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ADATTĀDĀNAM: VALUABLE BUDDHIST CASUISTRY

Adattādānam, « taking an object that has not been given to the taker », is an alternative, not quite a synonym, for *steya*, *caurya*, « theft ». The idea occurs in *dharmaśāstra*, naturally. The reason why it occurs rarely, whereas *steya* occurs frequently, is nowhere explained. In all the places where it does occur the commentators, almost without exception, gloss it by « *steya* »[1]. « *Steya* » itself is not explained by the commentators at the principal places where it occurs in *smṛti*[2]. It is treated as « well-known », « obvious ». This is not to say that some attempts have not been made by *śāstrīs* to define it. Vardhamāna says *steyaṃ nāma anaiyāyikaṃ para-sva-grahaṇam iti*, « theft is an unjust, or illegal, taking of the property of another »[3]. This is a good definition, since when a king takes a fine or confiscates a culprit's property he most certainly commits *adattādānam*, but it is not *steyam*. Similarly when a person entitled to tolls, usually the king or his licensee, takes tolls, this is *adattādānam* on his part, but it is not *steyam*. But what is *anaiyāyika*, « unjust », « unlawful »?

And there are other gaps. The *smṛtis* themselves do apply themselves fitfully to the problem. Kātyāyana, a *smṛtikāra* of a truly legal turn of mind, says[4],

pracchannaṃ vā prakāśaṃ vā niśāyām athavā divā
yat para-dravya-haraṇaṃ steyaṃ tat parikīrtitam.

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1. Aparārka on Yājñavalkya III.135, p. 998; Medhātithi on Manu VIII.340 (*adattāddāyī coraḥ*). So Govindarāja, Kullūka, Nandana and Rāmacandra, ibid. Lakṣmīdhara, *Kṛtyakalpataru, Vyavahāra-kāṇḍa*, p. 550, followed by Caṇḍeśvara, *Vivādaratnākara*, p. 341. Pratāparudra, *Sarasvatī-vilāsa*, p. 287. *Mitākṣarā* on Yājñ. III.136 is an exception (below).

2. E.g. Bhāruci and Medhātithi on Manu VIII.72.

3. *Daṇḍaviveka*, p. 80.

4. Kane's reconstituted text, 1933, v. 810, cf. 796. There is also Nārada XIV.17, « Taking away by any means whatsoever property of persons asleep, or disordered in intellect, or intoxicated, is declared to be theft by the wise ». This is inadequate. Yet it is all Keśava-paṇḍita can offer in his *Daṇḍanīti*, p. 15, by way of definition.

No doubt some archaic mistakes are pushed aside here, but the end product is not impressive: «theft» is « the taking of the asset of another » whether by day or night, etc. The very extensive treatment by Nārada and Bṛhaspati, other legally-minded *smṛtikāras*, really amounts to this, that the poverty of the Sanskrit vocabulary is demonstrated along with the rich experience that India had (and has!) of every variety of dishonest handling of the property of others. « Theft » is applied to a very wide variety of cheating, misappropriation, embezzlement, fraud, and so on. The only careful exception is « robbery », which is treated as a separate crime, because of the ingredient of violence. The *smṛtis* give a luxurious treatment to the question what punishment should be inflicted on the various categories of « thieves », should they be made to compensate the owners, should penance as well as penalty be applied [5], and what steps ought to be taken to apprehend and suppress thieves [6]. The *arthaśāstra* is similarly silent on the jurisprudential ingredients in theft. These deficiencies are remarkable considering that one of the earliest *dharmasūtras*, that of the often unique and always original Āpastamba, does attempt an investigation of the nature of theft and actually cites the differing opinions of ancient teachers. He starts off by finding the germ of theft in the *formation of the intention to take another's asset* (*para-parigraham abhimanyate steno ha bhavati*: Āp. I.10.28,1), and goes on to discuss whether privileged takings are sinful even though not punishable. This seed of jurisprudential thought is soon stifled.

There are two places in the *smṛti* literature known to me, where the jurisprudential aspect of theft arises; and in one and the same place two important aspects of the subject are handled nearly simultaneously.

