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Limitation Act, and cannot be allowed the extended period under article 147. In *Gopál Pándey* v. *Parshotam Dás*[1], Sir R. Stuart remarks that "it matters not whether the security may have the name of a simple mortgage or usufructuary mortgage or a conditional sale;" "in all cases, foreclosure may take place if the terms of the contract admit of that remedy." In the present case, the terms of the contract do not admit of foreclosure; and the remedy by sale through the Court is barred.

We, therefore, confirm the decree of the Courts below, with costs.

Decree confirmed.

(1) I. L. R., 5 All., 121.

ORIGINAL CIVIL.

Before Mr. Justice Scott; and, in appeal, before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1886.
April 9, 10, 13, 16.

JUGMOHANDA'S MANGALDA'S, (ORIGINAL PLAINTIFF), APPELLANT, *v.* SIR MANGALDA'S NATHUBHOY AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Partition—Right of a son to claim partition of moveable as well as immoveable property in his father's life-time—Son's right to partition of property come to the possession of his father before the son's birth—Property acquired by litigation—Self-acquired property devised by a father to his son is taken by the son under the will and is self-acquired in his hands—Earnings of father as mill manager not ancestral—Property left by testator to be held moveable or immoveable according to its condition at testator's death—Kápoli Baniá caste, custom of, as to partition—Accounts in partition suit.

Per APPEAL COURT:—There is no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the Mitákshara law to partition in the life-time of the father.

Per SCOTT, J.:—Where the law of the Mayukha applies, a son is entitled to demand partition of moveable as well as immoveable property in his father's life-time.

Defendant's great-grandfather (M.) died in 1792, leaving a will, dated 1789, whereby he directed his property to be equally divided among his five sons, of whom R., (the grandfather of defendant), was one. The property became the

* Suit No. 444 of 1881.

subject of litigation, and was not divided until 1852, long after the death of R., which took place in 1808. R.'s share was received in 1852 by the executors of his son, Nathubhoy, (defendant's father), who had died in 1843.

Held, that this property came to the defendant by inheritance, and was ancestral property, and was not capable of being given or willed away by him. Further, that, as having regard to M.'s will, there was no apparent intention on the part of the testator to convert into money such of his property as consisted of lands and houses, the general rule of law applied, *viz.*, that the property must be held to be real or personal according to the actual condition in which it existed at the testator's death.

Held, also, that the defendant's son had a right to claim partition of this property, although the defendant had no son born to him at the time (1852) he came into possession of it.

All property acquired out of the income of ancestral property is itself ancestral, whether acquired before or after the birth of a son.

In order to entitle a co-parcener to hold, as property self-acquired by him, property which has been recovered by his exertions (*e.g.* by litigation), such property must have been recovered from usurpers holding it adversely to the family; the co-parceners must have abandoned their rights; and where such abandonment is a matter of inference, the co-parceners, to whom it has been imputed, must have been in a position to sue.

A son to whom his father leaves his self-acquired property by will, takes the property under the will, and not by inheritance; and as property received by will is held by Hindu law to be received by gift, such property is self-acquired in the hands of the son, and is not subject to partition.

The first defendant was sued by his son for partition. Some of the property in the defendant's hands consisted of his earnings as manager of a mill and of the investments of such earnings. The mill had been established in 1860, and the defendant bought thirty-nine shares with the ancestral funds in his hands. He was appointed chairman of the company, and managed the mill for ten years without any remuneration. His management was very successful, and good dividends were declared every year from 1863. In 1870 he declined to work any longer without remuneration, and at a meeting of the shareholders he was appointed managing director, and was granted a commission on all sales effected by the company.

Held, that the commission so received by the defendant was his self-acquired property. Under the circumstances it might safely be inferred that he did not obtain the appointment of manager by the direct influence of the shares which he held in the company. The gratuitous services which he had for years rendered to the shareholders had influenced them in giving him the appointment, and such influence could not be said to have been created by the direct instrumentality of the ancestral property.

In a suit for partition brought by a son against his father, *held* that the plaintiff was entitled to partition of the ancestral property as it subsisted *at the date of the suit*.

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A custom alleged to exist among the Kápoli Baniá caste, according to which a son is not entitled to the partition of ancestral property in his father's lifetime and against his father's will, *held* not proved.

SUIT for partition. The plaintiff was the youngest son of the first defendant, and the second and third defendants were the other two sons.

The plaint alleged that the plaintiff and defendants were a joint and undivided Hindu family, and that the whole of the family property was in the possession of the first defendant; that the said property consisted of moveable and immoveable property inherited from the plaintiff's ancestors, and the accumulations arising from the investment and employment thereof by the first defendant; that the income thereof (the plaintiff believed) exceeded one lákh per annum.

The plaintiff attained the age of eighteen years on the 1st December, 1880.

The plaint further stated that, in consequence of dissensions in the family, the plaintiff had left the first defendant's house, and had applied to the first defendant for an allowance out of the family property, but had been refused, except on conditions to which the plaintiff would not accede.

The plaintiff submitted that, even if he were not found at present entitled to a partition of the ancestral property, he was entitled to have it ascertained what was the ancestral property in the hands of the first defendant, and to have a proper maintenance allowed to him thereout.

In his written statement the first defendant stated that the property in his hands consisted of the following:—

(1). His share of the estate of his *great-grandfather*, Manordás Rupdás. This share he received upon the partition of the said estate.

(2). The self-acquired property of his *grandfather*, Rámdás Manordás. This property had been devised by will by the said Rámdás Manordás to the first defendant's father, Nathubhoy Ramdás, and by him had been again devised by will to the first defendant.

(3). The self-acquired property of his father, Nathubhoy Rámdás, devised by him to the first defendant.

(4). Property given or devised by the first defendant's *grandfather*, Rámdás Manordás, to his wife, Rámcuverbái. This property on her death became the self-acquired property of the first defendant's father, Nathubhoy Rámdás, and was devised by him to the first defendant.

(5). Property acquired by the first defendant himself.

(6). Property acquired by means of the self-acquired property of the first defendant and of the self-acquired property of his father, Nathubhoy Rámdás, which had been devised by the said Nathubhoy Rámdás to the first defendant.

As to the first of the above classes of property, the first defendant stated that when he received the share of his great-grandfather he had no male issue born to him, and he submitted that, under the circumstances, such property was not ancestral property in his hands, and that the plaintiff had no interest therein. He further contended that, even if it was held to be ancestral, yet that the said share was *moveable* property, and that the plaintiff was not entitled to partition thereof against his will.

As to the second, third, fourth, fifth and sixth classes of property above mentioned, the first defendant submitted that they were his self-acquired property, and that the plaintiff was not entitled to a partition thereof.

As to class 2 above mentioned, the first defendant also contended that, even if the property devised by Rámdás Manordás was ancestral property in the hands of his devisee (the first defendant's father), yet that it had been recovered by the first defendant by litigation and without the aid of ancestral funds, and that, therefore, the plaintiff was not entitled to partition of it.

The first defendant also alleged that, even if it were held that there was ancestral property in his hands, nevertheless the plaintiff was not entitled to partition, inasmuch as, *by the custom* and usage of the *Gujaráti Baniá* castes and of the *Kápolí Baniá*

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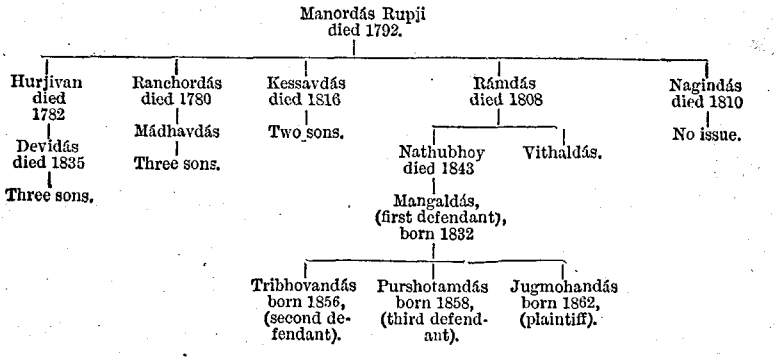
caste to which the first defendant belonged, a son was not entitled to partition of ancestral property *in his father's life-time* and against his father's will.

The first defendant further stated that his family had originally come to Bombay from the village of Diu, in Portuguese territory, in which, by the custom and usage there prevailing, a Hindu son could not enforce partition of ancestral property *in his father's life-time* and against his father's will. He alleged that his family continued to be governed by this custom since settling in Bombay.

Defendants 2 and 3 filed a separate written statement. They took no active part in the suit, stating merely that they believed that the whole of the property in the hands of the first defendant was ancestral property, in which they, as members of the family, were interested; but they objected to any partition of the said property being made in the life-time of their father, the first defendant.

The following table shows the pedigree of the plaintiff and defendants :—



Manordás Rupji died in 1792, leaving five sons, all of whom, except Nagindás, had issue.

Manordás left a will, dated 1789, at which date his two eldest sons (Hurjivan and Ranchordás) were dead, leaving issue. By his will be appointed his three then surviving sons (Kessavdás, Rámdás and Nagindás) and his two grandsons (Devidás and Madhavdás) joint residuary devisees and legatees of the whole of his property.

In 1832, Devidás, one of the said grandsons, filed a suit in the Supreme Court of Bombay to carry out the will; and a decree, establishing the said will and ordering the trusts thereof to be performed, was passed on the 17th June, 1835. Under that decree, Nathubhoy, (father of the first defendant), took a share of Manordás's estate and a further share as heir of his uncle, Nagindás, who had died in 1810 without issue. Accounts of the estate were taken, and the estate was not actually divided until 1852.

Besides the property which thus came to them from Manordás Rupji, his five sons had themselves acquired property. Rámdás, (grandfather of the first defendant), had self-acquired property amounting to some lákhs of rupees. He died in 1808, and by his will he left his property to his wife and two sons, Nathubhoy, (father of the first defendant), and Vithaldás. The property so devised did not include any of the property left by Manordás. Vithaldás died in 1813, and his share under the will of Rámdás passed to Nathubhoy. There was much litigation in connection with the will of Rámdás [1], and the necessary funds were provided by the executors of Nathubhoy and by the first defendant himself. Ultimately, a considerable amount of property was taken by the first defendant under the will of Rámdás.

In 1843 Nathubhoy died, leaving a will whereby he devised his property to his son, (the first defendant).

The present suit came on for hearing before Scott, J., on the 6th February, 1885.

Latham (Advocate General) and *Jardine* for plaintiff.

Macpherson, *Inverarity* and *Telang* for defendant No. 1.

Lang and *Dhurandhar* for defendants Nos. 2 and 3.

Latham :—The presumption is, that the property of the first defendant is ancestral. It will be for him to show that it is not. The property mentioned in his written statement may be divided into two classes :—

(I).—His share in his great-grandfather's estate ascertained by partition. This he claims by inheritance.

(II).—The property which he alleges he acquired by devise.

(1) See 3 Moore's P. C. C., 87, and Perry's Or. Cas., p. 42.

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As to this, his contention is that anything taken by devise is self-acquired, and not ancestral.

The written statement shows that there is property *primâ facie* ancestral. It is for him to show that it is not all ancestral, and not all subject to partition.

As to what is ancestral property, see Mayne on Hindu Law, paras. 247, 248 and 249; Mitákshara, ch. I, sec. 5, para. 9. The defendant contends that devised property is self-acquired. But it cannot stand higher than a gift—*Muddon Gopál* v. *Rám Buksh Pandey*(1); *Tárá Chand* v. *Reeb Rám* ; West and Bühler, pp. 266—267; *Vináyak Wássudev* v. *Parmánunddáss Jeevandás* (unreported); *Ratanji Aspandiárji* v. *Murlidhar Oodhowji* (not reported). We contend that self-acquired property, which a father gives by will to his son, is ancestral property in the hands of the son.

