The District Judge does not appear to have decided the question whether Balkrishna and Parashram were undivided, but did hold the adoption to be invalid on the ground that Bhimrav was the son of Parashram's daughter, and because Bhimrav was an only son; and, accordinly, rejected Bhagirthibai's application.

It is unnecessary for us here to enter upon the question whether Parashram and Balkrishna were united at the death of Parashram, or whether Bhimrav was an only son, and, therefore, disqualified for adoption. It is sufficient to invalidate the adoption that he was the son of Parashram's daughter. My brother West is acquainted with and approves of the grounds on which my brother Kemball and I decided to-day in *Gopal Narhar Safray* v. *Hanmant Ganesh Safray* (1) that amongst Brahmans such an adoption is incestuous and invalid, and cannot be supported on the ground of *factum valet quod fieri non debuit*.

We, consequently, on these grounds, without entering upon the question whether Prashram and Balkrishna were united in estate, or whether the adoption of an only son is invalid, affirm the order of the Senior Assisstant Judge with costs.

(1) *Supra*, p. 273.

ORIGINAL CIVIL.

(66)

Before Sir, C. Sargent, Justice.

April 19.

IN RE THE FLEMING SPINNING AND WEAVING COMPANY (LIMITED) AND THE NEW FLEMING SPINNING AND WEAVING COMPANY (LIMITED).

H. R. CORMACK, NOWROZJI FURDUNJI AND MICHAEL ROZARIO DE QUADROS (PETITIONERS.)

Company—Winding up—Transfer of assets to New Company—Indian Companies Act (X of 1866), Sections 149-154 and 175—Right of creditors of transferring Company—Dissentient shareholders—Sanction of Court.

By special resolutions passed on the 3rd July 1878, and confirmed on 31st July 1878, the shoreholder of the Fleming Spinning and Weaving Company (Limited) resolved that the company should be wound up voluntarily, and that all the assets of the said company should be transferred by the liquidators to a new company then intended shortly to be formed and registered in Bombay, called the New Fleming Spinning and Weaving Company (Limited), and that the liquidators should receive as the consideration for such transfer certain fully paid-up shares in the new company for distribution among the shareholders of the old company. The said transfer was to be made subject to a covenant on the part of the new company to perform all the agreements and to discharge all the debts and liabilities of the old company. The new company was duly formed and registered on the same day (31st July 1878) and the specified number of share was delivered to the liquidators of the old company for distribution among the shareholders of the old company. Two of the said shareholders, J and H,

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the holders of 50 and 20 shares respectively, dissented from the special resolutions in the manner provided by section 175 of the Indian Companies Act (X of 1866), and required the liquidators to purchase their interests. The matter was thereupon referred to arbitration. In the case of H, an award was made and filed, but further proceedings were stayed by order of Court. In the case of J, no award was made, and he brought a suit which was still pending against both the old and new companies and the liquidators to recover Rs. 75,000, the alleged value of his shares. In pursuance of the resolution, the liquidators of the old company handed over the assets to the new company, but no formal grant or assignment, in writing, of the said assets was executed. They remained in its possession until the 17th January 1879, on which day the said new company was ordered to be wound up by the Court. The petitioners were appointed official liquidators, and as such were in possession of the assets at the date of the petition. No property whatever remained in the hands of the old company, except the shares remaining to be distributed among the dissentient shareholders. The new company had discharged debts of the old company to the amount of six lacs of rupees, and there remained debts of over three lacs due by the old company. Until after the new company had become insolvent no creditors of the old company had expressed his dissent from the above special resolution, or had refused to accept the new company as his debtor. On 1st March 1879 the voluntary wending up of the old company was directed to be continued as a winding up under the supervision of the Court. The official liquidators of the new company now presented as position, paying that the above special resolutions might be sanctioned by the Court. Certain unsatisfied creditors of the old company opposed the petition, insisting that the sanction should be refused, except upon the condition that they should be paid in full out of the property of the old company. The two dissentient shareholders, J and H, also objected to the sanction being given, unless provision were made for the satisfaction of their claims as soon as they should be ascertained.