One context (theft of common property) can conveniently be left to the end; the other context is inheritance by an heir, or heirs, of property found in the estate of the deceased which is known, or strongly suspected, to have been acquired by him improperly, so that his own title was, in his lifetime, questionable. Not all aspects of this were ventilated, but the discussion reaches a high level. First the conclusion is made that the one who acquires from the improper acquirer (if so I may call him for short) is guilty, at second hand: for one way of controling theft, robbery, etc., is to make it difficult for the thief or robber to pass on his ill-gotten gains. Secondly it is concluded that the heir is not affected by his predecessor's misdeed of a moral character. This is a conclusion supported by *mīmāṃsā*, and an established Hindu position. Incidentally the question is raised whether after all a thief acquires title to what he has stolen.

5. Bṛhaspati XXII.22.
6. Manu VIII.311-343, IX.204-272. Nārada XIV, Appendix. Bṛhaspati XXII.

It must be remembered that in ancient India there was a rudimentary law of limitation of actions, but it was quite unreliable in practice, and jurisprudentially insecure. The discussion therefore proceeded as if there were none. The proposition, that a thief could give good title to his successor, e.g. a donee [7], was founded on the idea that, although he would have no title at the moment of taking, the lapse of time would raise a presumption of a giving up of hope on the part of the true owner, whereupon the thief could give good title to a third party. There is much in this that appeals even to the modern lawyer, who knows that goods must circulate, and purchase in the open market will, given certain conditions, confer a good title even to stolen goods. However, the *śāstrīs* settled to the position that a thief could always in theory be ousted by the original owner if he brought proceedings, from which it follows that the thief never becomes owner until all chance of a lawsuit for recovery of the asset has passed [8].

Apart from the two contexts I know of, no inquiry arises into the aspects of theft which are regarded nowadays as essential to prosecution and conviction for the crime. Leaving aside cheating, embezzlement, fraud, etc., and keeping our attention solely on true theft we know what modern definitions require: there are certain ingredients. First there must be an object of sufficient value to attract the law's attention. Secondly the accused must be capable of crime. Thirdly the asset in question must belong to another, i.e. his own ownership over it must be excluded. Forthly his intention must have been (at least in some systems of law) permanently to deprive the owner of it. In these and such ways the different systems of the world require certain *ingredients* to be proved before a prosecution for theft will be upheld by the courts. The *dharmaśāstra* is silent on practically all of this.

And not only in respect of *steyam*. It is equally silent in respect of *adattādānam*, which is a term much wider than *steyam*, and much more sophisticated. One could have expected more of *adattādānam*. But we are disappointed.

Bṛhaspati is rather negative about people who take small quantities of other people's produce [9]. But it is clear from Manu that in emergencies, whether to life, or to sacrifices, certain takings without

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7. This is irrespective of the *smṛti* position that one should be punished for receiving from a thief and should perform a penance (including abandonment of the object). On stealing see Medh. on Manu V.110.

8. Vijñāneśvara, *Mitākṣarā*, *dāyabhāga* section, Colebrooke's divisions, I.i, 7-12, 15-16, contains the whole discussion. DERRETT, *Religion, Law and the State in India*, London, 1968, 139. On sale by one not the owner see P. V. KANE, *History of Dharmaśāstra*, vol. III, Poona, 1946, 462-65. On giving up hope see R. LINGAT, *Classical Law of India*, Berkeley and New Delhi, 1973, 71, 135, 160-5.

9. Bṛhaspati XXII.20. After all, such a negative view preceded Āpastamba (Āp. I.10,28,4, the context is *penance*). Nārada, too, has no counterpart to Manu VIII.339. See DERRETT, *Essays*, vol. II, 42, n. 131.

permission are not punishable. In general, it is true, the *karmas* which lead to inauspicious rebirths, include *adattādānam* [10]:

adattānām upādānaṃ hiṃsā caivāvidhānataḥ
para-dāropasevā ca śārīraṃ trividhaṃ smṛtam.

No exception is made here for this stype of *svīkāra* (as Rāghavānanda and Rāmacandra render the expression). But in a verse attributed in one place to Yājñavalkya and in another to Nārada [11],

puṣpe śākodake kāṣṭe tathā mūla-phale tṛṇe
adattādānam eteṣām asteyaṃ tu Yamo 'bravīt.

It is not theft to take, without permission, certain natural products, obviously under certain conditions. And this is standard *śāstra* [12]. Yet the nature of *adattādānam* is not explored: it is assumed that the meaning is merely the etymological one.

