sumed and re-granted to the claimant or those through whom he claims, it must be held that the land continues to be attached to the office.

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In the present suit no evidence has been offered, and the case of the plaintiff which is simply that the land ceased to be attached to the office of kurnum because it had been enjoyed as a lopayakari share excludes any such presumption. We therefore think that the miras of the land must be held to have continued to be attached to the office notwithstanding that it may have been for some time enjoyed as private property, such enjoyment having been confessedly by members of the kurnum's family by claim of co-parcenery right. The property being annexed to the office was indivisible, and as the Collector who was then in management of the zemindary in ejecting plaintiff appropriated the land to the office by putting it in the possession of the kurnum whom he appointed in room of plaintiff's husband, plaintiff can have no right to recover.

On the above grounds the decree of the Principal Sadr Amin must be reversed and the plaintiff's suit dismissed, and the plaintiff will bear the costs of suit in the original and appeal stages and in this special appeal.

Appellate Jurisdiction *(a)*

Special Appeal No. 514 *of* 1868.

S. NAMASEVAYAM PILLAY ....*Special Appellant.*

ANNAMMAI UMMAL .....*Special Respondent.*

The plaintiff, the divided brother of the defendant's deceased husband, sued to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant and of her obligation to accept any persons whom he may select and provide for the celebration of their marriages.

Held,—That the exclusive right sought to be enforced by the plaintiff was not warranted by Hindu law, apart from the legal position and rights of the defendant as the guardian of her daughters and possessor of her husband's property, which however presented still stronger grounds of objection to the plaintiff's claim.

THIS was a Special Appeal against the decision of F. S. Child, the Civil Judge of Tinnevelly, in Regular Appeal No. 290 of 1867, confirming the decree of the

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(a) Present : Scotland, C. J. and Innes, J.

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Principal Sadr Amin's Court of Tinnevelly in Original Suit No. 76 of 1866.

Mayne, for the special appellant, the plaintiff.

The Advocate General and *Sloan*, for the special respondent, the defendant.

The facts fully appear from the following

JUDGMENT:—The plaintiff in this case is the brother of the defendant's deceased husband and was divided from him, and he seeks by the suit to obtain a declaration of his independent legal right to betroth the infant daughters of his deceased brother by the defendant to persons of his own choosing without the interference of the defendant, and of her obligation to accept any persons whom he may select and provide for the celebration of their marriages. Both the Lower Courts have pronounced the plaintiff's claim to be unreasonable, and without legal authority to warrant it, and have decreed the dismissal of the suit. The plaintiff has appealed from the decree of the Civil Court, and the question for determination is whether he is entitled to a declaration of the exclusive general right which he sues for.

The authorities relied upon in argument as directly supporting the alleged right rest on a text of *Yajnavalkya* which, as given in the remark of Mr. Colebrooke to be found in 2 *Strange's Hindu Law* 28, is "The father, "paternal grand-father, brother, kinsman, remote relations "(Saculya) and mother are the persons to give away a "damsel—the latter respectively on failure of the preceding."

The version given in the *Digest*, Book 5 Ch 3, Section CXXXV is; "In the disposal of a girl the father, the pater- "nal grand-father, the brother, a kinsman or the natural "mother shall be consulted in the order here specified; upon "the death of the first the right of giving away the damsel "devolves on each of the others successively provided they "be of sound understanding." It cannot be gainsaid that this text in its literal acceptation does import an individual right of betrothal in the order of succession declared, and we do not see any sufficient ground on which it can be held to be applicable only to the daughters of an undivided

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member of a family. In the *Digest* and in Vol. 1 p. 36 of *Sir Thomas Strange's Hindu Law* it is treated as of general application. But it does not necessarily import the absolute exclusive right which the plaintiff seeks to have declared, namely, the right to betroth his brother's daughters to any person whom he may hereafter choose without reference to their mother and even against her feelings and wishes. Therefore in forming our judgment as to its true effect and force we must be governed by a consideration of the reason and principle on which it rests and the natural rights of the defendant as a mother and her legal position and capacities as a widow.