Held—That, under the special circumstances of the case, the sanction of the Court should be given to the resolutions, but subject to the value of the interest of the two dissenting shareholders being paid or adequately secured. Such order to be without prejudice to any question between the creditors of the old company and the dissenting shareholders.

THIS was a petition, by the official liquidators of the New Fleming Spinning and Weaving Company (Limited) praying that the Court would, as required by section 175 of the Indian Companies Act, 1866, give its section to certain special resolutions passed by the shareholders of the Fleming Spinning and Weaving Company (Limited) for transferring the assets thereof to the New Fleming Spinning and Weaving Company (Limited).

By a special resolution agreed to on the 3rd July 1878, and confirmed by the shareholders on the 31st July 1878, it was

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resolved that the Fleming Spinning and Weaving Company (Limited) should go into voluntary liquidation, and by an order of the Court of the 1st March 1879 the liquidation was directed to be continued as a liquidation under the supervision of the Court.

The New Fleming Spinning and Weaving Company was, by an order dated 17th January 1879, directed to be wound up by the Court.

The petition stated that the nominal capital of the Fleming Spinning and Weaving Company (Limited) was Rs. 18,75,000, divided into 1,500 shares of Rs. 1,250 each, all fully paid up; that at an extraordinary general meeting of shareholders, held on 3rd July 1878, the following resolutions were passed, and at a meeting held on 31st July 1878 were confirmed:—

"(*a*). That the Fleming Spinning and Weaving Company (Limited) be wound up voluntarily under the provisions of the Indian Companies Act (X of 1866), as and from Wednesday, the 31st day of July instant.

"(*b*). That Messrs. Jehangir Gustadji and Nanabhai Rustomji Ranina be and they are hereby, appointed liquidators to wind up this company, and that their remuneration shall be the sum of Rs. 500 each.

"(*c*). That the liquidators be, and they are hereby authorized and empowered to grant, convey, sell, assign, transfer, and make over unto a certain limited joint-stock company intended shortly to be formed and registered in Bombay under the provisions of the Indian Companies Act (X of 1866), and to be called 'The New Fleming Spinning and Weaving Company (Limited),' having a capital of Rs. 22,50,000, divided into 3, 757 shares of Rs. 500 each, *and* 1,846 shares of Rs. 250 each, all the lands, buildings, machinery, hereditaments, premises and property and business, good-will, effects, assets, rights and credits of the said Fleming Spinning and Weaving Company (Limited) (exclusive of the profits that may be made by the said company up to and including the 31st day of July instant), and to receive, as the consideration for such grant, conveyance, sale, assignment and transfer, as aforesaid, 2,970 shares of Rs. 500 each, and 1,846 shares of Rs. 250 each of the said New Fleming Spinning and Weaving Company (Limited), respect-

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ively, fully paid for distribution among the shareholders of the said Fleming Spinning and Weaving Company (Limited) in such manner as that the holders of each and every share in the Fleming Spinning and Weaving Company (Limited) shall for each and every share held by him at the date of the said sale receive two shares of Rs. 500 each and one share of Rs.250 of the said New Fleming Spinning and Weaving Company (Limited), respect ively, fully paid up.

"(*d*). That the sale and transfer of the said property of the Fleming Spinning and Weaving Company (Limited) be made by and subject to the covenant or undertaking on the part of the said New Fleming Spinning and Weaving Company (Limited) to perform all the agreements, contracts and obligations, and pay and discharge all the just debts and liabilities of the said Fleming Spinning and Weaving Company (Limited).

"(*e*). That the said liquidators be, and they are hereby, authorized and empowered to do all acts and exercise all powers comprised in section 174 of the Indian Companies Act (X of 1866), and also to buy the share or shares and interest of any shareholders dissenting in manner contemplated by section 174 of the same Act out of cash belonging to the said Fleming Spinning and Weaving Company (Limited), and which may come to their hands as liquidators.

"(*f*). That in case of the absence, at any time, from Bombay of either of the liquidators, all or any of the powers which can or might be exercised by the liquidators jointly shall or may be exercised by the liquidator for the time being present in Bombay solely."