Next, is there any difference in the character of moveable and immoveable property so acquired? We say there is none; and that moveable property received by the defendant, either by inheritance or devise from his father, is ancestral—Mayne's Hindu Law, paras. 226, 227, 291; West and Bühler; *Báboo Beer Pertáb Sahee* v. *Mahárájáh Rajender Pertáb Sahee*(3); *Pauliem Válloo Chetty* v. *Pauliem Sooryah Chetty*(4); *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*(5); *Rámchandra Dádá Náik* v. *Dádá Mahádev Náik*(6); *Nágalinga Mudáli* v. *Subbiramaniya Mudali*(7); *Rájá Rám Tewary* v. *Luchman Pershád* (8); *Láljeet Singh* v. *Rájcoomár Singh*(9); *Suraj Bunsi Koer* v. *Sheo Proshád Singh*(10); *Káli Parshád* v. *Rám Charan*(11); *Jogul Kishore* v. *Shib Sahái*(12); *Báboo Beer Kishore Suhye Singh* v. *Báboo Hur Bullub Narain Singh*(13); *Moro Vishvanáth* v. *Ganesh Vithal*(14); *Mussamut Deo Bunsee Kooer* v. *Dwárkánáth*(15); *Muddon Gopál* v. *Rám Buksh*

(1) 6 Calc. W. R. Civ. Rul., 71.
(2) 3 Mad. H. C. Rep., 50.
(3) 12 Moore's Ind. Ap., 39.
(4) 4 Ind. Ap., 109.
(5) I. L. R., 1 Bom., 561; S. C. on appeal. 7 Ind. Ap., 181.
(6) 1 Bom. H. C. Rep., Appx., 67.
(7) 1 Mad. H. C. Rep., 77.
(8) 8 Calc. W. R. F. B. Civ. Rul., 15.
(9) 12 Beng. L. R. 373; see pp. 378, 380.
(10) 6 Ind. Ap., 88.
(11) I. L. R., 1 All., 159.
(12) I. L. R., 5 All., 430.
(13) 7 Calc. W. R. Civ. Rul., 502.
(14) 10 Bom. H. C. Rep., 444, p. 463.
(15) 10 Calc. W. R. Civ. Rul., 273.

Panday[1]; Mayukha, ch. 4, sec. 4, paras. 4—13; West and Bühler, p. 67. The son is entitled to partition of all property acquired by will or gift, whether moveable or immoveable.

If the plaintiff is not entitled to partition, he is entitled, at all events, to maintenance out of the ancestral property—*Himmatsing Becharsing* v. *Ganpatsing*[2]; *Rámchandra Sakhárám Vágh* v. *Sakhárám Gopál Vágh*[3].

Inverarity for the first defendant:—We say that none of the property in the hands of the first defendant is ancestral property. As to the property which came to him from his great-grandfather Manordás, a large part of that was purchased either by the first defendant himself or by his father's executors; and that ought not to be regarded as ancestral property.

As to the property which came from Rámdás, the grandfather, Nathubhoy was an infant when his father, Rámdás, died, and the executors of Rámdás misappropriated the estate. It was recovered by litigation in 1852; but Nathubhoy had died in 1843, and so the recovered property came to his son, the first defendant. We say it is self-acquired property in his hands, first, because it came to him under the will of Rámdás; secondly, because it was acquired by litigation without assistance from ancestral funds. The remaining property of the first defendant came to him under the will of his father, Nathubhoy, or was his own earnings.

It has been decided by this High Court that a son can obtain partition of ancestral *immoveable* property in his father's life-time and against his father's will, and we do not raise that question here, but we say that ancestral *moveables* stand on a different footing.

Next, we contend that where a Hindu devises self-acquired property to his heir, the heir takes by devise, and not by inheritance, and the property is self-acquired in his hands.

(1) 6 Calc. W. R. Civ. Rul., 71. (2) 12 Bom. H. C. Rep., 94.
(3) I. L. R., 2 Bom., 346.

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In England the rule has been that a devise to an heir is a nullity, and the heir takes by descent as being a better title—Cruise's Digest, Vol. VI, p. 124. The reason given for adopting this rule in England is a reason for not adopting it in India, for in India a title by devise is the better title. An estate taken by descent is ancestral, and the power over it is limited, while an estate taken by devise is self-acquired. Again, in order to apply the English rule, the estate devised should be the same estate as that which would otherwise be inherited—Cruise's Digest, Vol. VI, p. 216, para. 11. Here that would not be the case. Rámdás left his property to his widow and his two sons jointly. If he had left no will, his two sons would have taken the estate, and the widow would only get maintenance. So, also, as to Nathubhoy's will; the estate taken by the first defendant is different from what he would have got by descent. The English law leant to the better title, at least prior to the Wills Act. Here devise would give the better title, and the Court should favour devise. If even where there is a will, an heir must take by descent, and not under the will; a widow should take only a widow's estate, although she is left the property by will. But it has been otherwise decided—*Mulchand* v. *Bái Manchá*(1); *Prosunno Coomár Ghose* v. *Tarraknáth Sirkar*(2); *Sreemutty Soorjee Money Dossee* v *Denobunde Mullick*(3). If a Hindu can devise absolutely to his widow, why can he not do so to his son?—*Nánee Tárá Náikin* v. *Allárakiá Soomár*(4); *Vináyak Vásudev* v. *Purmánunddás Jeevandás*(5); West and Bühler, p. 1130, 227; *Mohábeer Kooer* v. *Joobha Singh*(6); *Mahabir Kowar* v. *Jubha Singh*(7). In that case, under an agreement to divide, it was held the heir took under the agreement and not by descent—Mayne's Hindu Law, para. 249; West and Bühler, 24; *Myna Boyee* v. *Ootáram*(8). A son has no ancestral right to the self-acquired property of his father. Self-acquired property of a father can be devised—Mayukh, ch. IV, secs. 7—11; and self-acquired property devised, is not partible.

(1) I. L. R., 7 Bom., 491.
(2) 10 Beng. L. R., 267.
(3) 6 Moore's Ind. Ap., 526.
(4) I. L. R., 4 Bom., 573, in note.
(5) Suit 204 of 1876, not reported.
(6) 16 Calc. W. R., Civ. Rul., 221.
(7) 8 Beng. L. R., 38.
(8) 3 Moore's Ind. Ap., 400.

A large part of the property of his great-grandfather, Manordás, came to the first defendant as moveables; and in 1852, when dividing the estate under the decree, the Court treated it as moveables. Then the question arises, whether the son is entitled to partition of ancestral *moveables* against his father's will. We contend he is not, and we rely on *Rámchandra Dádá Náik* v. *Dádá Máhádev Naik*(1). The case of *Lakshman Dádá Náik* v. *Rámchandra*(2) does not question that decision. There is strong reason for holding that moveable property is not subject to the same incident as immoveable—West and Bühler, p. 657; *Suraj Bunsi Koer* v. *Sheo Proshád Singh*(3). A father has larger power over moveables—Mitákshara, ch. I, sec. 24, pl. 27; West and Bühler, 163. If partition is granted in his life-time, those powers are taken away.

The next question is, whether the plaintiff is entitled to any part of the property which was bought prior to his birth with the income of ancestral property. We contend that he takes no right by birth in those accretions. After his birth he would be entitled, as he has a vested right in the ancestral property—*Gungá Prosád* v. *Ajudhia Pershád Singh*(4); *Sudánund Mohapattur* v. *Soorjoo Monee Dayee*(5); Mitákshara, ch. I, sec. 5, pl. 7 *et seq.*; Mayne's Hindu Law, 249.

16*th April*, 1885. SCOTT, J.:—This is a suit brought by one of three sons against Sir Mangaldás Nathubhoy, the father, for partition of family property. The plaintiff, who is the third son, attained his majority on the 1st December, 1881, and in the following February he left his father's house, and on the 10th October, 1881, he filed the present suit for a partition of the ancestral property. The other two brothers are opposed to partition, and the suit was brought against them as well as the father. They stated that they were not opposed to the first defendant as regards partition, although they contended that all

(1) 1 Bom. H. C. Rep., Appx., 76.
(2) I. L. R., 1 Bom., 561.
(3) 6 Ind. Ap., 88.
(4) I. L. R., 8 Calc., 131, at. p. 133.
(5) 11 Calc W. R. Civ. Rul., 436.

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the property was ancestral; and after the statement they did not appear further in the case. The father, of course, is the real defendant, and I shall speak of him as the defendant throughout the case.

Before I enter on the merits of this case in detail I will refer to Mr. Inverarity's argument on behalf of the defendant, that any rule, compelling a Hindu father against his will to distribute the ancestral property amongst his heirs *during his life-time*, is a modern innovation. He has the support of Sir Henry Mayne, (Early Law and Custom, p. 122), who says: "There are a few texts which have been thought to imply that the sons of an aged father could compel his retirement." "But," continues Sir Henry Mayne, "whatever may be the meaning of those texts I cannot allow that they lend any countenance to an opinion, that sons could compel a partition of the family property at any time against the will of their father." On the other side, however, is Dr. Bühler, perhaps a greater authority on Hindu law, who in his translation of Gautama (Gautama's Institutes of Sacred Law, ch. XV, sec. 19), thus comments on a passage ascribing to the sons the right to enforce division, but refusing to sons who exercise that right any share in funeral oblations: "From this *sutra* it would appear that sons could enforce a division of the ancestral property against their father's will, as Yájnavalkya also allows, and that this practice, though legal, was held to be *contra bonos mores*." I may add that Dr. Bühler in his Introduction describes the Institutes of Gautama as "the oldest of the existing works on the sacred law." It certainly would seem that a general denial by Hindu sons of the father's power over the family estate while he lives might lead to a painful revolution in the Hindu family system. But that danger, if it exists, can only be met by legislation. It is my single duty, sitting here as Judge in the first instance, to ascertain whether the son's right to partition is or is not established, either by custom, or by the Hindu law as interpreted by modern decisions; and if the right has legal sanction I cannot concern myself with the consequences of its unrestrained exercise.

The defence set up is two-fold. First, that amongst the Kápoli Baniá caste, who are a branch of the Gujaráti Baniá caste, there is a custom, according to which a son is not entitled to the partition of ancestral property *in his father's life-time* and against his father's will. The defendant, secondly, says that the whole of his property is self-acquired, and not ancestral, and, therefore, not subject to partition.

I will first examine the defence of custom. It is needless for me to dwell on the importance given to custom in the Hindu system of law. There are three passages in Manu, (ch. I, sec. 108; ch. 8, sec. 41; ch. 8, sec. 46), and there are three other passages cited in Colebrooke's Digest from other ancient writers (1 Colebrooke, pp. 162, 137, 377), which clearly show that the written law must be followed only where it is not inconsistent with the legal customs of provinces, districts, classes or families. Where such customs are clearly proved, they must be followed in preference to the written law—*The Collector of Madura* v. *Moottoo Ramalinga*(1). But the Privy Council has also laid it down that a particular custom, inasmuch as it is in derogation of the general rules of law, must be strictly construed and clearly proved—*Hurpurshad* v. *Sheo Dayal*(2) and *Ramalakshmi Ammal* v. *Sivanantha*(3). In the second case I have just cited, their Lordships say, as regards a special usage deviating from the ordinary law of succession: "Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence."