In principle and reason the duty enjoined on the male relatives of the father is not, it appears to us, founded upon the incapacity of a woman to perform the rights required by the Hindu system of rules relating to the marriage ceremony. Among the rites at the marriages of Brahmins as set forth in *Mr. Colebrooke's 3rd Essay on the Religious Ceremonies of the Hindus* (See 1st Vol. of his Miscellaneous Essays, page 203) there are some to be performed by the bride's father which (as was urged for the appellant) the mother could not in person perform instead of the father, and perhaps the same may be said of the rites practised at the marriages of members of some of the other castes and sects. But we have no doubt that the mother would be quite as competent to depute a male kinsman of her husband to act for her on such an occasion as on the occasion of the performance of her husband's exequial ceremonies. This too the very ordinance itself recognizes by placing the mother in the order of persons who are charged with the duty of betrothal enjoined by it. The true reason for the injunction it appears to us was the state of dependence in which women were formerly placed by the law even where as widows they had succeeded to the possession of their husband's estates, and that certainly does not warrant the ordinance being carried to the length of declaring the right claimed by the plaintiff, if what appears to us to be the reasonable and proper view of the law relating to such state of dependance be taken. It was, according to the strict letter of the most ancient precepts, a state of submis-

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sion and reliance, not servility, inculcated for the protection and control of wives and widows in regard to the strict morality of their lives and the due observance of religious duties, and also in the management and use of property for which they were rendered unfitted by the rigid lives of retirement and austerity which they were compelled to lead. *Manu*, (Ch. 9 Sl. 23) declares: "Day and "night must women be held *by their protectors* in a state "of dependence. Their fathers protect them in childhood "their husbands protect them in youth, their sons protect "them in age." And again (Ch. 5 Sl: 148). "In child- "hood must a female be dependent on her father, in "youth on her husband, her lord being dead on her "sons; if she have no sons on the near kinsmen of her "husband, if he left no kinsmen on those of her father, "if she have no paternal kinsmen on the sovereign: a wo- "man must never seek independence."

Protection and guidance and submission thereto are the duties thus enjoined, and seeing that women of full age are throughout the law treated as of legal capacity to act to a limited extent, it is a reasonable implication that those relative duties were intended to be performed by their appointed protectors with a due regard to the feelings and wishes of those under protection, whether wives or widows, within the sphere of their proper duties and the legitimate limits of their proprietary rights. In short the state in which it appears to us women were intended to be placed was simply that of protective guardianship very similar probably to the *legitima tutela muliebris* exercised under the Roman Law before the time of Justinian over women of full age and *sui juris* which, recognizing their legal capacity to act, required the advice and interposition of their tutors to give effect to their transactions. See 1 *Colquhoun's Roman Civil Law*, Sections 741, 742.

In this view it would obviously be doing violence to the reason and principle on which the text of *Yagnyavalkya* is based to put the construction upon it necessary to support the plaintiff's present claim, for it is beyond question that a voice in the betrothal of a child of tender years is peculiarly a mother's right and duty. The dictates of human natural affection impel her to feel deep

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concern in such an event and teach that her feelings and wishes should be fully consulted, and the whole spirit and policy of the Hindu Law seems to us to accord to every mother the perfect enjoyment of this natural right.

But the strictly legal position and rights of the defendant as the guardian of her daughters and the possessor of her husband's property present still stronger grounds of objection in opposition to the plaintiff's claim. It was conceded in argument that the law has always recognized a mother's right to be the guardian of her minor son or daughter upon the death of her husband in preference to his kinsmen. Such a recognition is very inconsistent with the disposal of her daughters in marriage by her husband's brother or other relation without reference to her, and tends forcibly to support the view we have expressed with respect to the state of dependency imposed on women. Thus the recognition of her position as guardian militates against the law *ever* having given the exclusive right contended for. But now that the texts declaring such state of dependency have become as did the Roman Law relating to the *tutela muliebris* obsolete, and a woman acts independently as guardian, and such acts are perfectly legal, it would amount to almost an absurd contradiction to hold that although competent and capable to be guardian a mother has no right to be consulted in the choice of a husband for her daughter.