The petition further stated that on the 31st July 1878 the said New Fleming Spinning and Weaving Company was duly formed and registered, and delivered to the liquidators of the old company the shares as mentioned in the resolution for distribution among the shareholders of the old Company. Two of the said shareholders, viz., Jusub Haji Ahmed and Hormusji Bezonji Dantry, the holders of 50 and 20 shares respectively in the old company, dissented from the above special resolution in the manner provided for by section 175 of the Indian Companies Act

(X of 1866) and required the liquidators to purchase their interests. The matter was thereupon referred to arbitration ; and in the case of Hormusjee Bezonji an award was duly made and filed, but all further proceedings had been stayed by an order of Court. In the case of Jusub Haji Ahmed no award had been made, and he had, accordingly, brought a suit, still pending, against both the old and new companies and the liquidators of the old company to recover Rs. 75,000, the alleged value of his shares.

In pursuance of the above resolution the liquidators of the old company handed over the assets to the New Fleming Spinning and Weaving Company, which remained in its posssession until the making of the order for winding up the said company on the 17th January 1879, and at the date of the petition were in the possession of the petitioners as official liquidators of the new company, but that no formal grant or assignment, in writing, of the said assets had been executed. No property whatever remained in the possession of the old company, except the shares remaining to be distributed among the dissentient shareholders.

The petition also stated that the new company had discharged debts of the old company to the amount of upwards of six lacs of rupees, and that there still remained debts to the amount of over three lacs due by the old company ; that in consequence of the defalcations and insolvency of the secretary and agent, Nursey Kessowji, it was found necessary to have the New Fleming Spinning and Weaving Company wound up by the Court ; that, until after the insolvency of Nursey Kessowji and the filing of petitions to wind up the company by the Court, no creditor of the old company had expressed his dissent from the above special resolutions or had refused to accept the new company as his debtor ; that, unless the sanction of the Court were given to the resolutions, the assets of both companies would be materially diminished by the costs of suits ; that a refusal of such sanction would be especially inequitable to the new company, inasmuch as it was formed and registered wholly for the purpose of carring into effect the said resolutions, and of continuing the business of the old company, and as it had, on the faith of the said resolutions, paid debts of the old company to the amount of over six lacs of rupees ; that the refusal of such sanction would be ruinous to the shareholders

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in the new company, who had accepted shares therein under the belief that such shares were fully paid up, and were allotted to them in lieu of the shares formerly held by them in the old company, inasmuch as the result of such refusal would probably be to render each shareholder liable to pay up the full nominal value of his shares in the new company.

The petitioners, therefore, prayed that the above special resolution (*c*) and (*d*) might be sanctioned by the Court.

Latham and *Macpherson* for the petitioners (the liquidators of the new company).

Macpherson for the liquidators of the old company.

The *Advocate General* (Hon. *J. Marriott*), *Lang*, *Farran* and *P. M. Mehta* for various creditors of the old company.

Inverarity for Jusub Haji Ahmed and Hormusji Bezonji, two dissentient shareholders of the old company.

Latham.—The petitioners now apply for the necessary sanction to the resolution of transfer. There is a dispute between the two classes of creditors. The creditors of the old company claim to be paid in full in priority to the creditors of the new company, while the latter demand that all shall be paid *pari passu*. It is for the Court to say whether the former class has priority. If it decides in the affirmative, we undertake to set apart assets sufficient to satisfy their claims. The transfer from one company to the other caused no cessation of the business, which went on continuously: so that the question really is, whether the creditors up to a certain period shall be paid in priority to those of a latter date. If the Court refuse to sanction the resolution of transfer, the assets go back at once to the old company, and the creditors of the new company, who advanced money to the extent of fifteen or sixteen lacs on the faith of these resolutions, will be left without remedy. The new company has paid off many of the debts of the old company. It has not paid all, because some are not yet due. The creditors did not object to resolution of transfer.

Macpherson for the liquidators of the old company.—We support the application for sanction. The question ought to be regarded in the light of the circumstances existing at the time the resolution were passed, and not of those which have

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happened subsequently. The resolutions which were to have the effect of increasing the capital, were, when passed, in the interest of all the creditors, and the creditors were of that opinion, and made no objection.

