impossible to hold that there was no justifiable necessity. The necessity was clear, and the uncle of Bhagwati Singh was fully empowered to incur the expenditure. As to the form of marriage it seems to me that it is more or less immaterial what that form was, provided it was legal and binding and the money was properly spent in carrying it out. In this view of the case I also would dismiss the appeal.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

1910

May 11.

Before Mr. Justice Richards and Mr. Justice Tudball.

RUP RAM (PLAINTIFF) *v.* MUSAMMAT REWATI AND ANOTHER (DEFENDANTS).*

Hindu law—Widow's estate—Gift by a female to her daughter—Right of daughter's heir—Acceleration of estate.

The widow of a sonless separated Hindu, in possession as such of her husband's property, made a gift thereof in favour of her daughter. The donee predeceased the donor, and the donor remained in possession of the property the subject of the gift. *Held* that no action by the donee's heir to recover possession would lie during the donor's lifetime. *Bhupal Ram* v. *Lachma Kuar* (1) referred to.

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* Second Appeal No. 837 of 1909, from a decree of D. R. Lyle, District Judge of Aligarh, dated the 13th of May, 1909, reversing a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 25th of December, 1908.

(1) (1888) I. L. R., 11 All., 253.