1866. September 27. S. A. No. 69 of 1866.

total loss, the plaintiff will be entitled to recover the amount claimed with interest; but if not, then such a proportion of the value of the iron and jágarí and oil which were actually lost, and of the amount of the deterioration suffered by the cotton seeds and other articles, as the sum insured by the defendant bears to the whole sum insured, should be awarded to the plaintiff with interest thereon. And, in estimating the value of the goods lost, and the amount of the deterioration which the underwriters are to be charged with, the court must consider what proportion the sum insured bore to the actual value of the goods; and, if it was less than the actual value, should allow for the loss and deterioration in the same proportion. And the costs of this appeal will abide the final decision.

Decree reversed and suit remanded.

Special Appeal No. 540 *of* 1865.

NAROTTAM JAGJI'VAN..... *Appellant.*
NARSANDA'S HA'RIKISANDA'S..... *Respondent.*

Hindú Law—Testamentary Power—Separate Property.

The title of a remote kinsman, though heir of a Hindú testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of the property of that testator, whether such property was, by the testator, self-acquired, or held in severalty, either by virtue of a partition, or of the non-existence, or, if any ever did exist, the extinction of coparceners.

1866. October 13. S. A. No. 540 of 1865.

THIS was a special appeal from the decision of C. H. Cameron, District Judge of Súrat, in Appeal Suit No. 65 of 1865, reversing the decree of the Munsif of Surat, in Original Suit No. 1304 of 1864.

The case was argued before WESTROPP and GIBBS, J J., by *Nánábháí Haridás* on behalf of the appellant.

There was no appearance on behalf of the respondent.

Cur. adv. vult.

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WESTROPP, J.—This is a contest between the heir and the devisee of a deceased Hindú.

Vandrávandás Nathubhái made his will, bearing date the 23rd of February 1862, as follows:—

"The 9th of Máhá vad of Samvat 1918, Sunday, the 23rd of February 1862. To Khamár Narottam Jagjívan bin Raghunáth, inhabitant (of Súrat) Nâusárí gate. Written by Khamár Vandrávandás Nathubhái bin Nágardás, carrying on no trade at present, aged about 91 years, inhabitant (of Súrat) near the Nâusárí gate. To wit: I am alone. I am very old. I have been ill for some time, and I am now not certain of my life. And you have been taking care of me for seven years. And I have got no near relative. And you are like my son. And I lodge in your house. And you provide me my maintenance in every way. And I have in all property worth Rs. 300, including cash and jewels. The same I have this day given to you. And if I require anything for charitable purposes, during my life-time, I am to take the same from you out of it. And if I die then you are duly to perform my funeral ceremonies for a year, according to the custom of our caste, from the balance that may remain, after deducting what I may have taken from you from the said Rs. 300. Should any further balance remain, you are the owner thereof. No person has any thing to do with it. Because you take care of me, and provide me my maintenance, and you are like my son, I have given this writing to you. The same is agreed and consented to by me."

The will was duly signed and attested.

The respondent Narsandás obtained a certificate of heirship to Vandrávandás, the testator, of whom he was a remote kinsman on the paternal side. The testator died, without leaving any issue or near relative surviving him. He had lived for several years preceding his death with, and he died in the house of, the appellant, the devisee, who performed the funeral ceremonies of the testator.

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The plaintiff (respondent) brought the present action against the appellant (defendant), to recover from him the property of the testator. The defendant relied upon the will; and the Munsif of Súrat decreed in his favour.

The plaintiff appealed to the District Judge of Súrat, Mr. Cameron, who, on the 30th of August 1865, reversed the decree of the Munsif with costs; and held the plaintiff, as heir, entitled to the property of the deceased.

The defendant has specially appealed against that decision to this court. The points of appeal are as follows:—

"That the District Judge was wrong in holding that, without any independent inquiry in this case, the plaintiff must be considered Vandrávandás's heir, because he held a certificate to that effect, granted to him after a summary inquiry into his claims; (2) that he was wrong in holding that the will, relied upon by the defendant, was contrary to Hindú Law, and therefore useless; (3) that he was wrong in holding that a Hindú cannot make a will, except with regard to self-acquired property; and that, with regard to all other property he may possess, he is merely a tenant for life."

The testator never was united in family with his remote kinsman, the plaintiff; nor did the latter ever assert that they had lived together, or been united, either in food, worship, or estate. He rested his claim simply on the supposed invalidity of the will, and on his being next male heir of the deceased.

The District Judge seems to have held the will to be invalid on two grounds: (1) because there was nothing to show that the property of the deceased was self-acquired; (2) that, even if it were, he being a Hindú, could not dispose of it by will.

In the Supreme Court the wills of Hindús have been always recognized, and also in the High Court, at the Original Side. Whatever questions there may formerly have been as to the right of a Hindú to make a will relating to

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his property in the Mofussil, or as to the recognition of wills by the Hindú law, there can be no doubt that testamentary writings are, as returns made within the last few years from the zillahs show, made in all parts of the Mofussil of this Presidency; but, as might have been expected, much more frequently in some districts than in others, and this court at its Appellate Side has, on several occasions, recognised and acted upon such documents. That Hindús may make wills, and such wills may be admitted to proof, is contemplated by Sections 1 and 13 of Act XXVII. of 1860, an enactment which more especially concerns the Mofussil. The testamentary power of Hindús is by Lord *Kingsdown* in 9 Moore's Ind. App. p. 121, and by *Knight Bruce*, L.J., *Ibid.* p. 135, treated as completely established. It is, therefore, now too late to deny to Hindús in the Mofussil of this Presidency the right to make wills, as the District Judge has done in the present case.