And then we have Manu VIII.340,

yo 'dattādāyino hastāl lipseta brāhmaṇo dhanam
yājanādhyāpanenāpi yathā stenas tathaiva saḥ.

« He who, being a Brahmin, takes wealth from the hand of one who took what was not given to him, even by way of sacrificing for him or teaching him the Veda, he is exactly like a thief ». This is the text which figures in the discussion which the *mīmāṃsā* solves in a common-sense fashion. The taker might be « like a thief », but he is not a thief, nor necessarily liable to the state's punishment. And in any case his heirs are not affected by his immorality (cf. Iustinian, *Dig.* X.2.4.2).

Neither *smṛtikāra*, nor commentators upon his work explain what the term *adattādānam* really means, or what are the *ingredients* of it. The Mitākṣarā is typical: when explaining Yājñavalkya III.136, *adattādāna-niratah*, it says *adatta-para-dhanāpahāra-prasaktaḥ*, « One who is addicted to taking the wealth of other people which has not been given to him », and it is assumed that this tells all.

Perhaps one reason for the want of a proper definition of theft and of *adattādānam* is the fact that there were two contexts, and two only, in which such discussions could arise. In a royal court the purpose of « suppression of thieves » was so obvious, and the need for scientific jurisprudence so slight, that attempts to refine definitions, e.g. concerning intention on the taker's part, were superfluous and confusing. This would be exactly the type of academic training which the man on the spot, the judge in the field, would ridicule as pointless. In a penance committee, on the other hand, where the spiritual condition of the taker was the principal issue, no less flexibility was required than in a royal court, but there was an important difference. In the court the culprit

10. Manu XII.7. Cf. Yājñavalkya III.136.
11. L. S. Joshi, *Dharmakośa, Vyavahāra-kāṇḍa*, 1744b.
12. See n. 9 above.

presumably denied his crime, and was proved guilty to the satisfaction of the judge. In the penance committee the facts were admitted, or soon became so, no technicalities of proof were entertained, and in most cases the culprit himself initiated the proceedings. Here again the need for careful thought as to any liability he might have, unknown to himself, must have been slight. I do not say that the experts in penance went to work in a haphazard manner. But the proposition that it was sinful, with untoward effect on subsequent births, to take that to which one had no right, would be one which even a simpleton could apply in ninety-nine cases out of a hundred.

The reason why modern law insists on the ingredients of the crime with such minuteness is simple. Modern courts operate under the rule of law, and the accused is presumed innocent until, by whatever stages the legal system provides, he is gradually proved guilty. The notion that the citizen has rights against the state, and that therefore he cannot be punished unless the legal requirements are scrupulously complied with, is one foreign to the ancient, and certainly to the eastern world. It cannot be said to be universal in the modern world as we very well know. But there was an environment in which, in very ancient times, quite a different attitude to wrongdoing produced very scrupulous learning, and it is to this that this article is directed.

Let us assume a voluntary society, supported, on reasons of state, by the ruler, but normally self-governing. Let us suppose that it is dedicated to holy living, the pursuit of righteousness, and, therefore, it can safely live on the offerings of pious lay-people who hope to imitate as far as they can the virtues of the monks. The aspect which the lay disciplies most admire is the monks' forswearing property (except the minimum), sex, and status. On this basis the monks are entitled to be fed and clothed (at a mere subsistence level) by the laity. They have a position of prestige and act as the laity's spiritual directors if called upon to do so. *If they recruit from unworthy persons their society will collapse.* Therefore not only the monks themselves but also their novices, people on probation, must know how, in practice, they may break their vows. They may (i) misbehave themselves, so as to put the monks on enquiry whether they are fit for professing as monks, and (ii) they may disqualify themselves and revert *ipso facto*, as it were *latae sententiae*, to lay status. This is important because a lapsed novice can thus cease to be a member of the order without an elaborate trial such as a monk in similar circumstances would be entitled to: the failed novice simply ceases to be a novice. He could, of course, offer himself later for readmission in that capacity. But it would be up to the monks to discover whether he had reformed, or whether he was in need of an easy living. It is not surprising that the definition of *adatta* (Pali *adinna*) at *Sutta-vibhaṅga* II.3 (= text, *Vinaya-piṭaka* III.46) includes « what has not been thrown away » (!) and whatever is kept under guard! Yet that is far from adequate.