The *Advocate General* (Hon. *J. Marriott*) for creditors of the old company.—We say these resolutions *(e)* and *(d)* were *ultra vires*. The effect is to hand over the assets and liabilities of the old company to the new one. That is contrary to the provision of section 149 of the Indian Companies Act (X of 1866). No resolution can remove the property of a company from its creditors. The debts which have been incurred, are a first charge upon it, and it cannot be handed over to the new company discharged of this liability, thus leaving the creditors only a right to sue the new company upon their covenant.

Lang for other creditors of the old company.—We ask the Court to refuse its sanction. Section 175 of the Indian Companies Act only given power to transfer property ; it gives no power to transfer liability. The assignable property is that which remains after paying creditors.

Farran for creditors of the old company.—We propose a modified order. At present the liquidators of the new company have all the property in their possession, and the liquidators of the old company have nothing. We ask that the sanction of the Court be given to these resolutions, provided that the creditors of the old company are paid off in full.

Inverarity for the two dissentient shareholders of the old company.—Both of my clients have already filed suits to recover the value of their shares, and one has been awarded compensation, under section 175, by arbitration. We support this application if our rights are secured ; otherwise we oppose it. The Act shows that the claims of dissentient shareholders should be satisfied before assets are parted with : section 175 of Indian Companies Act (X of 1866). If the liquidators have parted with the property of the company, how can they "raise" the amount claimed by a dissentient? If the resolution be sanctioned without securing our rights, so many other creditors will come in *pari passu* that we shall get nothing. At present the liquidators of the new company are not legally in

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possession, at all, and have no *locus standi* to contest our claim; but, if the sanction be given, they can resist us. The petition does not ask the Court to sanction resolution *(e)*. A sanction is necessary under section 175. That resolution is a fraud on dissentient shareholders. The creditors of the new company have no equity at all. If they lent their money on the faith of these resolutions, they had notice of the provision of this Act. We also submit that our claim is a liability under section 149.

Latham in reply.—The question of the priority of the different classes of creditors is not now before the Court. The only question is, whether the Court will sanction their resolutions or not. The new company here has taken the usual course of agreeing to pay the debts of the old company. There is no charge on the property. The liquidators of the new company are bound to pay the creditors, but they can only do this by selling the property transferred to them, which they cannot do if the property is charged. The creditors have no charge on the property, any more than a legatee has a charge on the property of a testator, where executors have undoubtedly a power to sell. The liquidators are in a similar position. (Counsel referred to *In re Marine Investment Co.*;(1) *Griffith* v. *Paget*;(2) *In re Agra and Masterman's Bank*;(3) *In re Imperial Land Co. of Marseilles*.(4))

April 24.—SARGENT, J.—This is an application by the official liquidators of the New Fleming Spinning and Weaving Company now in course of being wound up, for the sanction of the Court, as required by section 175 of the Indian Companies Act of 1866, to a resolution, come to by the Fleming Spinning and Weaving Company in July 1878, for the sale and fransfer of its business and property to the New Fleming Spinning and Weaving Company. It appears that in July 1878 a special resolution was passed by the company for the valuntary winding up of the company, and also for the transfer of its business and property to the new Fleming Spinning and Weaving Company, then in course of formation, in consideration of a certain number of shares in the new company being allotted for distribution amongst the old share-

(1) L. R. 8 Ch. App. 702.
(2) L. R. 5 Ch. Div. 894.
(3) L. R. 12 Eq., note, p. 509.
(4) L. R. 6 Ch. Ap. 96.

