[APPELLATE CIVIL JURISDICTION.]

1873.
October 29.

Regular Appeal No. 29 *of* 1873.

MORO VISHVANA'TH and
others........................*Defendants and Appellants.*
GANESH VITHAL and others, *Plaintiffs and Respondents.*

Hindu law—Partition Suits—Right to demand partition—When Partition questioned—Valuation of appeal.

Partition can effectually be demanded by a Hindu more than four degrees removed from the acquirer or original owner of the property, sought to be divided, provided he is not more than four degrees removed from the last owner, however remote he may be from the original owner thereof.

Devala's text *Avibhakta Vibhaktánám* discussed.

Partition cnce effected is final and cannot be re-opened on the ground of the inequality of shares. It can be re-opened only in case of fraud, or mistake, or subsequent recovery of family property.

Presumption of union in a Hindu family is stronger as between brothers than as between cousins, and the presumption is weaker the farther from the common ancestor the descent has proceeded.

The proper valuation in the case of an amended plaint is that ascertained at the date of the amendment, and not at the date of the original filing of the plaint,

THIS was a regular appeal from the decision of Chintáman S. Chitnis, First Class Subordinate Judge of Ratnagiri, in Suit No. 905 of 1866.

The facts of the case, in so far as they are material for the purpose of this report, are briefly as follows :—

The plaintiffs and defendants are descendants of one Udhav, the acquirer of the property now in dispute between them. The former are beyond, and the latter within, the fourth degree from Udhav. The plaintiff's claim for partition was admitted by some of the defendants and opposed by the rest, principally on three grounds, viz., 1st, improper valuation of the claim; 2ndly, limitation; and 3rdly, an averment that the parties have been in a state of separation for fifty years.

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The Subordinate Judge found for the plaintiffs on all these points, and accordingly gave them a decree, which it is unnecessary here to set out in detail.

The appeal was heard by West and Na'na'bha'i Haridá's, JJ.

Rávsáheb V. N. Mandlik for the appellants, the original defendants.

Dhirajlál Mathurádás, Government Pleader, for the respondents, the plaintiffs :—

West, J. :—Of the two preliminary points, raised on the hearing of this appeal, the first, raised on behalf of the respondents, was that the appeal was improperly valued for the stamp duty payable on account of Court fees. The appellants, it was urged, seeking to have the judgment entirely reversed, were bound to value the subject-matter of the appeal according to the aggregate of the property embraced in the original suit, and the more so as the respondents had, as plaintiffs, been compelled, at the instance of some of the appellants, to increase the valuation of the property beyond that at first set forth in the plaint. But the decree of the Subordinate Judge awards portions of the whole estate, regarded as family property, to each of the litigant parties. It is only so far as this order goes to deprive them of what they possess that the defendants now appeal against it; and they are not bound to pay duty, except on the computed value of the relief that they actually seek. As to the part of the decree which affects property in the possession of the plaintiffs (now respondents), the appellants do not desire that it should be interfered with. The persons, if any, to seek relief against that branch of the decree are the respondents, who, according to Sec. 16 of the Court Fees Act (VII of 1870) would have to value their cross appeal accordingly. Taking that section along with Sec. 7, Sub-Sec. IV. (b) of the same Act, it appears that the appeal has been properly valued for stamp duty.

The second preliminary question was raised by the appellants. The original suit was rejected by the Principal Sadar

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Amin as barred by limitation. The claim, as there set up, was for part of the property held by the defendants. The Assistant Judge thought that, as thus constituted, the claim was barred, but that as what the plaintiffs really wanted was a partition of family property, they might be allowed to amend their plaint by including in the demand for adjudication the portion of that property held by themselves as well as that held by the defendants. The claim would thus be saved from the bar of limitation as the plaintiffs averred that they were in possession of what they held as co-parceners in an undivided family; while, by bringing in the whole estate, the stamp revenue would be guarded against fraud, and a means afforded for doing complete justice between the parties.

Against the order of the Assistant Judge, allowing the plaint to be amended, an appeal was made to the High Court, but it was confirmed on the 27th April 1869.

The plaintiffs, as to the family property in their own possession, valued the village of Kochri according to the Government assessment, but in estimating this assessment, they took the prices of grain prevailing in 1867-68 when the amendment was made, not in 1865-66 when the plaint was originally filed. To the other principal item, viz., the *Kár-khánishí watan* at Vishálgad, the plaintiffs attached no value on the ground that, as now regulated, the place had become a mere life appointment, affording no income except to the office-holder, disposable at the pleasure of the Chief of Vishálgad, and not, therefore, any longer to be regarded as property in the true sense. They also assigned no money value to the *Sar Potdári haks* claimed by the family over Khilna and the village of Khanu, on the ground that nothing probably would be realized on account of them.

The appellants now contend that this is a mere pretended compliance with the order of the Assistant Judge, directing an amendment of the plaint, and that as such an amendment, carried out in perfect good faith, was a condition precedent to their further prosecution of the suit, the claim must be dismissed. As regards the village of Kochri, the point

chiefly dwelt on is, that the value of rice being lower in 1867-68 than in 1865-66, the part of the claim relating to that village has been undervalued in the same proportion. But the order allowing the amendment did not prescribe that the price of grain, for the purpose of determining the valuation of the village, should be taken otherwise than as it stood in the year in which the amendment was made. In an ordinary suit, the valuation of Kochri, according to rates for grain higher than what prevailed towards the close of the litigation, would cause an expense for stamp duty greater in proportion to the property that could be recovered than the legislature really contemplated. In the present suit, if the artificial valuation could have any effect on the adjudication of the case, it was fairer that the village should be appraised according to the prices of the time when the valuation was made, than according to the exaggerated rates caused by the inflation of credit in 1865-66. The permission to amend at all, however, was a permission to proceed *nunc pro tunc*, and this being once allowed, there seems to be nothing unreasonable, or, at any rate, fraudulent in making the valuation *nunc pro tunc* on a computation of the current market rates instead of those of a couple of years before. It does not appear that by this course the intentions of the legislature have been defeated, and the Assistant Judge cannot, in this particular, have desired more than that the requirements of the law should be satisfied.

Of the remaining items, the *Sar Potdári haks* were abandoned by the plaintiffs. If they belong to the family, the defendants are thus free to appropriate them, and not entering into the plaintiffs' claim they need not enter into the valuation of it. The *Kárkhánishi watan* appears to have undergone a change analogous to that sustained by similar holdings under the British Government. The *Mokásá haks*, formerly attached to the office as the property of a family, seem to have been absorbed in a payment now made strictly for services rendered. It does not appear that, over and above the remuneration of the office-holder, any sum of

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money by way of surplus, or any other advantage, is enjoyed by the general body of the *Watandár* family. The office, it is admitted, is held hereditarily by the plaintiffs' branch of the family—a circumstance of some importance for another part of the case—but it does not seem to admit of valuation for the purposes of a law-suit. It could not be sold or transferred, and thus the ordinary criterion of value cannot be applied to it.