Whether Jaina or Buddhist, the two great ascetic communities of ancient India, applied their minds to *steyam* and to *adattādānam* with an abundance of casuistry. They thus filled the formidable gap left by the insouciant *dharmaśāstra*. In the case of *steyam* and *adattādānam* the *śāstra* gives some examples of the tricks and frauds practised by Indians of their times: they do not surprise us [13]. But that does not provide us with the answers to our questions. This feature also figures in the Jaina and Buddhist sources, but the Buddhist include a work which attempts to list and explain the ingredients of *adattādānam* and to distinguish carefully between those acts which disqualify, i.e. which forfeit the culprit's status, and those which are misbehaviour, but not necessarily visited with so dramatic an outcome. This work is, apparently, Jayarakṣita's commentary on the (lost) *śloka* verse work by Śrīghana entitled *Śrīghanācāra-saṃgraha*. Since the subject is the discipline of novices (*śrāmaṇeras*), it could be called a *Śrāmaṇerācāra-saṃgraha*. It has been published recently, and this is an exploratory inquiry into it.

Jayarakṣita's work can be dated only within very wide margins. It is obviously Indian and prior to the assaults by Muslims on Buddhist institutions. It is later than the 4th century A.D. [14]. Between those centuries it is impossible to place it, though a minimum of local colour is discernable and remains to be evaluated historically. A. S. Altekar, himself a lawyer as well as a historian, commented upon it in 1954. No Hindu jurist seems to have worked on it, though its unique importance is obvious. Due to difficulties with the text, in spite of heroic efforts by the editor, and due to the present writer's unfamiliarity with the Buddhist context presupposed, and with items in the vocabulary which (if not errors) are not listed in the dictionaries, it is not possible yet to give a literal translation. This is not so sad as it sounds. The original work was a commentary on the *ślokas* of a short compendium. The *ślokas* have disappeared, and could only be reconstructed fragmentarily from the very numerous *pratīkas*. Since not all the words in the *ślokas* were explained, the text reads disjointedly and roughly, and a literal translation would read badly. It must, however, be attempted some day. Meanwhile I shall arrange the material on *adattādānam*, one of the ten vows of abstinence, so as to conform, roughly speaking, to the requirements of modern definitions of « theft ». The uniqueness of the text will become apparent at once to anyone who knows the *dharmaśāstra* presentation.

The long-lived Indian Penal Code will give us a suitable model for our purposes. Sec. 378, though long, by no means exhausts the infor-

13. Bhāruci and Medhātithi on Manu VIII.193.

14. Sanghasena, ed. *Sphuṭārthā Śrīganācārasaṅgrahaṭīkā*, Patna, 1968, preface, p. 2. The work is called *Śrāmaṇera-ṭīkā* by A. S. ALTEKAR, *Cultural importance of Sanskrit literature preserved in Tibet*, in ABORI, 35, 1954, 54-66 at 63 ff. The text being unedited then Altekar cannot be blamed for misunderstanding some passages.

mation we need, and we have to refer to Sec. 24 to supplement it.

> Sec. 378: Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.
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> *Explanation* 1. A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.
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> *Explanation* 3. A moving effected by the same act which effects the severance may be a theft.
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> *Explanation* 3. A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.
>
> *Explanation* 4. A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.
>
> *Explanation* 5. The consent mentioned in the definition may be express or implied, and may be given either by the person in possession or by any person having for that purpose authority either express or implied.

We need also Sec. 24, which runs,

> Sec. 24. Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another persion, is said to do that thing « dishonestly ».

The tipical Indian students' book expends not less than twelve closely printed pages explaining this law. Sec. 378 provides numerous « Illustrations ».

In our enquiry below I shall see what Jayarakṣita, commenting on Śrīghana, does to answer the following questions:

(1) Who is capable of the crime of theft?

(2) Are there offences which are moral offences but which do not in themselves call for the punishment of disqualification?

(3) What objects are capable of being stolen?

(4) What act constitutes the moment of theft?

(5) What is the function of the intention to steal?

(6) What is the effect of attempts and anticipatory acts preparatory to theft?

(7) What is the effect of collaboration between culprits?

(8) What is the effect of intermediation or association of strangers?

(9) What is the effect of acting as agent for another, or offering onself as a tool for another?

(10) What guidance can be given to avoid imputations of stealing?