But the extent to which such testaments shall be permitted to take effect—the scope of the testamentary power of a Hindú—is quite another question. Even in the Supreme Court, where the right of a Hindú to make a will has been always recognised, I have never known it to be argued or held, that his testamentary power is co-extensive with that of an Englishman. The will of a Hindú, it has been decided by the Privy Council, must be regulated by the Hindú Law (*a*). It has been often ruled in the Supreme Court, that he may dispose, by will, of property wholly acquired by his own exertions, and also of separate property acquired by partition of family property, or by the non-existence, or, if any did ever exist, the extinction of co-parceners, (if the members of an undivided Hindú family may be so designated,) or joint tenants; and no distinction, of which I am aware, has ever been there taken between it and self-acquired property, either in point of descent or of alienability. On the other hand, it has been often held there, also, that he cannot dispose, *by will*, of undivided family property, or of any share therein, so long as that share remains unsevered from the family stock.

(*a*) See 8 Moore's Ind. App. 66.

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The District Judge has held, that, as the property, now sued for, has not been proved to be self-acquired property, even if the testator might have made a will, he could not, by it, have disposed of that property. However, it being undeniable that the testator was separate in food, worship and estate from the plaintiff; and there not being any reason for supposing that the testator was, at the time of his death, a member of an undivided family, or, in fact, that he had any descendant or near relative; his property,—even though it may possibly have been ancestral, or originally derived from a general fund, enjoyed by him jointly with members of his family since deceased without issue,—was at the time of his death, to all intents and purposes, separate property. The plaintiff, therefore, could not take by right of survivorship as a joint tenant or member of an undivided family.

The law of descent of separate property obtained on partition, and of self-acquired property, is the same. *Katama Natchier* v. *the Rajah of Shivagunga* (*b*). It is difficult to assign any sufficient reason why the power of disposition by will should not exist with regard to the former as well as the latter. Neither the Supreme Court nor this court at its Original Side has made any such distinction; and, without some strong authority, we see no reason why, with regard to Mofussil wills, we should do so.

In a case from Madras, *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty* (*c*), a will by a Hindú, without male issue, kinsman, or coparcener, but leaving a wife and daughters, was held good, as well as to ancestral as to self-acquired property. There cannot be any doubt that an alienation *inter vivos* by the testator, in the present case, of his property would have been good against the plaintiff. *Vallínáyagám Pilláí* v. *Pachché* (*d*) is a clear authority that in Madras, at all events, the testamentary power of a Hindú is co-extensive with his independent right of alienation *inter vivos*;

(*b*) 9 Moore's Ind. App. 539, 609, 610. See *Timmi Reddy* v. *Achamma*, 2 Mad. H. C. Rep. 325.

(*c*) 6 Moore's Ind. App. 309. (*d*) 1 Mad. H. C. Rep. 326.

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and we are unable to suggest any good reason, why the law in the Mofussil of this Presidency should be held to be different.

For these reasons we think that the decree of the District Judge should be reversed; and that the respondent should pay all costs of this appeal and of the suit in the courts below, and that, if the property were made over to the respondent, he should forthwith return it, or refund its value to the appellant.

GIBBS, J., concurred.

Appeal allowed.

Special Appeal, No. 530 *of* 1865.

KEDA'RI' bin RA'NU and BHAI'RU' bin JA'NKU' ..... *Appellants.*

A'TMA'RA'MBHAT bin NA'RA'YA'NBHAT and HARI' SADA'SHIV ..... *Respondents.*

Mortgage—Oppressive conditions of deed set aside—Directions as to account to be taken—Inadequacy of consideration.

Where money-lenders, dealing with ignorant, illiterate peasants, made use of the necessities of the position of those peasants, who were seeking to raise a sum of money for the purpose of stocking and tilling their lands, to impose upon them a contract, in the form of a mortgage, by which they agreed, in default of punctuality of payment of the half produce, and in other events, to sell their land at a gross undervalue, viz. one-third of the amount of the mortgage debt, which in itself was not more than equal to half the value of the annual produce of the land, and to remain liable to the remaining two-thirds of that debt with interest; and, even if no default should occur on their parts in payment of a moiety of the annual produce, or the performance of their other covenants, and notwithstanding full payment of the principal, to continue for fifteen years to pay the half produce of the lands to the mortgagees:—

Held (reversing the decrees of both the courts below) that the deed of mortgage should only stand as security for the payment of the principal sum of Rs. 300 and interest at nine per cent.; and in all other respects should be set aside as inequitable, fraudulent, and grossly oppressive.

Held, also, that if, in execution of the reversed decrees, the lands had been made over to the mortgagees as purchasers, they should be restored to the mortgagors, and that the rents, profits and produce, received by