The plaintiffs (respondents) admit that two dwelling houses occupied by them, have not been entered in the plaint. On the other hand, they do not seem to have set up any claim to a share in the abodes of the defendants. Possibly, they were influenced by the notion held by some Hindu lawyers that a dwelling house is not a subject of partition (See Coleb. Dig., B. V. T. 262). But there does not seem to have been any intention to defraud the stamp revenue by this slight omission. It does not seem to have been noticed in the Court below, and has not been pressed here by the appellants.

Upon the whole, we do not see any sufficient cause for reversing the decree of the Subordinate Judge, on the ground of an insufficient valuation of the property amounting to a fraud on the Court and a contempt of its order. We may proceed, therefore, to dispose of the case on its merits.

The first argument to be considered (one pressed with much learning and ability by Ráv Sáheb Vishvanáth Náráyan Mandlik for the appellants) is that, notwithstanding no partition may have taken place, yet, after three steps of descent from a common ancestor, the acquirer of the family property, all claims to a partition, by the descendants of one son upon those of another, cease. The comment of the Viramitrodaya on the passage of Devala cited at Coleb. Dig., B. V. T. 81, and W. and B., Pt. II., p. IV. is: "A distribution of shares shall take place down to the fourth (descendant) from the common ancestor." The special *Sapinda* relationship ends with the fourth descendant (inclusive) according to all the principal authorities, and as a great-great-grandson could not inherit, except as a *Gotraja* relation after the widow and

many other interposed claimants, it is said that the analogy of the law of inheritance prevents a lineal descendant, beyond the great-grandson, from claiming partition at the hands of those who are legally in possession, as descendants from the original sole owner of the family property or any part of it. The enigmatic language of the texts no doubt lends some support to this contention, but we think that it misses the true purpose of the rule. The Hindu law does not contemplate a partition as absolutely necessary at any stage of the descent from a common ancestor, yet the result of the construction pressed on us would be to force the great-grandson, in every case, to divide from his co-parceners, unless he desired his own offspring to be left destitute. Where two great-grandsons lived together as a united family, the son of each would, according to the Mitákshará law, acquire, by birth, a co-ownership with his father in the ancestral estate; yet, if the argument is sound, this co-ownership would pass altogether from the son of *A* or of *B*, as either happened to die before the other. If a co-parcener should die, leaving no nearer descendant than a great-great-grandson, then the latter would no doubt be excluded at once from inheritance and from partition by any nearer heirs of the deceased, as, for instance, brothers and their sons; but where there has not been such an interval as to cause a break in the course of lineal succession, neither has there been an extinguishment of the right to a partition of the property in which the deceased was a co-sharer in actual possession and enjoyment. Jagannátha in Colebrooke's Digest (B. V. T. 396, Commentary) has discussed an argument on a case almost identical with the one before us. The only difference seems to be that it supposes the son of the original owner to have been separated from his father, and the claim to be set up by his great-grandson to a share in property left undivided in the first partition. "But as for the opinion," he says, "that (the right to a) partition extends only to the brother, his son, and the son of that son, even when co-heirs die successively, and that no (obligation to) partition can exist beyond those with the great-grandson of the late owner's son, may it not be

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asked to whom then would the property belong?" Then meeting the argument from the "literal sense of the precept," already referred to, that the whole property would belong exclusively to the survivor of the two brothers and his descendants, he says that mere reasonings on the literal sense of the text are out of place, "for the several ancestors dying successively, and the property not having been silently neglected during adverse possession, nothing prevents the transmission of it even to the hundredth degree of lineal consanguinity." Each descendant in succession becomes co-owner with his father of the latter's share, and there is never such a gap in the series as to prevent the next from fully representing the preceding one in the succession. It is on the same principle that the seventh in descent in an emigrant branch, can return and claim a partition of the property. He may be a *Sapinda* in the stricter sense of one who was a *Sapinda* of the ancestor in possession. His great-grand-father may have inherited, as fourth in the line, a right which he was then capable of transmitting to the fourth in descent from himself. Here the right stops as amongst those who have not emigrated; it stops at the fourth from an owner in possession, through the operation of a law of prescription. Either there has been a failure of three links of the chain of descent, causing the succession to fall to collaterals, or there has been a "silent neglect" to assert the existing right, which in the fourth or the seventh generation annuls the title (Coleb. Dig., B. V. T. 394, 396, Com.). The passage cited by Mr. Dhirajlál from Mr. Strange's Manual, and the case there referred to, involve the same view of the Hindu law as the one just set forth, and are opposed to the notion that a division of a Hindu family necessarily occurs in the fourth generation from the common ancestor independently, or even in spite, of the wishes of the several members.

But though no such partition as this by mere operation of law is known to the Hindu system, it is equally clear that that system, like the English, respects an existing possession peaceably acquired, and raises, after the lapse of a considerable time, the presumptions by which it can be supported.

"Possession by strangers for three generations," according to Brihaspati, "gives no doubt an absolute title." In such a case "proof of a fair title," Vyása says, "is not required" (Coleb. Dig., B. V. T. 395, 396) though, where a shorter time has elapsed, the possessor for less than twenty years would have to disprove a *prima facie* adverse title, and one for more than that time a *prima facie* title supported by proof of possession in accordance with it (Ib. T. 384, Com.). The text of Yájnavalkya (B-II. S-124): "If one see his land in the possession of another and say nothing, it is lost after twenty years, moveable property after ten years," has, by Vijnáneshvara and Nilkantha, been construed in a very forced and unnatural way in order to bring it into accordance with the other texts (V. Mayukha, Ch. II., S. II., para. 6). They say that this lying by involves forfeiture only of the profits of the land. The text really goes to throw upon him, who seeks to disturb a possession held for twenty years with his assent, the burden of proving that the possession was constructively his own. But Nilkantha still limits Nárada's principle, that no length of time can validate a dishonest possession by restricting it to the time "fit for recollection of legal title," and admits that a colour of title is made effectual by three descents (V. M., Ch. II., S. II., paras 2, 3). Amongst *Sapindas* the presumption does not arise so readily (Coleb. Dig., B. V. T. 396), yet, as has been seen, an exclusion from the right to a share is caused by non-possession for three generations, and if this text is to be applied only to undivided property, yet text 384 from the same author shows that by laches an heir forfeits his right of inheritance as against his co-heirs, and a former co-parcener forfeits what he became entitled to on partition. But if he may forfeit the whole, so also a part. Where a partition has actually been made, it is conclusive in the absence of fraud (2 W. & B. 40, 43; Coleb. Dig., B. V. T. 377, 378; Manu IX. 47). It is not to be re-opened "on the simple allegation of an unfair distribution," and in the case of *Somangoudá* v. *Bharmangoudá* (a) the Court refused to interfere where the divided

(a) 1 Bom. H. C. Rep. 43.