The editor of the edition [15] wisely decided not to number the paragraphs. In our section it seems that all his paragraphing is sound. I find 46 paragraphs and have numbered them for our convenience [16]. The most striking result of a study of this chapter is that the author and his commentator, whilst not eschewing illustration of the propositions sought to be elucidated, concentrate on the jurisprudential aspects of *adattādānam*, and do not, as the *smṛtikāras* did, degenerate into descriptions of dishonest behaviour. They did not waste time over appropriate (or inappropriate) punishments, since the issues of punishment were clarified at the outset. Śrīghana dealt with disqualification from being a novice, by reason of breach of the vow, in the *ślokas* starting with *kālikam* up to *dakṣiṇādeśanā*, and moved on to deal with misbehaviour (*duṣkṛtāni*) in the *ślokas* commencing with *upakāryapakāribhyaḥ* and ending at *tūṣṇīṃ datvā* [17].

The author had made a thorough study of the subject of *adinnādīna*, as handled in the *Vinaya-piṭaka*, *Suttavibhaṅga* II (the Second *Pārājika*) — the stealing of property worth not less than 5 *māsakas* — but there is new material.

(1) *Capacity to thieve.* § 42: There are five ingredients of disqualifying theft (i.e. theft which renders the novice *ayati*, *aśrāmaṇera*): (i) assets, such as earth and upwards up to the minimum value; (ii) acquired by another; (iii) known to be so by the taker; (iv) the latter's intention to steal; (v) actual asportation (removal, actual or constructive). In five cases an *adattādānam* does not disqualify: (i) knowledge that it *has* been given (i.e. the taker is legally entitled); (ii) knowledge that it has become his own; (iii) knowledge that it was not acquired by another; (iv) it comes from his share; (v) by way of periodic allowance. See (9) below. § 45: The lunatic, or deranged, are not disqualified by taking, even if they take the property of others, because they have no intention to steal. § 3: The punishment for those liable is to be taken and expelled. § 44: There are supersensory benefits from avoiding « ungiven » assets, and evils from indulging in them.

(2) *The distinction between moral and « disqualifying » offences.* § 1: disqualification arises from taking (*apahāraṇa*) a thing (*vastumātra*) belonging to anybody (*yasya kasyacit*). § 16: it is not a moral

15. Sanghasena, see last note.

16. Thus *adattādānavirati* is § 1, *uktā* is § 2, *pūjācīvaretyādi* is § 10, *uṣitvetyādi* is § 20, *lābhārthaṃ* is § 30, *cāturdiśāyetyādi* is § 40.

17. So, § 46.

offence to retake from a third party to whom a thief gave the retaker's property; § 20: or to retake property one has forgotten, even though secreted by others in the meanwhile. § 23: misbehaviour (*duṣkṛtam*, Pali *dukkaṭa*, a wrongdoing, less grave than a *thullaccaya*, itself less than a *pārājika*, which involves « defeat ») results from accounts having to be falsified, even though no actual gain accrues to the culprit. § 29: It is a *duṣkṛtam* to retake lost property of which you have lost hope of recovery. § 30: Also to break any agreement relating to acquisition (of alms) likewise an agreement to give a recitation or instruction, likewise to perform any act of *dhamma*. § 31: Likewise to take a flag from the *stūpa* of a *paṇḍara-bhikṣu* [17a], though this is not a disqualifying theft, since such a flag has no owner. § 39: It is a *duṣkṛtam* to sell or use an object given to the *saṃgha* which the latter is incompetent to use. I do not find in our text a generalisation such as is at *Suttavibhaṅga* II.4,2 (end), that any form of destruction of an object of adequate value is a *dukkaṭa*, a useful generalisation (cf. Indian Penal Code).

(3) *What objects are capable of being stolen?* 1: In this treatise minor items are considered, excluding objects which are *by nature* subject to the *saṃgha's* ownership alone (i.e. including objects capable of being acquired by a novice), as for example items of diet subject to vow or regulation: periodical requirements such as food and drink, rags, conveyances, pearls, etc. 2: The « eight requirements » of a monk figure. A total of sixteen objects are listed: earth, water, human beings, quadrupeds, snakes, plants including trees, anything attached to these. The definition is exhaustive. The minimum amount capable of theft (§§ 3,42) is 1/4 *kārṣāpaṇa* = 5 *māsakas* less 1 *kākinī* (at the rate of 19 [!] *paṇas* of cowries to the *kārṣāpaṇa*). If it is a *duṣkṛtam* to steal less (as no doubt it is) this is not mentioned.