The Madras High Court in *Gopálayyan* v. *Rághupatiayyan* has laid down the following rules for ascertaining whether an alleged custom should be given the force of law. "First, the evidence should be such as to prove the uniformity and continuity

(1) 12 M. Ind. Ap., 436.
(2) L. R., 3 Ind. Ap., at p. 285.
(2) 14 M. Ind. Ap., 570 at p. 585.
(3) 7 Mad. H. C. Rep., 250, at p. 254.

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of the usage, and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. Secondly, evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts or even of *panchâyats* upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible. But it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."

In the case of *Bhagvándás Tejmal* v. *Rájmal*[1], Westropp, C. J., says: "In this country it is no uncommon experience to find the custom alleged to be that which for the moment it is convenient to those who assert its existence that it should then be. I have known the most conflicting customs to be from time to time asserted to exist in one and the same sect. We find it necessary to scrutinise evidence of usage closely, and especially to demand specified instances of the custom."

I will now examine the evidence of custom adduced in this case by the light of the foregoing authorities. It appears that the defendant's family came from Diu, a Portuguese town on the coast of Káthiáwár, to Bombay at least a hundred years ago. The family does not appear to have lived either in Gujarát or in Káthiáwár since that time. But their caste, the Kápoli Baniás, claim a town in Káthiáwár as their place of origin; and the whole Baniá caste, of which they are a branch, originated in Gujarát. It must also be borne in mind that the whole Baniá caste (see Sherring's Castes of India, Vol. II, p. 281) belongs to the lowest division of the three pure and higher castes, and forms one of the great trading castes of this Presidency. Many of them are men of intelligence and wealth; and all from their position in the Indian caste hierarchy are less likely to have diverged from, or never followed, the general law of inheritance as contained in the *shástras*, than if they had been members of the impure castes. It is curious that although there are many Baniás and Kápoli Baniás in Bombay, the defendant proved no authen-

(1) 10 Bom. H. C. Rep., at p. 261.

ticated Bombay cases of the application of the alleged custom. Neither of the Bombay instances bears examination. He relied on what I may call the Borrodale answers, and on evidence partly taken on commission, partly given before me, but brought from Gujarát and Káthiawár. The Borrodale answers, so far as they concern the question of partition, record the opinions taken, fifty years ago, of many of the members of fourteen out of the eighty-four sections of the Baniá caste in Gujarát. These opinions were elicited at the instance of the Supreme Court in Surat, and were intended to form part of a collection of customary law for the use of the Courts of that district. The Kápoli Baniás were not amongst the castes that answered; and many Kápolis before me denied the existence of the custom under investigation, although it was supported by all those who answered the Borrodale questions. Evidence was also given before me that, although almost all Baniá castes eat and drink together, and intermarry, that fact would not necessarily make the law of inheritance and partition the same for all. The custom of one section on that point might, it was said, be different from another in spite of their intercommunication, because such questions were never dealt with at caste meetings. It was further stated that even different branches of the same caste, living in different places, might have different customs. Now the Borrodale evidence consists wholly of opinions, gives no instances, and was all taken in Gujarát; whilst the defendant's family never lived there, and belonged to a caste that did not answer the questions, and that had its original home, not in Gujarát, but in Káthiáwár. On the whole, I do not think the Borrodale answers are conclusive.

Are, then, the other opinions and the instances and decisions proved by the defendant sufficient to establish the custom he sets up? Ninety-two witnesses were examined on commission—thirty-five at Surat, the rest at seven of the principal towns in Káthiáwár. Twenty-two witnesses were also examined before me. The answers often show a partisan feeling: as, for instance, when the witnesses denied having heard of even voluntary partitions between father and son. But the charge of unfair bias is equally sustainable against many of the plaintiff's witnesses,

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who, for instance, maintained that a son could enforce partition against a father, even of his self-acquired property. Still numerous cases were cited by the defendant where a son had separated from his father, and his demand for a share had been refused; and, although many of these cases were of a hearsay character, some appeared to me to be genuine. The defendant's best witnesses, such as Vijbhukhandás Atmárám and Bechardás Bottibhoy, whilst they confirmed the custom, all base their opinion on the fact that they have never heard of partition having been obtained by the son while the father was alive. Their opinion shows that enforced partition is extremely rare, as is certain to be the case even under the general law, which, as Dr. Bühler points out, though it holds such partition possible, still reprobates it as immoral. But the opinion does not show that it is impossible. Some of the plaintiff's witnesses,—for instance, Jamnádás Parbhudás, a *vakil* of forty years' standing,—could not speak with any certainty as to the custom. He said there was no certain rule in the matter. Another witness, an editor of a newspaper, even mentioned instances where a son was given partition. This witness was proved to have previously expressed himself in favour of the custom, and his evidence was so far discredited; but the instances he gave were not disproved. Another, a Brahmin pleader, even said that a son might bring a suit for division, and that no one has actually agreed to the custom.

I have not, however, to decide on the defendant's evidence alone. A great mass of evidence was adduced by the plaintiff. Over fifty witnesses were called by him, and numerous instances cited, to show that a son could enforce partition against his father's will. Many of the instances were only *ex relatione*, but even those are not without their importance as showing the opinion of persons whom this custom is supposed to bind, and who are "likely to know of its existence if it existed." Moreover, some of the instances were not mere hearsay, but were in the personal knowledge of the witnesses. In many of the cases cited there was, at any rate, great reluctance to give the son a share; and, if a custom against partition had existed as the

customary law of all this caste, why did not the father avail himself of it? Some of the plaintiff's witnesses were men beyond suspicion, and of a profession where they were likely to have special knowledge. Mr. Dayábhoy Jádarám, for instance, a leading solicitor of Bombay, said that there was no custom which interfered with the Hindu law of inheritance, and that the son had a right to a share of the ancestral property in his father's life-time Mr. Goculdás Káhándás Párakh, pleader of the High Court, gave similar evidence, as also did Mr. Jamnádás Rámdás, a Kápoli Baniá, a mill-owner and mill manager, and guarantee-broker to Messrs. Ralli Brothers. These opinions, coming from persons all of the Baniá caste whose position and profession are a guarantee of their acquaintance with custom and usage, are of undoubted importance. Such persons are, so to speak, the depositaries of customary law, just as the text books are the depositaries of the general law.

The plaintiff's exhibits are perhaps stronger in his favour than his oral evidence. He produced twenty-three releases between fathers and sons, showing a partition of property in the father's life-time. Most of them, no doubt, were mere voluntary divisions, which are only important as shaking the credibility of those of the plaintiff's witnesses who said they had never heard of any partition at all.

But some of the releases relate to partitions made in consequence of a quarrel and by the intervention of friends,—as, for instance, exhibits E, G, H, Q and A3. There are other exhibits, V, A, and A 4, which are equally strong against the uniformity of the custom, inasmuch as they prove judicial decision, when the parties, members of Baniá castes, followed the general law, and made no mention of the custom.

In conclusion, I am of opinion this custom has not been proved to be "part of the legal conscience" (to borrow an expression of the Advocate General) of all those whom it is said to bind. The *consensus utentium*, which is the basis of all legal customs, has not been shown to be uniform and constant.

At the same time it seems to me that as long as the establishment of a custom is made dependant on its proof by instances,

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very few customs will ever be proved. Instances will be met by instances. The cost and delay of sifting the good from the bad will be always greater than the parties will face or the Court permit; and almost every custom will fail for apparent want of uniformity. The obvious result will be the continually widening influence of the Bráhminical law. Mr. Steele, in his work on Caste Law (pp. 122, 126), states that amongst many castes, points of disputed custom are settled by an assembly of the caste. But even such a measure as a caste vote in the present case would fail to arrive at the truth. The Kápoli Baniá caste is divided into two factions, one headed by Sir Mangaldás the other by another leading member; and I fear there is little doubt that in a caste *plebiscite* the one set would unanimously establish the custom and the other would hold just as firmly to the general law.

As the custom set up has not been satisfactorily proved, the case must be decided by the general Hindu law of inheritance. The present state of the law as regards the partition of ancestral property,—that is to say, property acquired by descent or by the use of the patrimony,—has been summed up by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*(1) in the following terms:—"But it seems to be now settled law in the Courts of the three presidencies that the son can compel his father to make a partition of the ancestral immoveable property. On this point it is sufficient to cite the cases of *Láljeet Singh* v. *Rájcoomár Singh*(2) and *Rájáh Rám Tewarry* v. *Luchman Persád*(3) decided by the High Court of Calcutta; that of *Káliparshád* v. *Rám Charan*(4) decided by the High Court of the North-West Provinces; that of *Nágalinga Mudali* v. *Subbiramaniya Mudali*(5) decided by the High Court of Madras; and the case of *Moro Vishvanáth* v. *Ganesh Vithal*(6), decided by the High Court of Bombay. The decisions do not seem to go beyond ancestral immoveable property." The above passage puts beyond all ques-

(1) L. R., 6 Ind. Ap. at p. 100.
(2) 12 Beng. L. R., 373.
(3) Bengal Full Bench Rulings from 1863 to 1867, p. 371.
(4) I. L. R., 1 All,, 159.
(5) 1 Mad. H. C. Rep., 77.
(6) 10 Bom. H. C. Rep. ,444.

tion the son's right to demand a division of the ancestral immoveable property at any time.

It remains to consider the question of his right to a partition of the ancestral moveable property. West and Bühler, p. 657, lay down the rule in terms which draw no distinction between moveables and immoveables: "A son living in union with his father, who is head of the family, may demand a separation and a division of the ancestral property at any time * * * * * * * * . The law of the Mitákshara thus stated must be regarded as binding generally in Bombay." Similarly, Mr. Justice Nánábhái Haridás, whose decision is cited by the Privy Council, draws no distinction—*Moro Vishvanáth* v. *Ganesh Vithal*[1]: "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."

Similarly, the Madras High Court in *Nágalinga Mudali* v *Subbiramaniya Mudali*[2] lays down the broad rule that "sons may compel a division of ancestral family property at the hands of their father." The Calcutta High Court in *Laljeet Singh* v. *Rájcoomár Singh*[3] also admits the son's claim to partition under Mitákshara law, and makes no distinction between moveable and immoveable property. This last case is specially applicable, as Phear, J., in his statement of the Mitákshara law admits "that the father as head of the joint family has independent power of disposal for certain purposes of the family effects other than immoveable property;" and yet no distinction is drawn between the two kinds in his judgment, which was the judgment of the Court. There is, however, a case, known as the *Dádá Náik Case*[4], where Sausse, C. J., and Arnould, J., decided that "on this side of India a son (Hindu)

(1) 10 Bom. H. C. Rep. at p. 463.
(2) 1 Mad. H. C. Rep., 77.
(3) 12 Beng. L. R., 373, at p. 376.
(4) 1 Bom. H. C. Rep., Appx., 76.

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has no right to enforce partition of ancestral moveable property in the hands of his father." Considerable doubt, however, was thrown upon this decision by Mr. Justice Melvill in a very carefully considered judgment—*Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[1]. The direct point decided there is, that "a Hindu, governed by the Mitákshara law, who has two sons undivided from him, cannot, whether his act be considered a gift or a partition, bequeath the whole or almost the whole of the ancestral moveable property to one son to the exclusion of the other." Mr. Mayne, in his work on Hindu Law, treats Mr. Justice Melvill's decision as practically overruling that of Sir Mathew Sausse. The Privy Council, in confirming the decision of Melvill, J., whilst they abstained from pronouncing a decided opinion against the older judgment, certainly did not speak in its favour. They said (7 Ind Ap. at p. 193) that the order then made "whether founded on a correct or an erroneous view of the law," must be treated (by lapse of time) as an adjudication binding on the parties; and they added that it would be unjust to say that it did not "suspend the statute of limitations, because it was erroneous in point of law, and the respondent ought to have appealed from it." The case relies upon the Mitákshara (ch. I, sec. 1, paras. 21-27), whilst the later case relies on Mayukha (ch. 4, sec. 5).