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holders, and also of the new company taking upon itself all the just debts and liabilities of the old company. The new company was formed, and carried on business on the basis of this arrangement until the close of 1878, when, owing to the failure Nursey Kessowji and Company, agents and managers of the new company, it was compelled to stop business, and an order was made for its winding up by the Court on the 17th January 1879. The voluntary winding up of the old company was also brought under the supervision of the Court by order of the 1st March 1879. Under these circumstances it became necessary, under section 175 of the Act of 1866, for the liquidators of the new company to obtain the sanction of the Court to the sale and transfer to it of the business and property of the old company. This application is opposed by those of the creditors of the old company whose claims still remain unsatisfied, and also by two shareholders of the old company who dissented from the resolutions, and gave notice of such dissent to the liquidators, as required by section 175. It was contended by Mr. Marriott, on behalf of the creditors, that the sale and transfer of the business and property of the old company was void *ab initio*, because the claims of creditors had not been previously satisfied, or, at any rate, secured. This conclusion was sought to be drawn from clause 1 of sections 149 of the Act, which provides that, as one of the consequences of voluntarily winding up a company, the property shall be applied in satisfaction of its liabilities *pari passu*. I cannot, however, accede to that view of the Act. In the first place, had such been the intention of the Legislature, we might expect it to be so provided in distinct terms in section 175. On the contrary, that section gives an unqualified power to the liquidators, with the sanction of the company (subject to the proviso on behalf of dissenting shareholders), to sell and transfer the business and property of the company. In the next place, the effect of the exercise of such power by the liquidators is to substitute the shares, debentures, policies and other like interests in the transfer company for the business or property so transferred or sold—in other words, merely to change the character of the assests applicable to the payment of creditors. Lastly, the Act affords ample security to creditors, if dissatisfied with the arrangement resolved upon by the

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company, to apply to the Court, either before or after it has been carried out, to have the company wound up by or under the supervision of the Court, and thus to make the validity of the arrangements dependent on the sanction of the Court, as provided by sections 169 and 175, as the case may be. The voluntary winding up of the old company having been brought under the supervision of this Court by an order made in February last, or within one year after the resolution was passed, this Court has now to determine, as provided by section 175, whether, under all the circumstances of the case, it ought to sanction the resolutions come to by the company as far back as July 1878. No case was cited at the bar, nor have I been able myself to find any reported case in which the sanction of the Court of Chancery has been applied for under section 161 of the English Companies Act of 1862, which corresponds with section 175 of the Indian Act of 1866. In the case *In re Agra and Masterman's Bank*, reported in a foot-note in page 509 L. R. 12 Eq. and *In re the Imperial Mercantile Credit Association*, (1) the companies were, at the time of the proposed transfer, being wound up under the supervision of the Court. Nothing, therefore, could be done without its sanction, and the question, under such circumstances, for the consideration of the Court was simply whether the transaction in questson ought to be allowed, having due regard to the interests of all persons concerned in the winding up, whether creditors or shareholders. In the present case, however, the transaction in its inception required only the sanction of the company, expressed by the special resolution to give it validity, and the sanction of this Court has not been asked for until after a considerable lapse of time, when circumstances have supervened which have made it necessary to continue the voluntary winding up of the company under its supervision. As to the considerations which ought to influence the Court in granting or refusing its sanction, it would not be prudent to attempt a more specific statement than is given by Lord Hatherley, when Vice-Chancellor, *In re Agra and Masterman's Bank*.(2) He says: "In truth, the function of the Court seems reduced to seeing that everything has been fairly done and put before the creditors and shareholders, and that they have

(1) L. R. 12 Eq. 509, note.

(2) L. R. 12 Eq. 509, note.