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parceners had held the shares possessed by them for 16 years before the institution of the suit. But even where no regular partition has been proved, the presumption of acquiescence in favor of the existing separate possession of the descendants of former co-parceners is obviously stronger where each holds some than where one or more hold none of the once undivided property. Yet as to the latter case, Jagannátha says (Coleb. Dig., B. V. T. 384), "that the title is lost where the claimant has not taken possession, though healthful, able to occupy the land, and unopposed by any other claim" than that of the person in possession. The result seems to be that as a co-sharer may, by neglecting to assert his right, cause a presumption to arise, which cuts him off from participation altogether and makes him a divided member without any share in the family property; so *a fortiori* a similar neglect may cut him off with what he happens to possess, unless there has been some exercise or admission of reciprocal rights as to the several parcels of the property within so recent a period, that the presumption of separate ownership cannot, under the circumstances, reasonably be raised. An undisputed assertion of proprietary rights extending to the property actually possessed by other descendants from the common ancestor, will show that the several parcels are still held as shares of a common property. In the absence of such an indication, sole possession by several members of separate parcels may reasonably be taken in accordance with the ordinary presumption as proof of separate ownership. Though a state of things different from that now relied upon by the party defendant may once have existed, yet, if the present state can be traced back for a certain time, a reasonable inference arises that it had a legal origin. What that time is to be is, in some instances, precisely regulated by law as by the sections on prescription in the Indian Limitation Act; in the absence of a precise rule, it is determined by a consideration of all the circumstances, but the presumption itself has found a place in most systems of law. Jaganátha's discussion of the subject implies this as to the Hindu law; for the English law reference may be made

to the cases collected under *Yard* v. *Ford*, 2 Williams Saunders 171 C, and to the history of the doctrine given by Cockburn, C.J., in the case of *Bryant* v. *Foot* (b); and for the Roman law to Von Savigny's disquisition on the subject of "*tempus immemoriale*" in the 4th volume of his system (Ch. III., Sec. 201), and Goudsmid Pandects, Sec. 81, page 224.

A partition, tacitly effected in the way just considered, is, for practical purposes, identical with the separation constituted according to Yájnavalkya by separate possession of house or field. Brihaspati and Nárada (H. W. and B. XIII. V. Mayukha, Ch. IV., Sec. VII., para. 27) give the separate transaction of affairs as another indication of division. Separation in food and worship and in residence are of less weight in this than in former ages as signs of partition, but should be taken into consideration along with other circumstances. It is a recognized principle that, when a Hindu family has once been proved to have been joint, it lies on those who assert a subsequent separation to prove it. The state of things shown to have existed is presumed to have continued, until the contrary be shown. But it is not inconsistent with this doctrine, and is, indeed, obvious that, as the course of nature itself brings about inevitable changes in a family, the presumption is one which grows weaker at each stage of descent from the common ancestor. Brothers are for the most part united; second cousins are generally separated. After a considerable lapse of time, testimony of the precise terms on which a partition was effected, and of the precise time at which it was made, will, in most cases, be wanting. The presumption that the old state of things continued, is, at some point, met by the presumption that the present state of things had a legal origin, and it cannot be said that the Hindu law, in the form in which it has come down to this generation, looks on all separation of families with disfavor. Many sages point complacently to the increase of offerings that attends the separate performance of family religious ceremonies, and the pressure of modern circumstance tends

(b) L. R. 2 Q. B. 161.

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steadily towards disintegration. There may be a separation gradually effected by tacit agreement, as well as one by express contract: *Doe* d. *Gulchunder Mitter* v. *Tarachurn Mitter*, 1 Ful. 132. Where, therefore, we find descendants in two lines in the fourth, fifth, and sixth degree, from a common ancestor, the presumption in favor of continued union between the two branches, though it has not altogether vanished, has become but a slender one. If it is met by proof of long continued exclusive possession of parcels of the original family estate, of independent dealings with the parcels in its own possession by each branch, of a total separation in food and residence, it cannot, in general, prevail against the inference which such facts suggest. It would be unreasonable that it should.

In the present case, the Subordinate Judge has found "that during the last 50 years the plaintiffs were in possession and enjoyment of some part of the property, and the defendants were also in possession and enjoyment of some and that they never, during that period, rendered accounts of the profits and expenses to each other." No attempt has been made, on appeal, to impugn this statement of the facts. It further appears that no part of the family property, whatever rights existed, was, during that time, actually enjoyed in common, and that as to one village (Borivle), the plaintiffs and the defendants hold, each party, exactly one-fourth of that village, and give separate *Kabuláyats*, or agreements, for their respective shares of the Government revenue. The defendants appear to have repeatedly mortgaged the moiety of the village of Kolwan, which the plaintiffs claim as family property, without any reference to them. The plaintiffs, even after the institution of the suit, alienated two-thirds, if not the whole, of the village of Kochri, without reference to the defendants or reservation of their rights. This village is the chief item of the disposable family property in the plaintiffs' possession; and, if they did not regard it as exclusively their own, their alienation of it was a fraud on the defendants. The plaintiffs, it is plain, by such a transaction, deprived themselves of the capacity to give up to the defendants in

specie the share which the decree might award them in that portion of the family estate. It is said that the inequality of the value of the possessions, held by the two branches, is a proof that no partition ever took place; but this inequality, taking it to be as great as the plaintiffs contend, would naturally have led, years or even generations ago, to an insistence, by the plaintiffs, on a more equitable distribution of the joint property, or to a suit for partition. The more obviously unequal the distribution, the more probable it is that it would not have been so long acquiesced in, unless there were good reasons for acquiescence. The evidence of the present value, however, is, by no means, satisfactory; the estimates of the two parties differ widely, and the evidence does not afford means of arriving at a satisfactory conclusion. How far the present values of the several parcels correspond to their values fifty or seventy years ago, is a matter left entirely to speculation, and it is in part to shut out insoluble questions of that kind that rules of prescription have been established. The conduct of the parties in living apart, in treating their several possessions as solely their own, and in setting up no claim against each other for half a century, affords evidence of a partition which, we think, quite overcomes the presumption, weak as it is in the case of parties so remotely connected, in favor of continued union. Nárada says (I. W. and B. 357) that a separation in transactions for ten years is conclusive of a partition, and though it is said at Pt. II. W. and B. that this rule has not been adopted by the modern commentators, yet it is to be found in the Smriti Chandriká (Ch. XVI., para. 14), though it is there ascribed to Kátyáyana. But without drawing the line of prescription so rigorously as this, or, indeed, laying down any arbitrary rule of general application, we think that, in this particular case, notwithstanding the absence of any written instrument of partition, the balance of probability, on the facts thus far considered, is altogether in favor of division. It is needless, therefore, at this stage, to consider how far the mere neglect to assert their rights on the part of the plaintiffs, independently of any finding on the fact of separation, deprives them of a

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remedy, or whether, as sole possession is *prima facie* proof of sole ownership, the plaintiffs are not bound by limitation, unless they have distinctly proved some act or some state of things, not possibly, but necessarily, referrible to common ownership within twelve years before the institution of the suit.