Sir Mathew Sausse in his decision relied also on a passage which is cited in Colebrooke's Digest (Vol. II, p. 113) as from Yájnavalkya. The Dáyabhaga, (ch. 2, sec. 22), cites it as from that work. But the Mitákshara, (ch. I, sec. 1, para. 21), cites it anonymously, and it does not occur in Roer and Montriou's translation of Yájnavalkya. Mr. Mandlik (p. 34) refers it to Vishnu, and Mr. Whitley Stokes (p. 204) also throws doubt on its alleged origin. The text in question lays down that "the father is master of the gems, pearls and corals and all other moveables, but neither the father nor the grandfather is so of all immoveables." I doubt whether it ought to be given the independent value of a citation from Yájnavalkya, especially as the following passage does occur, (Bk. 2, v. 121), in Yájnavalkya:—

(1) I. L. R., 1 Bom., 561.

"*The ownership of father and son is coequal in the acquisitions of the grandfather, whether land, settled income, or moveables.*" At any rate, it must be construed according to the interpretation of it by the two commentaries whose authority is paramount on this side of India,—that is to say, the Mayukha and the Mitákshara. The Mitákshara in commenting upon this text still affirms the principle that property in the ancestral estate, both moveable and immoveable, comes to the son by birth. But it goes on to say, that the father has independent power in the disposal of moveables for indispensable acts of duty and for purposes prescribed by texts of law, such as the support of the family and gifts of affection. The Mayukha (Stokes' Hindu Law Books) draws the line more strictly as to the father's control over moveables, and enunciates most clearly the son's right by birth to all ancestral property. Thus it says (ch. 4, sec. 1, para. 3): "From the plain sense of this text, 'even by birth ownership in wealth is obtained' and other similar ones, it is evident that ownership in the father's wealth, depending on the filial relation, is generated by the production of a son; and the same results from this text of Yájnavalkya, for the ownership of father and son is the same in land which was acquired by the grandfather, or in a corody, or in chattels, the word is *dravya*, which signifies property of any kind, (Mandlik, p. 32), which belonged to him." And, again, it says (ch. 4, sec. 4, para. 4): "Brihaspati declares partition in some cases without his (father's) wish. The father and sons are equal sharers, &c., &c., from which it results that sons are worthy of a share in property acquired by the grandfather or other ancestor, even though the father does not wish it." And, again, (in ch. 4, sec. 4. para. 13) Brihaspati, however, declares "the right to only an equal share with his sons, even if there be only one, in property acquired by the grandfather. In wealth acquired by the grandfather, *whether it consists of moveables or immoveables*, the equal participation of father and son is ordained."

Finally, as regards moveables, the Mayukha says, (ch. iv, sec. 1, para. 5), with reference to the text especially relied upon by Sir Mathew Sausse: "As for the text—'the father alone is master

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of all gems, pearls, and corals, but neither the father nor the grandfather is so of all immoveables,'—it signifies the father's independence only in wearing and otherwise using the earrings, rings, &c.; but not in giving or otherwise alienating them; *nor does it mean to exclude the birth of a son as the cause of ownership.*" (In the last few words I have used the translation by Mr. Mandlik in preference to that of Mr. Whitley Stokes' collections).

These passages from the Mayukha make it difficult to follow Sir Mathew Sausse in *Dádá Náik's Case*(1). That case, however, may be distinguished from the present one. The learned Judge in that case refused to follow the Mayukha as being opposed to the great weight of authority in the Mitákshara. But the parties were from the Southern Marátha Country, a district where the Mitákshara is paramount, and it was right to follow the Mitákshara when opposed to the Mayukha. But in the present case, where the parties are from the island of Bombay, and of a caste which comes from Gujarát, the authority of the two works is reversed, as both in Gujarát and Bombay the Mayukha is of higher authority than the Mitákshara—*Sakhárám Sadáshiv Adhikari* v. *Sitábái*(2).

The Privy Council in a recent case—*Suraj Bunsi Koer* v. *Sheo Proshad Singh*(3)—have defined the relations of fathers and sons in a joint family in a manner which reduces the position of the father, so far as the joint property is concerned, to that of manager, pure and simple. There is not a shadow of the *patria potestas* left. This decision undoubtedly is in favour of the son's right to divide against the father's will. Their Lordships say:—

"The rights of the co-parcener in an undivided Hindu family governed by the law of the Mitákshara, which consists of a father and his sons, do not differ from those of the co-parceners in a like family, which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons; and the

(1) 1 Bom. H. C. Rep., Appx., 76. (2) I. L. R., 3 Bom., at p. 365, *per* Westropp, C. J.
(3) 6 Ind. Ap., 88, at p. 100.

fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate."

In this decision, as in all the others I have cited, save one, no distinction is drawn between moveables and immoveables. In the present state of the law, I do not think such a distinction is admissible in districts where the Mayukha applies. The plaintiff is, therefore, entitled to partition of all the ancestral property.

The next point I have to consider is, what portion of the defendant's property is ancestral.

It was argued at the hearing that I should only answer this question in principle and for the guidance of the Commissioner, who will ascertain and apportion the exact amounts. The property may be divided as follows :—

(1) The defendant's share in the partition of the estate of his great-grandfather, Manordás Rupji.

(2) The property of his grandfather, Rámdás Manordás, which was devised by Rámdás to his wife and his two sons, all of which fell to defendant's father, who devised it to the defendant.

(3) The other property of the defendant's father which was devised to the defendant.

(4) The accretions and accumulations arising out of these various properties.

(5) The property acquired by the defendant's own exertions.

Now, first, as regards the character of the property which the defendant received as his share on the partition of his great-grandfather Manordás Rupji's estate. That property was left by will (27th February, 1789,) to be equally divided amongst five sons, of whom the defendant's grandfather, Rámdás Manordás, was one. But the property became the subject of litigation, and was not divided until 1852, long after the death of Rámdás Manordás. His share, one-fifth and one-twentieth, (which came to him as heir with the other brothers of Nágindás, who died in the life-time of Rámdás), was received by the executors of his son, Nathubhoy, the first defendant's father. It is clear that this property came to the first defendant

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by inheritance, and must be held ancestral property, subject to partition, and not capable of being given or willed away. A further question arose, whether it was immoveable or moveable, which I will answer shortly. Looking at the terms of the will, there is no apparent intention on the part of the testator to convert the land and houses into money, and it is a well-known rule of the law that, in the absence of any direction, the property must be held to be real or personal according to the actual condition in which it is found at the testator's death. The order on the equity side of the late Supreme Court, dated 21st October 1847, concerning the estate of Manordás Rupji also proves clearly that the immoveables belonging to that estate never really changed their character, although for the purposes of the division some part of it was sold by public auction, whilst other part was taken by the various claimants at a valuation. I think, therefore, it must be treated as immoveable property.

The first defendant next maintained it was not ancestral property, because when he obtained his share he had no sons. But the authorities are clear on the point, that the son's right at his birth applies to all the ancestral property in his father's hands, and is not limited to that which the father inherits after his birth. The defendant further argued that all the property he had purchased by means of the income of ancestral property, before the birth of the son, was self-acquired, and did not vest in the latter at his birth. He cited, in support of this contention, a *dictum* of Mr. Justice Mitter—*Gunga Prosád* v. *Ajudhia Pershád Singh*(1). This seems to be in conflict with the rule, that the accretions and accumulations follow the *corpus*, a rule laid down in *Sudánund Mohapattur* v. *Soorjoo Monee Dayee*(2): (see also Mayne's Hindu Law, para. 248). I shall hold that all the property acquired out of the income of the ancestral property is of the character of that from which it came, on the principle that *accessorium sequitur suum principale*. *A fortiori*, does this apply to property consisting of accretions made with the aid of the ancestral property after the birth of the son—*Bissessur Lall Sáhoo* v. *Mahárájáh Luchmessur Singh*(3).

(1) I. L. R., 8 Calc., 862. (2) 11 Calc. W. R., Civ. Rul., 436.
(3) L. R., 6 Ind. Ap., 233.

The defendant next says, as regards such property of his great-grandfather, Rámdás Manordás, as came to him, that it was recovered by litigation and without the aid of the ancestral funds. This rule is of very rare application, and the conditions under which it applies, as laid down in *Naraganti Achammagáru* v. *Venkatachalapati Nayaniváru*[1], show that the rule does not apply to this case.

"The conditions requisite for the application of the rule, conferring on a co-parcener a privilege in respect of joint property recovered by his exertions, are that the property should have been recovered from usurpers holding it adversely to the family; that there should have been an abandonment of their rights by the other co-parceners; and, where such abandonment is a matter of inference, that the co-parceners, to whom it has been imputed, should have been in a position to sue:" (see also Mayne's Hindu Law, para. 259).

I now come to the question, whether a son, to whom a father leaves his self-acquired property by will, takes the estate by devise or by descent. This is a most important point, perhaps the most important point in the case. For, if the son takes by devise, the property would, in my opinion, continue to be self-acquired in his hands, and a ready means would be afforded by the use of the testamentary power of checking enforced partitions, which Mr. Justice West (West and Bühler's Hindu Law, p. 650, note) fears may increase, and produce "a complete break-up of the Hindu family system." The first will we have to do with, is that of Rámdás Manordás, the defendant's grandfather, of the 1st February, 1808. The property was left to the testator's sons, who were the defendant's father, Nathubhoy, and defendant's uncle, Vithaldás. Vithaldás died in 1813 without issue, and at the widow's death the whole estate became the property of the defendant. It is clear that the property was self-acquired at the hands of the testator, the grandfather Rámdás. He received nothing from his father, and made his money by a separate and not family business. The question is, was it self-acquired in the hands of the defendant's father, or was it ancestral? The terms

(1) I. L. R., 4 Mad., 250, at p. 259.

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of the will itself, I think, show that the testator intended that it should be self-acquired. It says: "Further, our father, Sett Manordás Rupji, has left behind him, in writing, that the property in possession of, and obtained by, each person belongs to each person respectively. I also do write that whatever wealth any one possesses is exclusively his own: there is nobody else's share therein." But does the law carry out the testator's intention? The principle is now settled beyond question, that under Hindu law a man may alienate his property to the same extent by a will as he might by a gift *inter vivos*. In the *Tagore Case*[1] their Lordships of the Privy Council say: "A gift by will is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take, upon the death of the testator, as if he had given the property in his life-time." (See also 2 Strange's Hindu Law, pp. 431, 435.)

A bequest by will, therefore, is a gift made in contemplation of death. It only differs from a gift in the fact that it takes effect at a future time instead of immediately. But it must clearly be governed and controlled by the general rules regarding gift. Now, there is no doubt that a man can give away self-acquired property to whomsoever he pleases, including his own sons; and there is no doubt that property so given would be considered self-acquired in the hands of the donee. It would, therefore, follow that property given by will would equally be self-acquired in the hands of the devisee. But a limitation was placed by the Advocate General on this general rule in the case of father and son. He argued that where a father gave, by will, property to his son, the son would take the property, not as devisee, but as heir, in which case it would not be self-acquired, but ancestral property in his hands, subject to the rights of the joint family, including the right of partition. The proposition was supported by an alleged analogy of the English law before it was altered by the Inheritance Act, 1833. That old English rule is stated as follows in a work of the highest authority (in 2 William's Saunders, pp. 8, 9): "Though the ancestor devises

(1) Ind. Ap. Sup. Vol. at p. 68.

the estate to his heir, yet, if he take the same estate in quantity and quality that the law would have given him, the devise is a nullity, and the heir is seized by descent.* * * * But when a different estate is devised than would descend to the heir, the disposition of the will shall prevail, as where an estate in fee simple is devised entail, or where devisees are by the will joint tenants, who would be co-parceners by law. Messrs. Hargreaves and Butler in their note (Coke upon Littleton, Vol. I, 12 B., note 63), upon this point say as regards Lord Coke's text: "One leading principle, which this and other authorities seem clearly to establish, is, that whenever a *devise* gives to the heir the same estate in *quality* as he would have by *descent*, he shall take by the *latter*, which is the title most favoured by the law; and that merely charging the estate with debts or legacies will not break the descent."