Again, as the possessor of a life estate by right of legal succession in all her husband's property the defendant is as has been well settled absolutely *sui juris* (*Kamavadhzni Venkata Subbaiya* v. *Joyasa Narasingappa*, III *Madras H. C. Rep.* 116,) and is the person on whom the law casts the duty of determining what is a proper provision for her daughter's marriages and providing the means required to defray the expenses of their celebration. The independent right and discretion which she is competent to exercise in that respect she cannot be called upon to exercise until the choice of bridegroom has been made, and her reasonable discretion in the matter must be guided to some extent by the choice made. It seems to us to be necessarily incident to this absolute capacity to act that in making the choice of a bridegroom the defendant should be consulted.

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Upon reason and principle, therefore, and the application of the existing law in regard to the independent position of the defendant both as guardian and proprietor of the estate derived from her husband we come to the conclusion that the law does not warrant a declaration of the absolute right set up by the plaintiff. We are of opinion that the duty was enjoined on the husband's kinsmen in order to ensure the making of a suitable provision for the betrothal of daughters before reaching the age of puberty, just as it is declared to be their duty in the case of sons to provide for the several ceremonies required to perfect the regeneration of a twice-born man. It appears to be so treated by *Jaganatha* in the *Digest* Sections 303 and 113, and that they were left to perform it like all other "auspicious" family ceremonies in harmony if possible with the mother and other members of the family. If on a choice being made of a person in every way suitable to be affianced a mother without sufficient cause improperly refused to accept him and obstructed the betrothal, a suit to compel her to allow the ceremony to take place, and, if she was chargeable, to provide means for its celebration, would probably be successful. But no Court, we think, would be justified in granting such relief if the mother's refusal and resistance were because of serious objections to the person chosen or for other good and sufficient cause, nor, we think, would the betrothal of a daughter with an unobjectionable person of the mother's selection be restrained at the suit of the brother or other kinsmen of the father who had been consulted by the mother and had without any sufficient cause objected to the betrothal. It would seem from the express provision made by the law for the choice of a husband by a girl herself in case of neglect on the part of her relatives of their duty to betroth her for three years from the time she became marriageable (*Manu* Ch. IX Sl. 90, 91, 1 *Strange's Hindu Law* 36) that the duty does not amount to an enforceable legal obligation, and the effect of restraining the betrothal in such a case would probably be to aid in thwarting betrothal before puberty, the very purpose for which the duty was enjoined. We do not find in the cases which were referred to in argument anything to assist the decision of the present question

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except the recognition of the right of the grand-mother as guardian to dispose of a minor daughter with the consent of her male paternal relative, expressed in the Judgment of the Court in *Maharanee Ram Causi Koeri* v. *Maharanee Soobh Koeri, Wyman's Civ. and Rev. Reports*, p. 244 Vol. III, which certainly favors our view of the plaintiff's claim. For these reasons the decree appealed from must be affirmed and the appeal dismissed with costs.

Appellate Jurisdiction (*a*)

Special Appeal No. 500 *of* 1868.

K. VENKATRAMANNA..... { *Special Appellant.* (*1st Defendant.*)

K. BRAMMANNA SASTRULU and another..... { *Special Respondents.* (*Plaintiffs.*)

Upon a division of family property, the parties to the division entered into an agreement that the property of any one of the parties to the agreement or their heirs dying leaving no issue should not be sold or transferred as a gift, but should on his death be divided by the other shareholders.

In a suit by one of the shareholders to recover the share to which the plaintiff was entitled under the agreement from the defendant a purchaser from the son of the person to whom the property was allotted upon the division,

Held, that an estate cannot be made subject to a condition which is repugnant to any of its ordinary legal incidents and that the power of disposition, being a legal incident of the estate which passed to the vendor, could not be taken away by the agreement.

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THIS was a Special Appeal against the decision of H. Morris, the Civil Judge of Rajahmundry, in Regular Appeal No. 392 of 1867, reversing the decree of the Court of the District Munsif of Rajahmundry in Original Suit No. 120 of 1866.

Sloan, for the special appellant, the first defendant.

Snell, for the special respondents, the plaintiffs.

The plaintiffs sued to recover their shares of family property.

The plaintiffs alleged that the 1st plaintiff's undivided brother Bhadrayza died issueless on the 5th March 1863, and that the defendants took possession of the whole pro-

(*a*) Present: Scotland, C. J. and Innes, J.