The document, purporting to be an agreement for a partition of the whole of the family property, drawn up about eight years before the suit and signed by six of the defendants, is put forward as evidence of such an act. Two witnesses depose to the execution of this document, and another says he attested the document as executed by three defendants, who were not present, at their request. Besides these witnesses, four of the defendants depose to the genuineness of their signatures to the document. But of these defendants, Bálkrishna Vishvanáth deposes that when the document was executed, his brothers Shivrám and Keshev, the latter of whom did not sign the document, were separated from him. He deposes that Shámráv, the father of Váránashi, one of the defendants, signed a letter, in which he is contradicted by two witnesses. Sadáshiv Dámodar, another defendant, says he signed the document at the instance of Shámráv, now deceased; but he deposes also that there was a partition a hundred years ago, and that the document, drawn up eight years before the suit, was meant to effect a redistribution, but was never completed. Shivrám Yeshvant, the seventh defendant, deposes to the like effect. The family, he says, has been divided for a century, and the document, drawn up eight years before the suit, was a merely preparatory step towards a readjustment which was never carried out. Another witness also, while he admits the claim, says the families have been separated as long as his memory goes back. There was to have been another final memorandum, he says, on a stamp. As to the letter he agrees with one witness, and contradicts two others.

Upon the whole, it seems most likely that this document, drawn up eight years before the suit, was really executed by the parties, whose signatures it purports to bear. But three

of the alleged co-sharers did not sign it, nor is the evidence, that they joined in the agreement, satisfactory. As to a fourth co-sharer, Shámráv, a separate portion of the estate was given to his daughter Váránashi, one of the defendants, on the express ground that he was a divided member of the family, and to that suit the plaintiff Antáji was an effective party, though the decree did not direct him to give any property to Váránashibái. This consideration must dispose, at the same time, of any effect as against the appellants, except Váránashibái, of the letter written by Shámráv; and as to her it can have no effect, because her relation to the other parties is *res judicata.* The document, drawn up eight years before the suit, being an agreement for a partition or a re-partition if it was effective at all, superseded all the previous relative rights of the parties by a new set which it created or defined. But it is, on its face, defective, as wanting some signatures, the absence of which is not satisfactorily accounted for, and then it is clear that it was never acted on, or attended to by the parties. After, as before, its execution, both branches dealt with their several holdings, as if solely their own. There was no distribution, no rendering of accounts, in accordance with the mutual rights conferred or established by it. There were mortgages and sales quite inconsistent with it. Taking these facts into consideration, we must hold that either the document No. 28 was, as some of the witnesses say, a merely preparatory one, not intended to have force of itself, or else that the agreements contained in it were abandoned, and the rights arising from them renounced by common consent, or through a consciousness that they could not be given effect to by reason of the non-acquiescence of some necessary parties. Looked at by itself, it does not constitute, under the circumstances, a document on which the plaintiffs can now base their claim; while, as proof of a prior state of union, it is more than counterbalanced by its partial execution, by nothing having ever been done under it, and by a course of conduct on both sides inconsistent with its having been regarded as embodying serious and binding engagements.

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Three of the defendants admit the claim of the plaintiffs. The Subordinate Judge, upon this and upon the document drawn up eight years before the suit, has held that the defendants have admitted the union of the family, and that, as the defendants are all united, the admissions of some will bind all. But as to the admissions, such as they are, in this document, these are made merely as a basis for an agreement, one which, as we have seen, was either never regarded as final, or else was forthwith practically repudiated by all parties to it. Such admissions can have no conclusive effect, and appear to be of but very little weight, except when strongly corroborated. The admission of the claim by three of the defendants requires a closer consideration. The members of a Hindu family, sued by other alleged members, cannot be looked on in precisely the same light as partners in a firm each authorized to act as the agent of the others. If they were to be regarded in this way, the action itself, by alleged members against other members, would be inadmissible. It would be opposed to justice and reason, that an embarrassed member of one branch should, through corruption or spite, be able to betray the interests of all his co-parceners into the hands of their adversaries. The admission may bind him who makes it so as to make him joint with the plaintiff, who also asserts the union; but cannot be allowed to weigh against his co-parceners, who deny the union and perhaps prove a partition. As to the admitting defendants, the decree of the Subordinate Judge may be affirmed in this sense that they are to be deemed co-parceners with the plaintiffs, and entitled to share the paternal estate with them while bound to throw their own shares of that property, when ascertained, into the aggregate for partition, but that this is not to affect their rights and liabilities with reference to their co-defendants, or to affect property in the possession of those co-defendants, except so far as these three defendants may establish their right to it by a suit. They will themselves, at the same time, be liable to a suit by their late co-defendants, if they hold property either as divided or as undivided members of a family with them in excess of

what they are entitled to. This is a somewhat complicated process for giving effect to the admissions of these defendants; but it does not seem to admit of simplification, except by discarding their admissions altogether, which would be contrary to the usual practice, however conformable it might be to justice in the particular case. As between them and the plaintiffs, these defendants are to be regarded as united with the plaintiffs; as between them and their co-defendants, this union is not to be taken as adjudicated; as to union or division subsisting between the three and their present co-defendants for the purposes of any other suit, it is not to be understood that any judgment is given, but simply that their property, such as it may be, goes with them into the plaintiffs' family.

With this exception, the decree of the Subordinate Judge must be reversed. Costs throughout on the plaintiffs.

NA'NA'BHA'I HARIDA'S, J. :—One set consisting of three defendants, answered that they were willing to effect a partition and were unnecessarily sued. They, in fact, admitted the plaintiff's claim.

The other set, consisting of nine defendants, among other things, answered that the claim was barred by the law of limitation; that they had been separate from the plaintiffs for upwards of thirty years; and that this suit was the result of a conspiracy between one of the defendants, who admitted the plaintiffs' claim, and the plaintiffs.

The Subordinate Judge, on remand from the High Court, held, *inter alia*, that the suit was not barred, and that the property in dispute was joint ancestral property. He, accordingly, made a decree for partition thereof on the 4th September 1872, the one now in appeal before us.

Passing over as unimportant the objections, preliminary and otherwise, which were urged, as to the valuation of the appeal and of certain items of the property comprised in the plaint, but which do not affect the merits of the case, it seems to me that the substantial questions raised in the numerous

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grounds of objection to the Lower Court's decree, contained in the memorandum of appeal, as argued before us, resolve themselves into—

1st.—Whether this claim is barred by the law of limitation ?