Comyn's Digest (art. Devise, para. *k*, p. 383), says: "So the devise to the heir-at-law, of the same estate which he would take by descent, is void; for the descent shall be preferred."

"But if the devise gives the estate to the heir in another quality, he shall take by the devise; as if the devise be to coheirs to hold jointly, or in common."

It is clear from these eminent authorities that the English rule only applied where the devise to the heir-at-law was of the same estate which he would take by descent. It is equally clear that an estate devised to a member of an undivided Hindu family is very different from what he would take as heir. The present Chief Justice has decided this point in favour of the estate by devise as a different and preferable estate in Hindu law—*Vináyek Wássoodev* v. *Purmánanddáss Jeevandáss*[1]—and he also referred to decisions where a devise to a widow of separate immoveable property has been held to confer upon her the absolute estate—*Mulchand* v. *Bái Manchá*[2] In West and Bühler, p. 1113, this decision of the Chief Justice is cited and approved, and an adverse decision from Madras commented and distinguished.

(1) Suit No. 204 of 1876, (not reported).

(2) I. L. R., 7 Bom., 491.

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The case of *Lakshmibái* v. *Ganpat Morobá*[1] seems to me also in point. There a Hindu possessed of a property, both moveable and immoveable, which he had acquired by making partition with his brother of their joint ancestral property, devised in severalty his property to his two sons and the sons of his third son in equal third parts. The two sons took their thirds as separate estate without question; and the dispute only arose as to whether the grandsons of the third son took jointly or severally. The Judge of first instance, Arnould, J., had followed Westropp and Gibbs, JJ., in an earlier case, *Narottam Jagjivan* v. *Narsandás Harikisandás*[2], and held that ancestral property after partition can be disposed of by will in the same way as self-acquired property. This ruling, although disapproved by the Court, (Couch, C. J., and Sargent, J.,) in the case I cite, was sustained in the particular case, on the ground that the grandsons had by their conduct estopped themselves from contesting the will, which clearly showed the intention of the testator, that the grandsons should take in severalty. But the Court based their disapproval entirely on the fact that the property was originally ancestral, and they evidently were of opinion, that if it had been self-acquired property they would have agreed with Arnould, J., and the will would have been held perfectly valid, on the ground that in self-acquired property the power of disposal by will, and alienation by gift, is equally complete. In spite of the unreported decision referred to by the Advocate General, which probably turned upon special circumstances, I shall follow the Chief Justice.

The defendant's father, therefore, took the property by will and not by inheritance, and as property received by will in Hindu law is held to be received by gift, it must be considered self-acquired in the hands of the defendant's father. Similarly, the property he took from his brother and mother came to him either by the right of survivorship, or by inheritance from females or brothers; and such property is subject to the same rules as if it had been self-acquired. (See West and Bühler, p. 710.)

(1) 5 Bom. H. C. Rep., 128, O. C. J. (2) 3 Bom. H. C. Rep., A. C. J., 6.

As it was self-acquired property, he in his turn could give or dispose of it by will to whomsoever he pleased; and he devised it all to the present defendant. The following terms of the will, (dated the 26th August, 1843), show the intentions of the testator to have been, that his son should take it as sole owner under certain restrictions. There is nothing in it to show that the testator intended the devisee should take as a member of a joint family. The very fact of his making the will shows that was not his intention. He says: "I am the sole master of my property, and after my death my son Mangaldás is the master of my estate and all other goods and chattels." (Then follows list.) "The above-mentioned estate, &c., all belonging to myself, and after my death the owner thereof is my son Mangaldás; he is not to dispose of the estate, nor is he to give it in mortgage." The son's majority was also postponed until the age of twenty-one. Clearly, a different estate was intended to be created to that which the devisee would have taken as heir to his father in Hindu law. Therefore, according to the rule I have laid down in respect of the preceding will, the property which the defendant took under his father's will was also self-acquired, and not subject to partition.

The only other question of principle to be considered, is, whether defendant's earnings as mill manager are to be considered self-acquired or ancestral property. If the post was obtained without the use of ancestral funds, the earnings would undoubtedly be self-acquired property. If, on the other hand, the post was in any way purchased, and the purchase-money was taken from the family property, the earnings would, I think, be considered ancestral. This principle is clearly established by Melvill, J., in an elaborate judgment, *Lakshman Mayárám* v. *Jamnábái*[1]. The question of fact, whether the post was so purchased, was reserved; and I will fix a day for its investigation on the application of the parties.

I will now conclude by a *résumé* of my decision in the order of the issues:—

(1) I. L. R., 6 Bom., 225.

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1.—The share of the first defendant, received by him on partition of his great-grandfather's estate, was received as ancestral property.

2.—That share came into his hands as immoveable or moveable property according to its condition at the death of his great-grandfather.

3 and 4.—The plaintiff is entitled to partition of the ancestral immoveable and moveable property now in the hands of the defendant.

5.—He is entitled to partition of the accretions and accumulations of the ancestral property acquired by the defendant prior as well as subsequent to the birth of the plaintiff.

6 and 7.—The property devised by the will of Rámdás Manordás to Nathubhoy Rámdás, and devised by the will of Nathubhoy Rámdás to the defendant, and all accumulations and accretions thereto are the self-acquired property of the defendant, and the plaintiff is not entitled to its partition.

8 and 9 are answered by the answers of 6 and 7.

10 and 11.—The property devised by Rámdás Manordás to Rámcuverbái and the defendant's brother, so far as it passed to the defendant, with all accumulations and accretions thereto now in the hands of the defendant, are his self-acquired property, and the plaintiff is not entitled to partition of it.

12 and 13 must stand over until the special issue has been tried.

14 and 15 have already been answered.

16.—The custom has not been proved.

17.—The plaintiff is entitled to partition as above set forth.

18.—Some *interim* allowance for maintenance will be fixed on application by the parties.

An account must be taken of all the ancestral property, moveable and immoveable, as it is defined by my decision, and of the rents and profits of the same which have come into the possession of the defendant; and the defendant must deliver to the plaintiff one-fourth share of such ancestral estate.

Now, finally, as to costs. The enquiry into the custom formed a distinct and most expensive branch of the litigation. The defendant, having caused the enquiry, and having failed to prove the custom he set up, must pay all the costs occasioned by the enquiry. As regards the remaining costs of the suit, the other two defendants are entitled to be preserved from them, as in their written statement they put no claim for partition for themselves, and they took no part in the litigation. It would, therefore, be unfair to them to throw the costs of this suit on the ancestral property. The plaintiff has failed to establish the ancestral character of the major part of the property, and is only entitled to a share which will hardly yield him a larger income than that which the defendant voluntarily offered him before this suit. If maintenance had been refused him, as it may legally be refused to a son who is full grown and able to work, I would have granted him the costs in spite of Dr. Bühler's intimation that such partitions are against the moral sense of the ancient words in Hindu law. But under the circumstances of this case, I do not think he is entitled to his costs either out of the whole ancestral property or out of the defendant's general property. The plaintiff and his father must each pay their own costs; and the costs of the second and third defendant must be paid out of the ancestral property.

A question subsequently arose between the parties as to the effect of the above judgment on the 12th and 13th issues, which were as follows:—

"12.—Whether the property acquired by the first defendant himself, and in particular the commission earned by him as a mill agent, and all accumulations and accretions thereto, are not the self-acquired property of the first defendant."

"13.—Whether the plaintiff is entitled to partition of the property mentioned in the 12th issue."

On the 9th May, Scott, J., gave the following decision:—

SCOTT, J.:—The issues were (12th) whether the property acquired by the first defendant, Sir Mangaldás Nathubhoy himself, and in particular the commission earned by him as mill agent, are not

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the self-acquired property of the first defendant; and (13th) whether the plaintiff is entitled to partition of this property. The law as to self-acquired property is put very clearly in Strange's Hindu Law, Vol. I., p. 213. He says: "The acquisition, in order to be separate property, must have been original and independent, the essence of the exclusive title consisting in its having been made by the sole agency of the individual without employing for the purpose what belongs in common to the family. If the family property has been instrumental to it, it vests in the family * * * * * To take the case out of the rule, when there has been no conjoint labour, the common fund must have been directly instrumental."

Now to apply the law. In the present case there was clearly no conjoint labour. Sir Mangaldás did the work himself as mill agent. None of the family aided him in any way. The only question is, whether he obtained the post of mill agent through the direct instrumentality of the common funds which Sir Mangaldas had inherited from his great-grandfather. That is a pure question of fact, and the facts are as follows:—The Bombay United Spinning and Weaving Company was founded in 1860. Sir Mangaldás was appointed chairman of the company. He then owned thirty-nine shares, and subsequently bought a very much larger number. He seems to have managed the affairs of the mill for ten years without any remuneration. His management was successful, and very good dividends were declared every year from 1863. In December, 1870, he wrote a letter to the directors, in which he stated that he had acted hitherto as 'managing director and general supervisor and controller of the mill without any remuneration.' He goes on to say: 'He can do so no longer, and asks for the same remuneration as is paid by every other mill in Bombay.' At a meeting of the shareholders he was consequently appointed managing director with a commission of quarter anna per pound on all yarns and cloths sold by the company. The question is, did he obtain this appointment by the influence of his shares, or did he get it because his services were too valuable to be dispensed with and

fully worth the commission he asked? He possessed, no doubt, three hundred and thirty shares at that time either in his own name or in the name of nominees, and as every share gives a vote, he was possessed of great voting power. But there were nine hundred shares altogether, so that he could have been outvoted if the shareholders had wished it. As a matter of fact, he had two hundred and eighty-three independent votes in his favour and only ninety-seven against him: so that it may safely be inferred that he did not win the post by the direct influence of his own shares. It may be said that his position and voting power in the company had an indirect influence on the other voters. But it may be also said that the gratuitous services he had rendered for ten years influenced them also. Such influence cannot be said to have been created by the direct instrumentality of the common family fund. Nor can it be said that he bought these shares in order to secure this appointment, as they were in themselves an excellent investment. The dividends paid are sufficient reason for an explanation of the purchase without presuming any ulterior motives.

I think, therefore, he obtained this post without such use of the ancestral property as would deprive its emoluments of the character of self-acquired property. I, therefore, answer the 12th issue in the affirmative, and the 13th issue in the negative.

It has been assumed for the purpose of this decision that the shares were bought with ancestral property; but that question really remains open, and is subject to the Commissioner's report.

In settling the minutes of the decree, a point arose as to whether the plaintiff was entitled to claim only his share of the ancestral property actually in the hands of the first defendant, or to his share of all the ancestral property with all accumulations and accretions. The case was accordingly set down for speaking to the minutes of decree.