(4) *What act constitutes the theft?* § 3: « Taking » involves the movement of the object from its place and appropriating it (*sthānāt cyāvayan svīkurvan*). § 4: There is a *locus* (*sthānam*) of theft. In the case of an elephant, where it is kept in a gated enclosure, the moment is when all four feet have emerged, the enclosure being the *locus*, if the door was shut. If the door was open the *feet* of the animal are the *locus*. § 5: If the elephant is tied to a stake, when this is pulled up. If it is in a cage, when the feet emerge, if the entrance is large; but when the flank has emerged if the entrance is small. There are four *loci*: the stake, the feet, the cage, or a combination. § 6: If an item of a consignment is concealed about the body of the messenger the body is a *locus*. § 9: If elephants move freely, and the taker causes one to go in his direction, believes himself to have acquired it while there is (known to him?) a keeper, the *locus* is all four feet: in fact four *loci*

17a. Skt. *pāṇḍara*, a sect (?), white (Hindu?) ascetic. But cf. *odātāni dusāni* at Aśoka's Sarnath, Kausambi, and Sanchi Pillar Edicts!

can be found; unauthorised direction, behaviour, hindering (in this case the keeper), and intention or aim (*cittam*).

§ 10: A rag-garland is allowed to fall from an idol by loosening the ends — the moment is the fall of the garland. If a cloth is taken from the *bodhi*-tree the ascetic is disqualified. Three *sthānas* arise in reference to such a garland: the two ends, the mental acquisition, the cloth. The first is where the garland is held by a pin. The second is where two ascetics independently work the ends loose. The third where the cloth is torn up. § 11: Disqualification may arise from behaviour. A necklace of pearls is scattered. With a companion to hold the bag the ascetic gathers them in the monastery and so takes them away; or he uses a shaggy dog to pick up the necklace or entices a calf and so takes it. It is not by the foot-fall of the person or animal that the punishment is incurred but by the deviant behaviour. He is liable when he deviates through others.

§ 12: If he yokes a cart by night (cf. Manu VIII.342) and warns his accomplice that the animals will take the cart away the *locus* is his consciousness of acquisition (*mamatva(?m) lābhaśca*). § 13: When he abstracts a necklace: if the pin is good and the clasp hard the *locus* is the discontinuity caused by breaking the clasp; he is a thief when he breaks it. Not so if the pin is bent and the clasp slack: the deviation is not located at the pin in such a case. The *locus* will be at the point at which all the pearls become free of the clasp. § 15: Intention alone is the *locus* where one takes a disproportionate share of land at the family partition. On this last point see below.

§ 24: Even where two novices receive alms from one household one of them steals if he takes the other's share. One is a thief in respect of the second novice's share. § 28: Failure to give a due share of alms to a monk entitled to it, pretending that the measure is inadequate (?). § 32: One must not help strangers to evade tolls (cf. Gaut. XII.41; Bhāruci on Manu IX.257), e.g. Śaṭhakas (? Śeṭṭis) smuggling gems; monks who transport or deal in gems must themselves pay tolls.

§ 33: In the rain-retreat even a novice whose way of life is deficient can expect his maintenance. But he must present himself before Śrāvaṇa, unless the *saṃgha* resolves otherwise. § 34: A lapsed novice who is received back can share the rain-retreat mantenance. § 35: But the following are not entitled: those that do not enter the retreat; those that wander away; heretics; and *nāstikas* (denying obligation and supersensory rewards); and those that stop the life-force (*mṛtakas*), also those that leave for a different country. The inference is that non-entitled takers are thieves.

(5) *What is the function of the intention to steal? Steya-citta*, « having a mind to steal » (§ 3); *steya-cetanā* (§ 42); *stainya-citta* (§§ 6, 21, 22, 42). This requires attention to be paid (§ 22) (*yoniso-manasikāra*). This is manifested by: (§ 7) failure to give a due share; (§ 8) appro-

priation of property of a monk who dies leaving an heir [18]; (§ 36) deceased monks' property must go to their legatees, if any; if a monk is absent for three months his property must be deposited in a suitable building. Theft occurs (§ 15) even when taking a disportionate share at a partition of land. It occurs (§ 16) if one who has lost hope of recovery of an article taken by a thief later retakes it from him; *otherwise* (a) if he did not lose hope, or (b) if the thief gave it away to a third party. § 20: Secreting property of an asctic who leaves, whether one or all secrete it, manifests this intention. If the owner remembers it and recovers it he is not liable. § 21: To steal one must know that another is owner.