2nd.—Whether the plaintiffs are entitled to demand a partition at all, assuming them to be members of an undivided family ?

3rd.—Whether they are members of an undivided family ? and

4th.—What share, if any, are they entitled to ?

It seems to me that a good deal of the argument on the questions of bar under the law of limitation might have been spared. It is admitted that a portion of the property, of which partition is sought, is now in the possession of the plaintiffs, and another portion of it in that of the defendants ; so that, if the plaintiffs and defendants are still members of an undivided family, the suit cannot be held barred under Cl. 13, Sec. 1, Act XIV. of 1859, the law of limitation governing this case ; *Sakho Náráyan* v. *Náráyan Bhikáji* (c) ; *Sookh Lal* v. *Goolzar* (d). On the other hand, if they do not now bear that character, no partition suit can at all lie between them, except under certain specified circumstances, which are not alleged to exist in this case, and the question of limitation under the Act, therefore, becomes immaterial.

The next question, however, whether, assuming them to be undivided, the plaintiffs are entitled to sue at all for partition according to Hindu law, is one of considerable importance and difficulty. Learned and ingenious arguments, based upon various original texts, have been addressed to us by the able pleaders on both sides. The plaintiffs and defendants are admittedly descendants of one common ancestor, Uddhav. The defendants are all fourth in descent from him. The plaintiffs, however, are, some fifth, and others sixth in descent

(c) 6 Bom. H. C. Rep. A. C. J. 238.
(d) 14 Calc. W. R. Civ. R. 223.

from him; and hence, it is urged, the latter cannot claim from the former any partition of property descended from that common ancestor.

It is argued for the appellants that, since the fifth and remoter descendants are, by the law of inheritance, postponed to the fourth and nearer descendants, (between whom and them, moreover, other relations may intervene,) the former are not co-parceners with the latter, and cannot, therefore, demand a partition from them. In support of this contention are cited the passages of Kátyáyana and Devala, quoted from the Viramitrodaya in 2 W. and B's Dig., Introduction, III., IV.; Manu IX., 186, with Kulluka's comments on it; Nanda Pandita's Comments on Devala; Aparárka on Yádnyavalkya; Vyavahára Mádhava; and Kamalákar. Devala's passage, it is urged, applies to divided and re-united as well as to undivided families, and not only to the former according to Nilakantha, who regards, by a forced construction, the word *Avibhaktavibhaktánám* as a *Karmadháraya* in the sense of *those who having been divided have again become undivided* [or re-united], instead of as a *Dvandva*, in the sense of *divided or undivided*, as one naturally reads it, all the authorities being opposed to Nilakantha on this point. It is further urged that the law of partition is inseparably connected with, and is, indeed, a part of, the law of inheritance, which is clearly founded on the spiritual benefit which certain persons, according to the religious ideas of the Hindus, are supposed to be capable of conferring on the deceased by the gift of the funeral cake; that this capacity of benefiting the deceased does not extend beyond the fourth in descent, for Manu says, Chap. IX., 186, "but the fifth has no concern with the gift of the funeral cake;" that this is made clearer by Kulluka in his commentary; and that as the fifth cannot inherit during the lifetime of the fourth in descent, so neither can he claim any partition from the latter. It is also urged that, according to Nanda Pandita: "Up to the fourth alone are the Kulyas called Sapindas," and that "the great-grandson's son gets no share;" that according to Aparárka, whose authority is recognized by Colebrooke, Stokes

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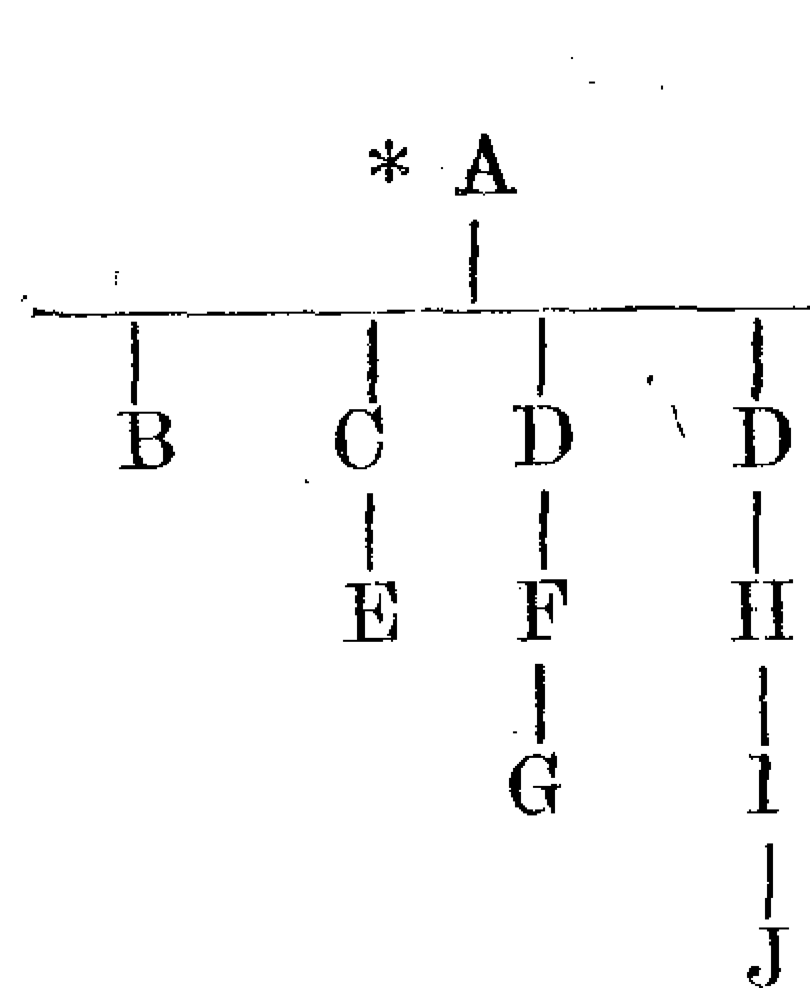
177, "Up to that (*i.e.*, the fourth) the *Kulyas* are *Sapindas* after which the *pinda* relationship ceases;" and that according to Vyavahár Mádhava "after that [*i.e.*, after the great-grandson,] there is always a stoppage of the division of the wealth of the great great-grandfather."