23*rd July*. SCOTT, J.:—On the motion last Monday to speak to the minutes of the decree in this suit an important question

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was raised as to the accountability of the manager of a joint family for his past dealings with the joint property. The point, though it is involved in the case, was not discussed at the hearing; and I had to give my judgment as to the extent of the liability of the first defendant as such manager without having had the advantage of argument from the able counsel engaged on either side. But, of course, all that I can decide at this stage of the case is, what was the actual order made.

I decided, following in the words of my decision the language of the issues raised at the hearing, first, that the plaintiff is entitled to partition of the ancestral moveable and immoveable property now in the hands of the defendant, and, secondly, that he is further entitled to partition of the accretions and accumulations of the ancestral property acquired by the defendant prior as well as subsequently to the birth of the plaintiff.

In the settlement of the minutes of the decree two different constructions are put upon this decision by the plaintiff and first defendant respectively.

The plaintiff contends that he is entitled under it to a one-fourth share of all the ancestral property with its accumulations and accretions which has been received by the defendant after all just allowances had been made.

The defendant, on the other hand, maintains that the plaintiff can only claim his one-fourth of the ancestral property now in the defendant's hands.

I am now asked to explain my decision. I will do so, though what I said seems to me to be perfectly clear.

I followed on this point, as I endeavoured to do in all the other points of the case, the existing Hindu law as it obtains in the Bombay Presidency, and as, in the absence of argument, I did not give my grounds I will very briefly state them now.

Mr. Justice West (West and Bühler, page 763) thus lays down the present law:—

"With respect to the determination upon partition of the shares for actual enjoyment, this has regard only to the property *as it actually subsists* without allowances for inequalities of expendi-

ture. In the case of an enforced partition, complete accounts must be taken."

Two decisions of the Bombay High Court show that Mr. West here states the existing law with his usual exactness.

In *Konerráv* v. *Gurráv*[1], Melvill, J., says: "The ordinary rule, no doubt, is that the members of an undivided Hindu family, when making a partition, are entitled, not to an account of past transactions, but to a division of the family property actually existing at the date of partition; see also *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[2].

No doubt in the case of fraud and misappropriation and even gross and reckless wastes the manager might properly be made responsible; but such charges were not even made, still less supported in this suit, "and the presumption in the absence of evidence, is that the estate as it subsists at the moment of the suit is that of which the claimant can demand his proper adequate part" (West and Bühler's Hindu Law, p. 769.) In Bengal, the authorities have, no doubt, taken a different view of the manager's liability to the other members of the joint family. But that probably arises out of the different theory of joint ownership which obtains in the Bengal school of Hindu law.

At any rate, I must follow the law as laid down here.

Now, to come back to what I decided and ordered to be done. I said, in terms that could hardly be clearer, that the plaintiff is entitled to partition of the ancestral property *now in the hands of the defendant*, and I further said that there must be included in that ancestral property the accretions and accumulations of the ancestral property acquired by the defendant before, as well as after, the birth of the plaintiff. In order, therefore, to ascertain the amount of all ancestral property now in the hands of the defendant, it is necessary to ascertain the amount of the accumulations and accretions, and that cannot be done without first ascertaining the original ancestral property from which they were derived.

(1) I. L. R., 5 589 at p. 595. (2) I. L. R., 1 Bom., 561.

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I think, therefore, the decree should contain the following words:—

"That it should be referred to the Commissioner to take an account of the ancestral property, both moveable and immoveable, which has come into the possession of the said defendant, and of the accumulations and accretions thereof, and to ascertain and report the amount of the said ancestral property with the said accumulations and accretions which is now in the hands of the said first defendant, and to ascertain the amount of the plaintiff's one-fourth share therein."

Both the plaintiff and the first defendant appealed from the decree of Scott, J. The appeal came on for hearing on the 9th April, 1886, before Sargent, C. J., and Bayley, J. In the appeal the allegation of special custom, which had been made in the Court below, was abandoned.

Latham (Advocate General) and *Jardine* for appellant, (plaintiff).

Farran, *Macpherson* and *Telang* for respondent, (defendant No. 1).

Lang for other respondents, (defendants Nos. 2 and 3).

Latham for appellant, (plaintiff):—The allegation of a special custom is now abandoned by the respondents, and it is admitted that the general Hindu law applies. We appeal against the decree of Scott, J., only on two points, *viz*:—

(1). We contend that the property which has come to the first defendant under various wills is not self-acquired, as held by the Court below. We submit it is all ancestral property in the hands of the first defendant, and liable to partition.

(2). We appeal against the order as to costs. On all other points we support the decree.

The real point is, not whether a son to whom property is devised takes it by descent or devise, but whether a son taking property by devise takes it as ancestral property. The test is, from whom did the property come? We say ancestral property is property derived from an ancestor. It is contended that the only

property which is ancestral is property derived *by inheritance*. That we deny. If there were any such distinction it would be somewhere clearly laid down, but it is not.

As to the early law of property and partition in India, see Mayne's Hindu Law, paras. 203—219 : see also paras. 226, 227. The contention on behalf of the first defendant here is that moveables differ from immoveables; and that, although partition of immoveables may be claimed by a son against a father, a partition of moveable property cannot. With regard to property as between a father and son, see Mayne's Hindu Law, paras. 248, 249. The leading text on Hindu law with regard to ancestral property is Mitákshara, ch. I, sec. I, pl. 27 (Stokes' Hindu Law, p. 375). That text is the writer's own conclusion upon the preceding discussion. It states the rights of a son by birth in ancestral property, whether moveable or immoveable, although the father may override those rights by exercising certain powers. That text refers even to a father's self-acquired property. *Placitum* 21 states a contrary opinion, which, however, the author refutes. See, also, Mayukh, ch. IV, sec. I, pl. 5 (Stokes' Hindu Law, p. 43); Mitákshara, ch. I, sec. V, pl. 3, 4 and 8 (Stokes' Hindu Law, p. 391). These passages show that a son takes an interest by birth in all his father's property, whether moveable or immoveable. I contend that there is no distinction in the son's right by birth to the self-acquired and ancestral property of his father.

Next, the Mitákshara, ch. I, sec. IV (Stokes' Hindu Law, p. 384) deals with property not subject to partition. That section, however, deals with partition as between brothers. By the strict law of Mitákshara there is no property derived from an ancestor exempt from partition as between the recipient and his sons. *Placitum* 6 shows that alienation of self-acquired property must be without detriment to the father's estate. *Placitum* 7 shows that any gift by a father out of his property to his son, which is a detriment to his property, becomes ancestral in his son's hands. A gift by a father to a son out of the father's self-acquired property would be ancestral in the son's hands, if it was a detriment to the father's estate. Property given by will to a son would be a detriment to the father's estate. See, also,

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placita 8, 9, 13. The other side will rely on *placitum* 28. I submit that text relates not to a disposition of the father's estate, but merely to small gifts. Chapter I, section VI, *placitum* 13 (Stokes' Hindu Law, p. 396) develops that text. It also relates merely to co-parceners, but does not say what will be the nature of the property in the hands of a son: see also Mayukh, ch. IV, sec. VII, pl. 10; Mayne's Hindu Law, pl. 249. In every case the test of its being ancestral is, from whom did it come?—*Muddon Gopál* v. *Rám Buksh Pandey*(1). Tagore Lectures for 1884-85, page 480, treats this as existing law—*Tárá Chand* v. *Reeb Rám*(2) *Ratanji Aspendiárji* v. *Moorlidhar Oodhowji* (unreported) decided on 11th November, 1872. We have thus a decision in each presidency in our favour. There is no contrary decision—*Chatur Bhooj Meghji* v. *Dharamsi Náranji*(3). Ancestral property partitioned is still ancestral—*Ganpat Morobá* v. *Lakshmibái*(4). As to the authorities against us, see West and Bühler, pp. 226, 227. That, however, is only an opinion, not a decision. *Purmánanddás* v. *Vináyak Wássoodev* (unreported) is not in point. There were no sons in that case. The cases in which widows who take by devise take other than a widow's estate are not in point, as widows have no inchoate right as sons have. The wills in the present case show no intention of altering the character of the property —Cruise's Digest, Vol. VI, p. 124.

Next we say there is no distinction between the son's right to partition of moveables and immoveables—Mayne's Hindu Law, paras. 291, 395; *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*(5) *Suraj Bunsi Koer* v. *Sheo Proshád Singh*(6); *Báboo Beer Pertáb Sahee* v. *Mahárájah Rajendra Pertáb*(7); *Pauliem Valloo* v. *Pauliem Sooryah*(8); *Rájá Rám Tewarry* v. *Luchmun Persád*(9); *Nagálinga Mudali* v. *Subbiramaniya*(10); West and Bühler, p. 657. None of these authorities as to partition suggest any distinction as to moveables, and we must infer that they were included—*Laljeet*

(1) 6 Calc, W. R. Civ. Rul., 71.
(2) 3 Mad. H. C. Rep., 50,
(3) I. L. R., 9 Bom., 438.
(4) 5 Bom. H. C. Rep., O. C. J., 128.
(5) I. L. R., 1 Bom., 561 S. C.; 7 Ind. Ap., 181; see p. 189.
(6) 6 Ind. Ap., 88.
(7) 12 Moore's Ind. Ap., 38.
(8) 4 Ind. Ap., 109.
(9) F. B Rul. (Calc.), 731.
(10) 1 Mad. H. C. Rep., 77.

Singh v. *Rajcoomar Singh*(1); *Moro Vishvanáth* v. *Ganesh Vithal*(2) Thus we have the text-writers (Mayne and West and Bühler) recognizing the similarity of the two kinds of ancestral property, and a long series of cases on the subject, which do not suggest any distinction in the son's right as to both; and, lastly, the Hindu law texts afford no ground for any distinction; therefore we claim that the son has the same right as to all. If he can claim partition in his father's life as to one class, he can as to the other. The only case which suggests a distinction is *Rámchandra Dádá Náik* v. *Dádá Mahádev Náik*(3); but the citation of texts there shows that Bengal law was introduced. That was an error. The grounds of that decision have been removed by the subsequent cases.

The right of the son to partition, in his father's life, of the ancestral immoveable property is not disputed. We ask the Court to hold that the son is equally entitled to partition of the ancestral moveable property, and that a father cannot dispose of it by will.

As to recovery of property by litigation—*Bissessur Chuckerbutty* v. *Seetul Chunder Chuckerbutty*(4); *Naraganti Achamma Garu* v. *Venkatachalapati Nayaniváru*(5). As to the accretions to the ancestral estate in the hands of the first defendant before the birth of the plaintiff, see Mayne's Hindu Law, para. 248; *Umrithnáth Chowdry* v. *Goureenáth Chowdry*(6); West and Bühler, p. 722; *Shudanuad Mohapattur* v. *Bonomallee*(7). Accretions take the character of the principal—*Sudánund Mohapattur* v. *Soorjo Monee Debee*(8); *Sudanund Mohapattur* v. *Soorjoo Monee Debee*(9). The only contrary authority is *Gunga Prosád* v. *Ajudhia Pershád Singh*(10). That, however, was not a decision, but only an opinion expressed in the case. We contend that the son has a right to partition of his father's property generally and of everything added to it, whether added before the birth of any son or before the birth of the particular son who claims.

(1) 12 Beng. L. R., 373.
(2) 10 Bom. H. C. Rep., 444 at p. 463.
(3) 1 Bom. H. C. Rep., Appx., 76 at p. 83.
(4) 9 Calc. W. R. Civ. Rul., 69.
(5) I. L. R, 4 Mad., 250.
(6) 13 Moore's Ind. Ap., 54.
(7) 6 Calc. W. R. Civ. Rul. 256.
(8) 8 Calc. W. R. Civ. R., 455.
(9) 11 Calc. W. R. Civ. Rul., 436.
(10) I. L. R., 8 Calc., 1.