§ 29: It is theft to acquire any and every lost property, without carefully considering whether the owner has lost hope of recovering it. Where the owner has lost hope the taker is not a thief and retaking from him is not a retaking from a thief. § 24: To take another's share of alms is a theft unless one previously guarantees to make it good. It is theft to break any agreement to the sharing of future jointly acquired alms. § 26: It is no theft if the *saṃgha* alienates property to benefactors, e.g. royal patrons. §27: The *saṃgha* is not entitled to feed menials who do not serve the monastery; the novice is not entitled to be fed whether he serves or not. § 36: The *saṃgha* ought not to allow its food to be given to improper persons during the rain-retreat, but it is all right if it thinks they deserve it. § 31: One may not take a flag or banner (cf. Bhāruci on Manu IX.285) from a *stūpa* if it has a *devalaka* in attendance. A worn-out flag can be appropriated for the *saṃgha's* rag-collection.

§ 37: When during the rains a liberal donor promises clothing or its purchase-price only present persons are entitled; if he promises to do the same for rain-retreat monks only those who have come for the rain-retreat are entitled. If the donor gives rain-retreat goods to those who have not come for the rain-retreat that is his privilege. § 38: At festivals of the Buddha's birth and Enlightenment gifts belong to the *saṃgha*, i.e. all the various denominations of gifts belong to the community as present at the time. Certain items are unsuitable for the *saṃgha* (e.g. beds and chairs) and they may not be sold or enjoyed individually. If a novice gives a prohibited object that has vested in the *saṃgha*, or sells it, or uses it personally, it is a *duṣkṛtam*, not a theft.

§ 40: Any donor's dedication to the « *saṃgha* of the Four Quarters » or to the Buddha must be handed over to the *saṃgha* of monks present by any ascetic that receives it. § 41: Where the donor gives in silence suitable items belong to the *saṃgha* of present monks.

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18. There is a genuine piece of Buddhist law comparable with the Hindu law stated at KANE, *op. cit.*, 764-65. On testamentary disposition in ancient India see now T. MUKHERJEE and J. C. WRIGHT, *An early testamentary document in Sanskrit*, in BSOAS, 42, 1979, 297-320.

(6) *What of attempts and anticipatory acts preparatory to theft?* § 14: If he makes a hole in a pot and takes a fluid within he is disqualified provided the pot requires to be filled and its flow is interrupted. Otherwise *vinaya*-experts say he is not disqualified provided he desists in order to be professed a monk. §§ 22, 26: It is theft to give to a *stūpa* what is dedicated for a *saṃgha*, or vice versa. The objection that all dedications belong to the Buddha and that therefore there is no deliberate theft by the manipulator is wrong, because such waste promotes the intention to steal (*stainya-cittasyotthāpakam*), like the abstraction of water through poverty. § 23: In practice the device requires a written order to the trustees (*Vārikas*) of the *stūpa* or *saṃgha*, their accounts will reveal discrepancies, and the trustees are forced into misbehaviour. § 26: It is worse to dissipate *stūpa* or *saṃgha* property on strangers (cf. § 5).

(7) *What of collaboration between culprits?* § 11: Liability is incurred through the use of human, pet, or (other) animal intermediaries. § 18: If two agree to share what each (unnecessarily) discards from his teacher's goods, the two of them are thieves, each have an intent regarding his own objects, each is liable in respect of both shares to the extent of a half.

§ 19: If many in consort take 5 *māsakas* less one *kākinī*, because they have a common purpose all are liable, « each acting like a look-out man for the others ». So if several ascetics, with a common purpose, employ a *mahallaka* (literally, « old man », or, conceivably, « rogue » [?] Roth, *Bhikṣuṇī-vinaya*, 23 n. 6) on equal shares, all are thieves, including the old man. I observe that in *Sutta.* II.4,5 even to search for a companion with an eye to theft is a *dukkaṭa.*

(8) *What of intermediaries or association with strangers?* § 19: On the « old man » see above. § 21: One is liable if he causes asportation of an object by another ascetic, who is not himself liable if he is ignorant of the true ownership and is not acquiring for himself. On the illegitimate use of human associates, e.g. the bagman see § 11 (4 above).