To this it is replied that the authorities quoted do not support the contention of the appellants; that the doctrine of ancestral property vesting by birth in one's son, grandson, and great-grandson, was overlooked by the other side; that if A died, leaving two or more sons forming an undivided family, and they died each of them, leaving one or more sons, and the same thing happened regularly for several generations, all the descendants of A, living in a state of union, as in this case, the authorities quoted did not prevent any of such descendants below the fourth demanding a partition of their joint family property: (See Str. Man. S. 347); that they only went so far as to lay down that, if *A die, leaving B, a son, E, a grandson, G, a great-grandson, and J, a great-great-grandson, the intermediate persons having all predeceased him, J, who stands fifth in descent from A, cannot demand a partition of A's property, because J had not vested in him by birth any interest in such property; that the same view of the texts cited was adopted by the learned authors of the Digest (W. and B. Bk. II. pp. II., IV; see also Stokes 53, 54, 515, 516, and 517); that the right to participate does not necessarily cease at the 4th descent; see Stokes 290, 291; that the expression *Avibhaktavibhaktánám* in the text from Devala must be taken to be a *Karmadháraya* compound, as Nilakantha takes it, and not a *Dvandva*, for otherwise the word *bhūyo* (again), which implies a previous partition, becomes inapplicable to one member of that compound; that Nilakantha's authority on this side of India is entitled to more respect than that of Nanda Pandita or of Aparárka; that, if Nilakantha is right in his interpretation



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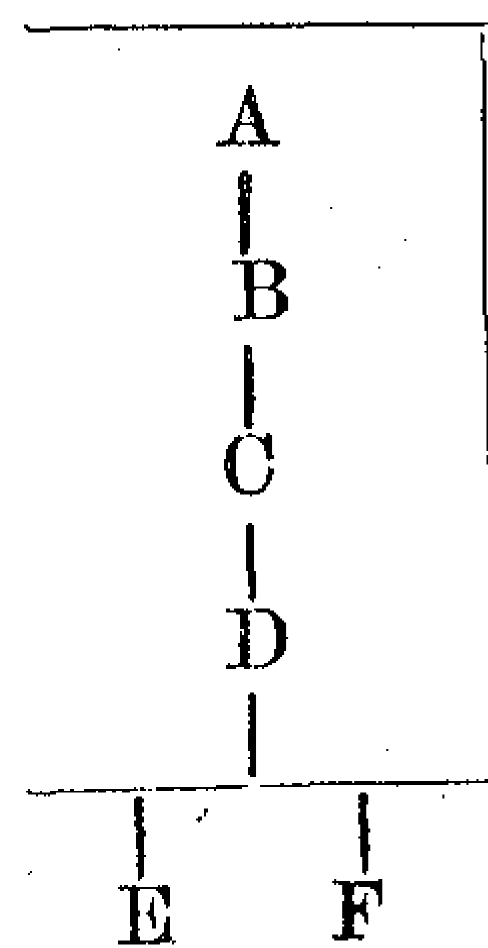
of Devala, the text, which apparently limits the right of partition to the fourth in descent, refers only to cases of re-united co-parceners and not to undivided ones; that, there being no question here of partition among re-united co-parceners, the text from Devala does not apply; that in an undivided family *Sapinda* relationship extends to the seventh and in a divided and re-united one only to the fourth, in descent from the common ancestor; that one of the original plaintiffs, who was fourth in descent from Uddhav, the common ancestor, and died pending the suit, is now represented by his two sons, and that, the whole of the property being still the undivided property of the family, any of the co-owners may compel a partition of it.

This is a mere summary of the arguments addressed to us on this part of the case. Upon a consideration of the authorities cited, it seems to me that it would be difficult to uphold the appellants' contention that a partition could not, in any case, (other than that of absence in a foreign country) be demanded by descendants of a common ancestor, more than four degrees removed, of property originally descended from him. Take, for instance, the case put in the margin: A, the original owner of the property in dispute, dies, leaving a son B and a grandson C, both members of an undivided family. B dies, leaving C and D, son and grandson, respectively; and C dies, leaving a son D and two grandsons by him, E and F. No partition of the family property has taken place, and D, E, and F, are living in a state of union. Can E and F compel D to make over to them their share of the ancestral property? According to the law prevailing on this side of India they can, sons being equally interested with their father in ancestral property; 1 Str. H. L. 177; 2 Ibid. 316; Mit. Ch. 1 Sec. I., 27, and Sec. V. 3, 5, 8, and 11; Vyav. May., Ch. IV., Sec. VI., 13.



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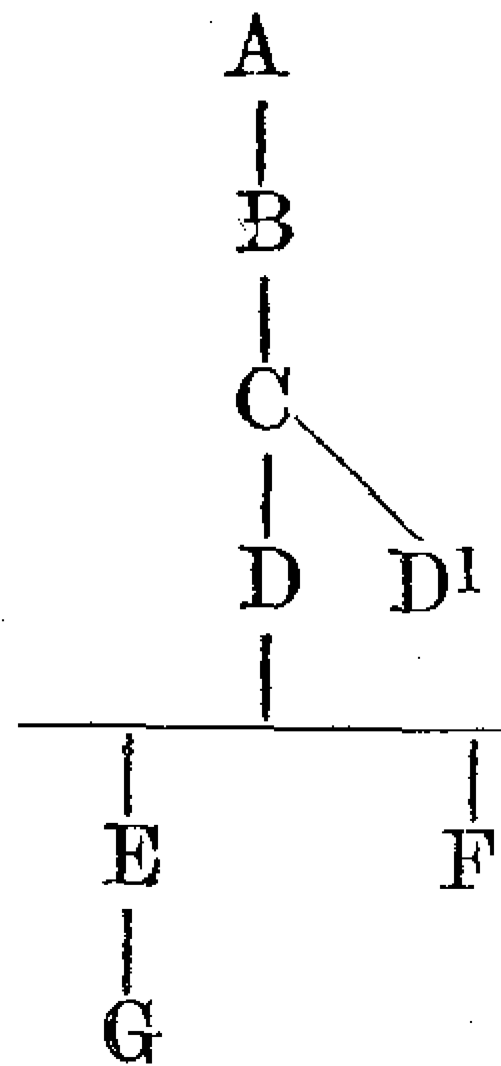

In the same way, suppose B and C die, leaving A and D members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D who thereafter has two sons E and F. They, or either of them, can likewise sue their father D for partition of the said property, it being ancestral.

Now, suppose B and C die, leaving A, D, and D^1, members of an undivided family, after which A dies, whereupon the whole of his property devolves upon D and D^1 jointly, and that D thereafter has two sons E and F, leaving whom D dies. A suit against D^1 for partition of the joint ancestral property of the family would be perfectly open to E and F, or even to G and F, if E died before the suit. It would be a suit against D^1 by a deceased brother's sons or son and grandson: Vyavahára Mayukha, Chap. IV., Sec. IV., 21.

But E and F are both fifth and G sixth in descent from the original owner of the property, whereas D and D^1 are only fourth.

Suppose, however, that A dies after D, leaving a great-grandson D^1 and the two sons of D, E, and F. In this case E and F could not sue D^1 for partition of property descending from A, because it is inherited by D^1 alone, since E and F, being sons of a great-grandson, are excluded by D^1, A's surviving great-grandson, the right of representation extending no further. See Jagannátha's Comment on Text CCCLXX. at 2 Colebrooke's Dig. 512, 517; 1 Norton's L. C. 299; Str. Man. Sec. 323; 2 Str. H. L. 327.