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We ask that the decree should be affirmed, except on the points as to which we have appealed.

Farran for respondent (defendant No. 1):—If the contention of the appellant is correct, the deeply rooted ideas connected with self-acquired property are wrong. It has always been understood that self-acquired property was property with which a man could deal as he pleased. But that cannot be so if a son takes by birth an independent and indefeasible right in such property, and takes by descent, although his father may have devised it to him. If the appellant be right, a grandfather cannot exclude a worthless son and devise his estate to his grandson, for his son has an interest which cannot be defeated, and he may claim his share. The Privy Council has held in the *Tagore Case*(1) that a Hindu testator may give successive estates by devise; but that can no longer be done if each son of any holder takes an immediate and equal interest in the estate, and may demand partition.

We contend, first, that over self-acquired property, both moveable and immoveable, a father has absolute power, and that with respect to such property a son has no enforceable interest; secondly, that property given by a father to his son is self-acquired property in the son's hands, and that the sons of that son take no enforceable interest in that property; thirdly, that property taken by a son from his father under his father's will holds precisely the same character as property taken by gift. In fact that there is no difference between a gift and a will.

Since the Mitákshara was written in the twelfth century the tendency has been to give the father greater power over self-acquired property and to accentuate the rights of the son in ancestral property. In early times there was little self-acquired property. Wills were unknown, and one descent made property ancestral.

We admit that sons acquire by birth an interest in all the father's property, even including his self-acquired property; but we say that in the ancestral property the son acquires a vested

(1) 9 Beng. L. R., 377.

enforceable right, while in self-acquired property he acquires by birth only a theoretical or imperfect right.

It is necessary to keep in mind the distinction between a partition and a gift. In partition you only recognize a right already existing. By a gift you confer something by favour; see Mayne's Hindu Law, para. 325. We say a will is a gift. An estate taken by a father in either way is absolutely independent of his son.

As to a father's power over self-acquired property, *Gangábái* v. *Vannáji A. Dátár*(1); *Narottam Jagjivan* v. *Narsandás Harkisandás*(2); *Lakshmibái* v. *Ganpat Morobá*(3); *Purshotam S. Shenvi* v. *Vásudev K. Shenvi*(4); *Bhagván Dullabh* v. *Kálá Shankar*(5); *Rájá Bishen* v. *Báwá Misser*(6); *Sital* v. *Mádho*(7); *Muddon Gopál* v. *Rám Buksh Pandey*(8); Mayne's Hindu Law, para. 298; West and Bühler, pp. 178, 179—193, 812, 772.

These authorities are conclusive as to the absolute power of a father over self-acquired moveable and immoveable property, as to his power to will such property away from his son.

But if a father dies without having disposed of his self-acquired property, and it comes to his son by inheritance, it is ancestral property in the son's hands. The inchoate and imperfect right of the son then becomes complete. It may possibly be so also if the father partitions it away among his sons in his life-time.

Next, how can a father defeat the inchoate right of his son in his self-acquired property? We say he can do so by making a gift of it. Here it is necessary to distinguish between partition and gift. It may appear subtle to say that property is taken differently if taken by gift rather than by partition. There are, however, important differences. A partition breaks up the family altogether, and destroys the co-parcenery relationship. It recognizes a right already existing in the son. A gift merely

(1) 2 Bom. H. C. Rep., 301.
(2) 3 Bom. H. C. Rep. A. C, J., 6.
(3) 5 Bom. H. C. Rep., O. C. J., 128.
(4) 8 Bom. H. C. Rep., O, C. J., 196.
(5) I. L. R., 1 Bom., 641.
(6) 12 Beng. L. R., 430.
(7) I. L. R., 1 All., 394.
(8) 6 Calc. W. R. Civ. Rul., 71.

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makes what was the self-acquired property of the father the self-acquired property of the son.

It is contended by the Advocate General that a gift to a son is really a gift to a son and grandson, inasmuch as the latter has a right in it. We contend that a gift by a father to a son is impartible, and that there are no co-sharers in it. In other words, it ranks as self-acquired property—Mitákshara, ch. I, sec. IV, pl. 28. The word "subsequently" there refers to ch. I, sec. VI. pl. 14—15 (Stokes' Hindu Law, p. 397). It is suggested that pl. 28 applies only to small gifts, but that does not appear in the text. The case of *Rámchandra Dádá Náik* v. *Dádá Mahádev Náik*(1) related to ancestral, not to self-acquired, property.

If we turn to the Mayukh the matter is still clearer—Mayukh, ch. IV, sec. VII, pl. 11 (Stokes' Hindu Law, p. 76); West and Bühler, p. 721; *Suraj Bunsi Koer* v. *Sheo Prosád Singh*(2), Mayne's Hindu Law, para. 292; Vivida Chintámani, (Tagore's ed., 1863), p. 250; Colebrooke's Digest, Bk. V, ch. V, pl. 353. It thus appears that all the texts agree in stating that a gift of self-acquired property by a father to a son ranks as self-acquired property in the hands of the son, and is impartible.

Lastly, if a will be analogous to a gift, it is clear that self-acquired property if given by will to a son is also self-acquired and impartible in the hands of the son. The question, then, arises, is there this analogy? When wills first became customary in India it was supposed that the law and principles applied to wills in England should be applied here. But the Privy Council in the *Tágore Case* laid down different principles for Indian wills—Mayne's Hindu Law, paras. 248, 344, 347, 350; West and Bühler, pp. 2, 3, 178, 181, 219, 813; Jolly's Tagore Lectures, 1883, p. 111. All these authorities show that a will is a gift. If that is so, it is clear that it is better to take by devise than by inheritance. Under the first, a man takes an absolute estate, while under the second he takes jointly with his sons—*Nánee Tárá Naikeen* v. *Allárakia Soomár*(3). As to the effect of a will in the

(1) 1 Bom. H. C. Rep., Appx., 76. (2) 6 Ind. Ap. at p. 100.
(3) I. L. R., 4 Bom., Appx., 573, in note.

case of a widow, *Mulchand* v. *Bái Manchá*[1]. In that case it was held that although there is a text forbidding a widow to alienate immoveable property, yet she may do so if she takes such property by will. That case is an authority to show that a testator may show an intention to set aside rights which otherwise his grandsons would enjoy. We say that intention is shown by the fact of his leaving his property by will to his son—*Prosunno Coomár* v. *Taraknáth*[2]. The possession of absolute power in the testator implies the power to exclude those who would otherwise take an interest in the property.

The case of *Tárá Chand* v. *Reeb Rám*[3] is not an authority in Bombay. The Judges there seem to have started with the assumption that the father was not entitled to dispose of the property by will. They also assumed that a will was different from a gift. The case of *Muddon Gopál* v. *Rám Buksh Pandey*[4] was treated as a case of partition; West and Bühler, pp. 715, 716, also cite it as such. We admit that by partition or by the death of the father the inchoate right of the sons becomes perfect. *Chatturbhooj Meghji* v. *Dharamsi Náranji*[5] is also a case of partition.

Macpherson and *Telang* on the same side cited, as to partition of moveables, *Lakshman Dádá Náik* v. *Rámchandra Dádá Náik*[6]; *Nagálinga Mudali* v. *Subbiramaniya*[7]: as to accretions, West and Bühler, 315; *Gunga Prosád* v. *Ajudhia Pershad*[8].

Latham (Advocate General) in reply.

SARGENT, C. J.:—The appeals in this case are against a decree of Mr. Justice Scott passed in a suit brought by Jugmohandás Mangaldás against his father, Sir Mangaldás Nathubhoy, praying for a partition of their ancestral property now in his possession, and that an account may be taken of the same, and that, in the event of the Court being of opinion that he is not entitled to a partition, a proper maintenance may be awarded him out of the ancestral property. The defendant by his written

(1) I. L. R., 7 Bom., 491.
(2) 10 Beng. L. R., 267.
(3) 3 Mad. H. C. Rep., p. 50.
(4) 6 Calc. W. R. Civ. Rul., 71.
(5) I. L. R., 9 Bom., 438.
(6) L. R., 7 I. A., 181.
(7) I Mad. H. C. Rep., 77.
(8) I. L. R., 8 Calc., 134.

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statement expressed his unwillingness that the partition should be made in his life-time, and disputed the plaintiff's right to insist on it against his will, on the ground that both by the custom and usage of the Gujaráti Baniá castes and of the Kápoli Baniá caste, to which he belongs, as well as of the Portuguese territories in which his family had been settled before coming to Bombay, a Hindu son cannot enforce partition of ancestral property in his father's life-time against his will. The former of these customs was the only one seriously attempted to be proved, and, in the opinion of the learned Judge of the Division Court, the evidence failed to establish it satisfactorily and the defendant has not appealed against that finding. The right to partition had, therefore, to be resisted upon the general Hindu law, and it was at once admitted at the trial that, on the authorities, the right of a son in a family governed by the Mitákshara law to a partition during his father's life could not be disputed as regards ancestral *immoveable* property.

But it was contended on the authority of a decision in 1861 of the late Supreme Court, consisting of Sir M. Sausse and Sir Joseph Arnould, in *Rámchandra Dádá Náik* v. *Dádá Mahádeo Naik*[1], that the son's right to partition did not exist in the case of *moveable* ancestral property. Mr. Justice Scott thought that the distinction sought to be drawn between moveable and immoveable property, especially where the Mayukha was the paramount authority, was not sustainable, and decided in favour of plaintiff's right to partition of all the ancestral property. Against this decision the defendant now appeals.

That the question was distinctly covered by authority was so regarded by the Privy Council in *Suraj Bunsi* v. *Sheo Proshád*[2], where Sir J. Colville, in delivering the judgment says: "But it seems to be settled now in the Courts of the three presidencies that a son can compel his father to make a partition of ancestral immoveable property. On this point it is sufficient to cite the cases of *Laljeet Singh* v. *Rájcoomár Singh*[3] and *Rájá Rám Tewarry* v. *Luchman Persád*[4] decided by the

(1) 1 Bom. H. C. Rep., Appx. 76.
(2) 6 Ind. Ap., 88 at p 100.
(3) 12 Beng L. R., 373.
(4) Beng. F. B. Rul., 731.

High Court of Calcutta; that of *Kali Pershad* v. *Ram Charan*[1] decided by the High Court of the N.-W. Provinces; that of *Nagalinga Mudali* v. *Subbiamniya Mudali*[2] decided by the High Court of Madras; and the case of *Moro Vishvanáth* v. *Ganesh Vithal*"[3]. But Sir J. Colvillé concluded by saying:- "The decisions do not seem to go beyond ancestral immoveable property." This last remark is probably accounted for by the express reservation of opinion as to moveable property by the Allahabad Court, and by the circumstances that the ancestral property, of which partition was sought, appeared to have been immoveable in all the cases.

Before, however, proceeding to consider whether the distinction between moveable and immoveable property is sustainable as regards the right to partition in the father's life-time, we think it proper to refer to two other decisions bearing on the general question, and which are not mentioned in the judgment of the Privy Council, but which are at least in this Presidency of high authority as regards the particular Judges who decided them, and in which the right to partition is disputed independently of any distinction between moveable and immoveable. We allude to the case of *Rámchandra Dádá Náik* v. *Dádá Mahádeo*, already mentioned, and that of *Ratanji Aspandiárji* v. *Murlidhar Oodhowji*, (unreported) decided on appeal in 1872 by Westropp, C. J., and Green, J. In the former case the suit was for partition of both moveable and immoveable ancestral property, to which the defendant demurred, and the late Supreme Court allowed the demurrer as regarded the moveable property, on the ground that by Hindu law it belonged to the father, and as to the immoveable property, on the ground that it was outside the jurisdiction; at the same time expressing a strong opinion that a son could not insist on partition in the life-time of his father, except under very special circumstances, and stating that it would have so decided if the property had been within its jurisdiction. In *Ratanji Aspandiárji* v. *Murlidhar Oodhowji* the suit was for partition of an ancestral house, and the judgment (of

(1) I, L. R., 1 All., 159. 1 Mad. H. C. Rep., 77.