(9) *Acting as agent for another.* We have seen that if a second party is ignorant of the ownership and takes the property of a third party to the culprit at the latter's request the second party is free from blame (§ 21). One is disqualified for knowingly helping merchants to evade toll (§ 32). This decidedly improves on the obscure Sutt. II.4,21. If an ascetic is employed (§ 45) by another person and takes the property of third persons, *whether consciously or unconsciously*, he is disqualified. This is an interesting provision of *vinaya* of the strict-liability type, which deserves further research.

(10) *Guidance.* The law of inheritance must be observed (§ 8). When thieves do not part with articles stolen one may frighten them and if

they are caught complain to the king (reading *gatvā vākyatvam*, omitting the *na*) (§ 17) (cf. Kātyāyana 813-819). One ought never to give up hope (§ 29) of recovering one's lost property. One must explain to would-be smugglers (§ 32) why one cannot cooperate. (§ 36): property of missing persons must be securely deposited.

A striking aspect of this treatise is that no authority whatever is cited except the Buddha himself (§§ 8, 27, 30, 32, 36), though, as we have seen, reference to knowers of *vinaya* does occur. Neither Śrīghana nor his commentator use any previous jurist. That there were earlier commentators on Śrīghana is clear since in two places variant readings of the *ślokas* are mentioned. There is no evidence of contact with Hindu or Jaina learning: the latter could have been useful and corroborative [19].

It is worthwhile in conclusion to refer to a Hindu discussion which arises in two important places in *dharmaśāstra* [20]. It is the question whether a joint-owner can steal in respect of the undivided assets in which he has a share at all material times. Common-sense says that he cannot, whereas if he defrauds others of their share the appropriate prosecution for dishonesty can obviously be launched against him for punishment, compensation, or both. The Mitākṣarā answer, however, is that a joint-owner secreting joint property (which was very common) is not merely « like a thief » but is actually a thief. The arguments are typical *dharmaśāstra* arguments: (1) Manu IX.213 asks for the punishment of an elder brother who defrauds his younger brothers, and this must apply *a fortiori* if a younger brother cheats; (2) a Vedic passage [21] says that he who extrudes a sharer from his share destroys him or if he does not destroy him he destroys his son or his son's son, which text is capable of two interpretations, neither of which meets the point; (3) — the only relevant reason — the argument that the taker is innocent since all common property is owned by him will not avail him since, by the same token, others (the co-sharers) are likewise owners of the same assets until partition; and finally (4) a purely technical argument from the *mīmāṃsā* to the effect that even though it might be supposed that when X's property is mixed with Y's property any prohibition of handling X's property or Y's property must be inapplicable, in fact the restriction on handling Y's property will bind X, as much when X's property is blended with it as when X's property is distinct from it. The maxim relates to Vedic texts on the suitability of certain sorts of beans in sacrifices, and is wildly irrelevant. A different view is taken by Jīmūtavāhana, who finds the Vedic text not helpful by analogy. To his mind the alleged thief could not possibly intend to acquire the

19. R. WILLIAMS, *Jaina Yoga*, London, 1963, 78-84. In Jaina ethics even lost property should not be acquired.

20. *Mitākṣarā*, Colebrooke's divisions, I.ix. Jīmūtavāhana, *Dāyabhāga*, Colebrooke's divisions, XIII.8-16.

21. Ait. Br. VI.7. DERRETT, *Essays*, vol. II, 321, 338-39.

property of another, since until partition the property of X and Y cannot be distinguished. The conscious taking of the property of another is the essence of theft, as seems to have been the opinion of Jitendriya [22].

The level of argument is high only at one point, and it is noticeable that the two leading authorities on partition are diametrically opposed. It is a pity that the juridical ability indirectly available to the *śāstrīs* from the works of their Buddhist and conceivably also their Jaina colleagues was not utilised here, or even reflected. It is possible that the *mimāṃsā* taboo on the consultation of *bauddha* scriptures had something to do with it. It is hoped that this exploratory study will lead to a further investigation of what Buddhist scholars were thinking and how far they solved problems which Hindu writers are in general content to pass over in their surviving treatises.

22. KANE, *op. cit.*, I, 1st edn., Poona, 1930, 281-83. Jitendriya was probably a Bengal writer who flourished about A.D. 1000-50. It is of interest that Kane detects considerable originality in him.