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been informed of all that they ought to be informed of; that a decision has not been snatched by surprise, that there has been nothing which would reduce the Court to say there has been either a surprise or fraud upon the persons sought to be affected by it." On applying that principle to the present case we find a special resolution come to by the Fleming Spining and Weaving Company in July 1878. The good faith and regularity of that resolution are not questioned. From that time the New Fleming Company, to which the business and property of the original company had been actually transferred, was virtually only the latter company under a new name, and with a fresh division of its capital into shares of smaller amount. No fresh shares were allotted, and everything proceeded, both as regards the conduct of the business of the company and its relations with its creditors, as if the arrangement in question had never taken place, and the old company had been still in active existence. The claims of the creditors of the old company were regularly satisfied by the new company as they fell due up to the time when its affairs became hopelessly involved by the failure of the managers, Nursey Kessowji and Company. Under these circumstances, can the remaining unpaid creditors of the old company now insist that the sanction of the Court should be refused, except upon the condition that they should be paid in full out of the proceeds of the sale of the mill and machinery, which were originally the property of the old company? It was contended that, by virtue of clause 1 of section 149 of the Act of 1866, that the debts of the old company were specific charge on the property in the hands of the new company. No authority was cited for this proposition, and it certainly would be a most inconvenient construction to put on the Act. After the sale of the assets it was doubtless open to the creditors to insist upon having these claims secured out of the shares of the new company by sale or otherwise. Even if they had been actually distributed by the liquidators among the shareholders, they would still have remained assets in their hands for the payment of the creditors of the old company. Had the creditors met with any resistance to this demand on the part of the liquidators or shareholders, they could at once have brought the liquidation under the supervision of the Court, as has now been done at the

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eleventh hour. Instead of adopting that course they have virtually submitted to the transfer of the business and property, and have relied upon the undertaking by the new company for the satisfaction of their claims. In the meantime the new company has been allowed to appear before the public as the owners of the mill, and to raise fresh loans in that character, part of which has doubtless been applied in satisfaction of old claims as they fell due. I cannot think that under such circumstances the unpaid creditors can now, at this late hour, successfully oppose the application for the sanction of the resolutions Their course is to prove for their debts under the obligation assumed by the new company to satisfy the past debts and liabilities of the old company.

With respect to the two dissentient shareholders, Jusub Haji Ahmed and Hormusji Bezonji, it appears that negotiations between them and the liquidators as to the price of their respective interests commenced immediately after the passing of the resolutions, which resulted in the matters of difference being referred to arbitration, and an award being actually made in the case of Hormusji Bezonji's claim. But these claims still remained unsatisfied. Section 175 says that the special resolution is to be binding on the members of the company, subject to the proviso that dissentient members, who give notice of their dissent, may insist on the resolution being abandoned on their "interest" being purchased. It is thus made a condition of the resolution being binding on the dissentient shareholders that they should be paid the value of their interest in the business and property intended to be transferred. In the case of the *Irrigation Company of France*(1) where a transaction of a similar nature to the present was resolved on by a company in course of voluntarily winding up, Malins, V.C., on the application of a dissenting shareholder, under section 138 of the English Act, restrained the transfer of the assets until the payment of the dissenting shareholder was secured, and when the case came on for hearing ordered the sum to be retained in Court for that purpose. That order was approved of by both the Lords Justices on appeal.

(1) L. R. 6 Ch. 176.

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Under the special circumstances of this case, the new company having taken the property and assumed all the liabilities of the old company, which would include the liability to purchase the interests of dissenting shareholders, there having been no laches on the part of those shareholders, and the property being now within the jurisdiction of the Court and under its direct control by virtue of the winding-up order, the Court ought, I think, to place the dissenting shareholders, with respect to the property of the old company, in the same position as it would have placed them had they applied under section 154 of the Indian Act for an injunction to restrain the transfer until a fund was provided to secure the payment of their interests. Upon all the circumstances of this case, I hold that the sanction of this Court must be given to the resolution, but subject to the value of the interest of the two dissenting shareholders being paid or adequately secured. This order, however, is made without prejudice to any question between the creditors of the old company and such dissenting shareholders. Petitioners to have their costs out of the estate of the new Fleming Spinning and Weaing Company, and to pay the dissenting shareholders their costs, with power to recoup themselves out of the estate of the new Fleming Spinning and Weaving Company; other parties to pay their own costs.

Attorneys for the petitioners.—Messrs. *Ardasir and Hormasji.*

Attorneys for liquidators of the Fleming Spinning and Weaving Company.—Messrs. *Craigie, Lyuch and Owen.*

Attorneys for creditors.—Messrs. *Hearn, Cleveland and Little*; Messrs. *Prescot and Winter;* Messrs. *Jefferson and Payne;* Messrs. *Tyabji and Sayani.*

Attorneys for dissentient shareholders.—Messrs. *Macfarlane and Gilbert.*