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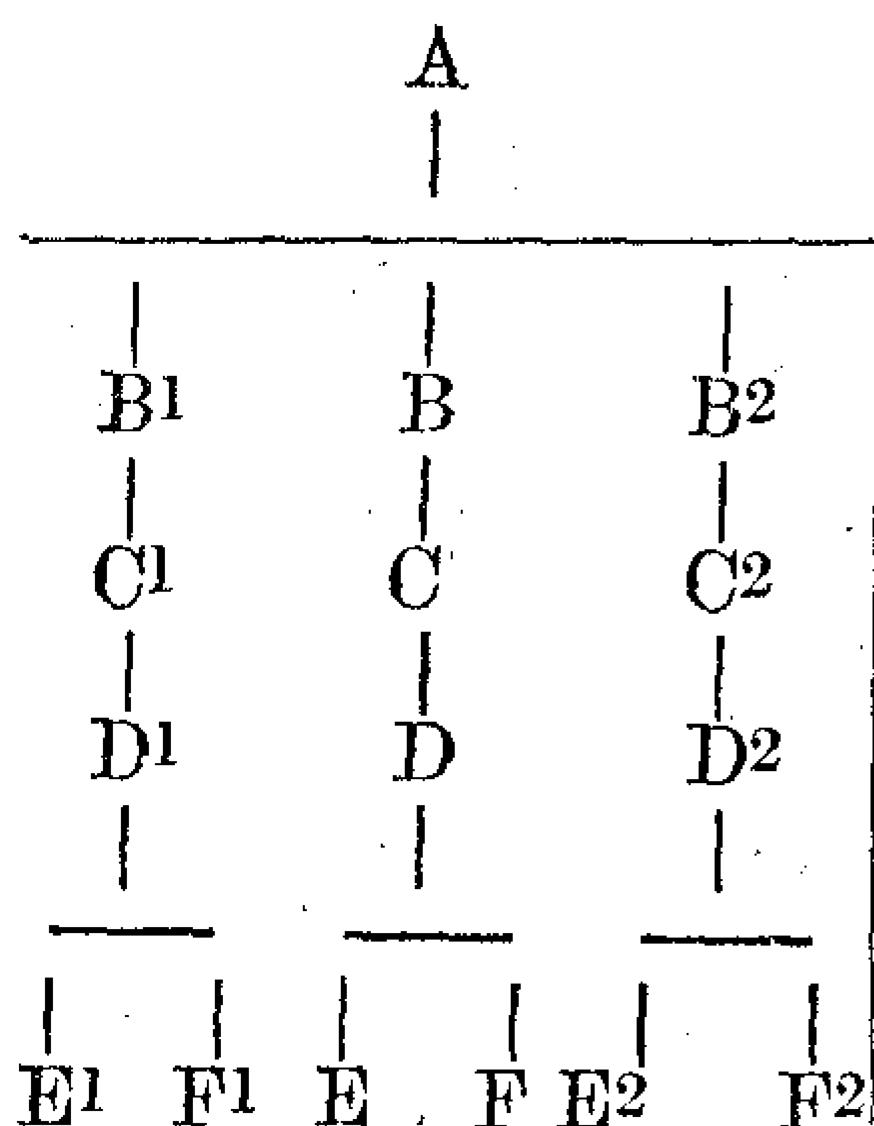

Introducing B1, C1, D1, E1, and F1, and B2, C2, D2, E2, and F2, as additional descendants of A, all forming an undivided family, might render the case a little more complicated and affect the value of their shares, but could not destroy the right, if any, of E and F to share the joint family property with the other members.

The rule, then, which I deduce from the authorities on this subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or *original owner* of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the *last owner*, however remote he may be from the original owner thereof. [In addition to the above authorities, consult 1 Norton's L. C. 292; 2 Colebrooke's Digest, Text CCCLXIX, page 479; also pages 512, 515; Str. Man. Sec. 347.]

If it were necessary, therefore, in this case to determine this nice question of Hindu law, I should feel inclined, in the absence of any precedents to the contrary, to hold the plaintiffs not precluded from suing for partition by reason simply of their distance from Uddhav from whom the property in question has, as admitted, originally descended. But it is not necessary to determine it, as the appeal to us can be satisfactorily disposed of on the 3rd point; and hence the question, whether the disputed compound *Avibahkktavibhaktánám* in Devala's text should be interpreted as a *Karmadháraya,* according to Nilakantha, or as a *Dvandva,* according to the other authorities, must remain an open question to be mooted again when a proper case arises. I may state, however, that I perfectly agree with the learned authors of the Digest in their view of the matter.* It is more natural

* West & Bühler Bk. II., pp ii-iv.

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to regard it as a *Dvandva* compound. Regarding it as such, Devala may be taken to lay down a general rule for all "Kulyas* residing together," 'undivided [or] divided' [and re-united]. This view is, indeed, open to the objection urged against it, that the expression *bhūyo* 'again' or 'further' necessarily implies a previous partition among the 'Kulyas residing together,' which would be a contradiction in terms to predicate of them if 'undivided.' But it must be observed that critical eyes not unfrequently discover inaccurate expressions in all literary compositions, in metrical ones more especially; and that both Jagannátha and his translator Colebrooke, no ordinary authority on such a subject, regard that expression as applicable only to one member of that compound and not to the other.: 2 Digest, Book V., Text LXXXI; Jagannátha says, "second (*bhūyo*) does not relate to a partition among undivided parceners, for it is a rule that an epithet which is liable to objection is superfluous." And it must also be observed that, besides Nilakantha's construction being forced, it seems liable to another and, perhaps, a graver objection, that it leaves a whole class of cases unprovided for, namely, cases of families which have continued joint for more than four generations. If the text of Devala does not refer to such families, but only to re-united ones, as Nilakantha interprets it, there seems to be no limitation whatever as to the right of partitioning property owned by them; and, accordingly, any descendant of the common ancestor, however remote, may demand a partition from any other however near. This does not seem to harmonize with the law of inheritance, which restricts the right of representation to the great-grandson, and, in his absence, prefers a number of other relatives to the great-great-grandson. Besides, Devala must be taken to be the best interpreter of his own meaning, and we find another text of his, not noticed by Nilakantha, which, on being compared with the other, shows clearly that the text relied upon by the latter (1) was never intended by the former to be restricted to re-united

* Men of the same family.

(1) 2 Dig. Bk. V. Chap. II., LXXXI.

families. It is as follows :—"So far, namely, as far *as the fourth in descent* relatives are *Sapindas or connected by funeral oblations*; beyond him the funeral cake is rescinded : sages declare partition of inheritable property to be co-ordinate with the gift of funeral cakes" (2). From this last clause, in which Devala states the reason of the law restricting the right to the *fourth,* it is evident that Devala is not speaking specially of re-united families.

(2) Ibid LXXXII.

Again, the interpretation, put by Nilakantha upon the text of Devala, does not agree well with the texts of Brihaspati given at 2 Dig. 511, 512, some of these are cited by him (Stokes 54, paras. 23 and 24) and he says they refer to persons living in the same district; "because, where they reside, in different districts, it will descend *even to the fifth,* as is declared by Brihaspati in treating of residence in other lands: 'Be he the third person, or the fifth, or even the seventh, [that is, in the second, or fourth, or even in the sixth degree,] he shall receive the share that gradually descends to him, on full proof of his birth and family name'" (3). Brihaspati is here admittedly providing a rule for persons residing in a foreign country. They need not necessarily be re-united. They may be either undivided or re-united. There is no warrant for saying Brihaspati's rule is only for re-united persons. On the contrary, Brihaspati himself, in another text on the same subject, also not noticed by Nilakantha, declares, "*whether a partition be or be not made,* whenever an heir appears, and the property descended to parceners, he shall receive his share," showing clearly that he does not mean to exclude from his rule undivided persons residing in a foreign country. Nilakantha's interpretation is, moreover, opposed to the express terms of the text of Kátyáyana cited by him, for it lays down the same rule as Devala, commencing "should a younger son die *before partition,*" &c. (4). This rule, too, not to be inconsistent, Nilakantha says, (5)

(3) Stokes 54.

(4) Stokes 53.

(5) Ibid 54.

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"does not refer to an undivided family, but to a re-united one," as if Kátyáyana was ignorant of the word re-united, and in his ignorance used the expression *avibhakte nuje prete* should a younger son die, *undivided,* or 'before partition', instead of *sansrishte nuje prete.*

As observed before, it is not, however, absolutely necessary to decide the second point shortly discussed above; for the view which I take of the evidence recorded, enables me satisfactorily to dispose of this case without pronouncing any decision on it. The Subordinate Judge finds, and the evidence in the case perfectly justifies him in finding, that the parties have been *living separate* for upwards of 50 years; that they have had *separate dealings*; that they have been *separate in food and worship*; and that they have been in *possession of separate portions of the property* now in dispute. It also appears from the evidence that during all that time their *earnings and expenditure* have been *separate,* that they have *separately dealt* with the *separate properties* in their respective possession as *their own* exclusive properties; and that they have *never rendered accounts* of profits and expenses to each other. All these facts may be taken as clearly established upon the evidence of reliable witnesses, whose ages vary from 42 to 72 years, and all of whom say they have witnessed this state of things among the parties ever since they remember. Such being the case, are we to regard them as members of an undivided family? The Hindu law, no doubt, presumes every family to be joint; but the strength of this presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker: 2 Str. H. L. 347.

Such presumption, then, in this particular case must be very weak indeed; and the question is, has it been rebutted by the evidence recorded? It would be difficult to hold it

has not. The abovementioned facts, each and all,* point very strongly to an actual partition at some remote period, of which the absence of any direct evidence now cannot reasonably be considered to tell against it; and the Subordinate Judge would have himself found partition among the parties, if he had not fallen into the error that the same could not be legally inferred from those facts, "*unless* it were proved that they have held possession of *separate portions* of the family property *equal* to their shares." This, however, is not necessary; for at a partition each co-parcener, though entitled, is not bound to take property equal to his share. So that, if when an actual partition takes place, he chooses to be content with less than what he might, if so inclined, insist upon having as his share, it cannot be afterwards permitted to him or his sucessors to deny the fact of such partition and base such denial upon proof that the property in his or their possession is less than his or their share. The question in each case of disputed partition is pure and simple, partition or no partition. If partition is proved, the inequality of the shares in their possession at any particular time is perfectly immaterial.† It is final and cannot be re-opened, except in a case of fraud or mistake, or subsequent recovery of family property, and none such is alleged here. "Once is the partition of inheritance made; once is a damsel given in marriage, and once does a man say I give:" these three are by good men done once for all *and irrevocably*—Manu IX., 47. The facts shortly set forth above, leave no doubt that a partition did take place in the family at some remote period of time beyond the reach of living memory. The plaintiffs, no doubt, contended that it was merely for each other's *convenience* that they dined separate and held properties separate. But the

* See on this subject 10 W. R. 148; Grady's H L. 279, 282; 17 W. R. 210; 7 Har. 372; 3 B. H. C., A. C. J., 173; 3 B. L. R., P. C., 41; S. C. 12 W. R., P. C., 40; Elb. S. 210; 1 Beng. S. D A. R. 13; 2 Str. H. L. 387, 395, 398; Steele 56, 213; West and Bühler, Book II. 68, 69; 2 Dig. 491, 493, 496, 497, 503, 504; Vyav. Darp. 541, 544; 1 Str. H. L. 226—29.

† See 2 Dig. 486; Stokes 51, 380, 381; 1 Morl. Dig. 24, pl. 108; West and Bühler, Bk. II. 33, 45, 46; *L. M. Pitchama* v. *L. M. Gooruppa*, Mad. Sudder Court, Dec. 1859, p 84; 2 S. D. A. N. W. P. Sel. Rep. 69; 1 Norton's L. C. 308.

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onus of proving this lay upon them : 1 B. H. C. 43; and they have entirely failed to prove it. There is, it must be noticed, some evidence on the plaintiffs' side, that some of the defendants, by their conduct in 1856, admitted the existence of union at that time. Exhibit No. 28 is a document, signed by some of the defendants, in which they agreed with the plaintiffs to make a division of what they respectively had in their possession. This document cannot be taken to have any value as against those defendants who have not signed it, and even as against those who have signed it, it does not operate as an estoppel. It appears, as they say, that it remained incomplete and was never carried out, but tacitly abandoned by all the parties to it, the plaintiffs themselves never having attempted to enforce it, and having, moreover, subsequently *sold some property*, which was in their possession, treating it as solely their own. Upon the whole, the evidence for the defendants in support of a partition seems to me greatly to preponderate over that for the plaintiffs, having due regard to the presumption of Hindu law that a family is united until the contrary is proved ; and I would, accordingly, if there were no special reason for acting otherwise, reverse the decision of the Lower Court with all costs upon the plaintiffs. But in this case there is such a special reason. Some of the defendants have admitted the plaintiffs' claim and have shown a desire to be regarded as their co-parceners ; and they have not appealed against the Subordinate Judge's decree. It is only just, therefore, to allow the plaintiffs to effect a partition with them of any ancestral property in the possession of either ; and I, accordingly, concur in confirming the Subordinate Judge's decree, so far as it affects the said defendants, reversing it with costs as to the other defendants.

Decree amended accordingly.