(3) 10 Bom. H. C. Rep., 444.

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which a copy has only been obtained since the hearing of this suit) shows that the Court, whilst admitting that the right of the son to compel partition in the life-time of his father had been frequently recognized in the Mofussil, acted simply and entirely on the strong opinion against such right as expressed in the last case, without any discussion of the text in the Mitákshara upon which that right is based, and "declined to make a first precedent in the island of Bombay." If, however, we go back to the judgment of Sir M. Sausse in the earlier case, we find no reasons given, but merely a strong expression of opinion (for decision there could be none, the property being outside the jurisdiction) formed, it is true, as the Court say, after looking into all the available authorities on the subject, but without any discussion of the particular texts. It is plain, therefore, that but very little weight attaches to those decisions, and that they cannot be regarded as authorities on the general question, however much respect is due to the opinions of the learned Judges who decided them.

In this state of the authorities, and as there can be no distinction, as is hinted at in *Ratanji* v. *Murlidhar* (unreported), between the island of Bombay and the rest of India, unless a particular custom be proved, and none was even suggested, we have no hesitation in concluding (and counsel for defendant exercised, in our opinion, a sound discretion in conceding the point) that the right of sons to partition of ancestral property in the life-time of their father must be regarded as settled, at least as to immoveable estates. As to moveable property, it is to be observed that in the *shlokas* 3, 7 and 11 of section 5 of chapter I of the Mitákshara, which states the part ownership of the father and son in the grandfather's estate and the right of the sons to insist on the partition of the grandfather's estate, the term *dravya*, which expresses wealth generally, is employed, and the only distinction alluded to is between the paternal estate and that of the grandfather. The language is equally general in the Mayukha, ch. 4, sec. 4. It is when the author refers to the opinion of Brihaspati and concludes that "sons are worthy of a share in property acquired by the grandfather or other ancestor, even though the father do not wish it," and the right is so stated by Sir J. Strange in his

Manual of Hindu Law with equal generality: "Sons may at their will and irrespective of all circumstances compel their father to divide with them ancestral property."

The only case, that we are aware of, in which the right has been considered distinctly with reference to moveable as distinguished from immoveable ancestral property is that of *Rámchandra Dádá Náik* v. *Dáda Mahádeo*[1] upon which the defendant relies in support of his contention. There the Supreme Court arrived at the conclusion that by Hindu law the moveable ancestral property belonged absolutely to the father, which, if correct, would of course be inconsistent with a right of partition by the sons against the father's will. The soundness of that conclusion was, however, disputed in a later case (relating to the same estate) of *Lakshman Dádá Náik* v. *Rámchandra Dáda Náik*[2] decided by Melvill and Kemball, JJ., when the question at issue was whether a Hindu father, who has two sons undivided from him, can bequeath the whole of his ancestral moveables to one son and to the exclusion of the other. The Court held that the father's power of disposal was confined, except in cases of distress or from pious purposes, to "gifts through affection," as provided by chapter I, section 1, clause 27, and declared against the validity of the will. On appeal, the Privy Council say in their judgment[3]: "It is now conceded by the appellant that under the Mitákshara law, as received in Bombay, by which the family is governed, a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons," and proceed to consider the argument for the appellant, that the father could at least devise his own share in the moveable property. This view of the father's testamentary power is quite irreconcilable with the theory that "the father takes the moveable ancestral property absolutely," as stated in *Rámchandra Dádá Náik* v. *Dádá Mahádeo*, and can only be explained by the 27th *sloka* of chapter I, section 1 of the Mitákshara, being regarded by the Privy Council as conclusively limiting the father's power of disposal to "gifts of affection." The Supreme Court of Bombay, on

(1) 1 Bom. H. C. Rep., Appx., 76.

(2) I. L. R., 1 Bom., 561. 7 Ind. Ap., at p. 189.

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the contrary, in *Rámchandra Dádá Náik* v. *Dádá Mahádeo*, appear, from the authorities cited in the judgment, to have adopted the view taken in the Dayabhaga, which is of little or no authority on this side of India, that the text "the father is master of the gems, pearls and corals, and of all other moveable property" attributed to Yajnaválkya, and referred to in chapter I, section 1, clause 26 of the Mitákshara in the discussion on the origin of property with which the chapter commences, shows that the father has absolute dominion over moveable property, whether acquired or ancestral. But it is to be remarked that the author of the Mayukha, (whose authority in this Presidency, and especially in Bombay, only ranks second to that of the Mitákshara, in chapter 4, section 1, para. 5 explains that the independence of the father conferred by the above text is confined to the use of the moveable property. This review of the authorities and the Hindu texts bearing on the question leads, we think, to the conclusion, that no distinction between moveable and immoveable property can be satisfactorily drawn as regards the right of a son in an undivided family governed by the Mitákshara law to partition in the life-time of the father.

We now pass to what is the more difficult question in this case, *viz.*, whether the defendant's property, so far as it consists of self-acquired property of his grandfather Rámdás or of his father Nathubhoy, is liable to partition during his life-time against his own wishes. It appears that both Rámdás and Nathubhoy made wills, which, it was admitted, operated as regards their respective self-acquired properties. But it is contended for the plaintiff that, even if the wills showed an intention on part of the testator to do so—which it was said they did not—still that could not affect the right of Sir Mangaldas' sons to an equal ownership on birth with their father in the property so devised—a right which it was said extended to all property in whatever manner devised by him from an ancestor.

It will be sufficient for the present to consider the effect of Nathubhoy's will, which is in the following terms:—"I do of my own free will and pleasure make out this will in my sound sense and judgment, that so long as I enjoy my natural life

I am the sole master of my property, and after my death my son Mangaldás is the master of my estate, houses, oarts, joys and jewels in the house, cash, household furniture, horses, carriages, debts due to me, and all the goods and chattels belonging to me." After giving the particulars of this property he states that it all belongs to himself. He adds: "After my death the owner thereof is my son Mangaldás. He is not to dispose of the estate, nor is he to give it in mortgage, but from the produce of rent hereof all the charges of the estate and of the family are to be disbursed, and the balance placed at interest at some proper place, but it is to belong to my son Mangaldas. Should he be under the necessity of giving the estate away by way of mortgage or selling them, he may do so on consulting the herein mentioned executors." He afterwards alludes to his claim against the property of his undivided family (meaning, it is admitted, the claim he had against the estate of his grandfather, Manordás Rupji, as to which a suit was then pending), and directs certain legacies to be paid out of it. The language of this will appear to us to unequivocally show the intention of the testator, that his son Mangaldás should take the absolute property in the estate which he enumerates, subject only to a restriction on his power of sale or mortgage without previously consulting the executors named by him. He states distinctly that he himself is the owner now, and then, using a form common in vernacular wills, expresses his intention as to the future by declaring that his son is the owner after his death. The restriction as to the disposal of it by sale or mortgage doubtless shows a desire to keep the property in the family, but does not show any indication of intention that any one else should have under any circumstances any interest or share in it during his son's life. It was said, however, that the will must be construed with regard "to the law of the country under which the will is made," as was doubtless laid down by the Privy Council in *Sreemutty Soorjee Money* v. *Denobundoo Mullick*[1], and that as the testator must have been well aware of the Hindu law respecting the co-ownership of father and sons in the grandfather's property,

(1) 6 Moore's Ind. App., 550.

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he must be deemed to have intended his son Mangaldás to take the same estate as he would have taken had it devolved on him by inheritance, *i. e.* subject to the rights of grandsons on their birth. In *Prosunno Coomar Ghose* v. *Tarraknáth*[1] a similar argument was pressed on the Court with the view of showing that the widow only took a widow's estate under a devise, which, in terms, conferred the absolute property, but the Court held that the testator might show his intention to disinherit his sons, as in the case of another person, by the disposition he made of his property, and that he had done so. In the present case we think Nathubhoy showed clearly and unequivocally his intention that his son Mangaldás should be as complete owner of the property after his death as he himself had been during his own life, subject only to the restriction as to alienation. Moreover, when it is remembered that Mangaldás was Nathubhoy's only son, and was at that time eleven years old, it is no matter of surprise that Nathubhoy's thoughts should have been concentrated on him, and that he should have intended to substitute him in his own place as the owner after his death, subject to a reasonable precaution against alienating the estate without due necessity. So far, therefore, as the question turns upon the construction of the will, there can, in our opinion, be no doubt that Sir Mangaldás took the property absolutely under the devise.

But it was said that, however that may be, he must, by analogy to the old English law, be regarded as having taken the property as heir and not as devisee. It would probably be sufficient to say that such peculiarities of English law have no application to this country; but it is plain that the rule can have no application in the present case, as it would defeat the will, and give the son an estate in co-parcenery with a grandson when born,—that is, a perfectly different estate in quality and quantity from what he was intended to take under the will, in which case the rule has never been applied, even in England. See Jarman on Wills, 62.

It remains, then, to consider whether, assuming that, upon the true construction of the will, the first defendant took Nathu-

(1) 10 Beng. L. R., 284.

bhoy's self-acquired property absolutely, the grandsons can nevertheless insist upon its being partitioned between themselves and their father. It was contended by the Advocate General that the grandsons' right of partition affected the property in the hands of the first defendant as soon as they were born, as property derived from an ancestor, and that, whether or not such right might have been excluded by the use of apt words by analogy to those deemed sufficient by an English Court of Equity to exclude the interest at law which a husband had in his wife's property before recent legislation, no such words were to be found in the devise under consideration. In support of the first branch of this contention we have been referred to three cases, the first of which is *Ratanji Aspandiárji* v. *Moorlidhur Oodhowji* (unreported), already cited, where the Court, without any independent discussion of the question, held, on the authority of the judgment of Holloway, J., in *Tárá Chand* v. *Reeb Rám*[1] and certain observations of the Supreme Court at Calcutta [2], that a father could not make his own right heirs a purchaser. The observations referred to, relate only to the power of a testator to alter by his will the legal course of succession in perpetuity, and do not appear to have much bearing on the question under consideration. In the Madras case the High Court says: "It is by no means clear, upon the authorities, that a father can deprive his sons of their right to share in his self-acquired property. It may, indeed, be said that the power of devising has been introduced by analogy to the power of giving, but this by no means involves, as a logical consequence, that a man may devise whatever he may give." The Court concludes by saying that it "sees no reason for doubting that the property, which came to the first defendent from his father, is ancestral property. There seems to us nothing in the contention that its quality was changed by his choosing to accept it, apparently, under his father's will. Still less ground would there be for the contention that his acquiescence in that mode of receiving it would vest in himself a larger estate than he would have taken by descent. On what principle can he be conceived capable, by

(1) 3 Mad. H. C. Rep., 50 at p. 55. (2) 8 Moore's Ind. Ap., p. 78.

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any act of his, of depriving his children of a right given to them by the doctrines of Mitákshara at the very moment of their birth?" In other words, the Madras Court doubted the right of the father to dispose, even of his separate acquired property, to the exclusion of those rights of "sons and the rest" in the paternal property which are the subject of *sloka* 27 of chapter 1, section 1, of the Mitákshara.

But that view is inconsistent with what must now be considered as well settled, *viz.*, that, notwithstanding the language of that section, at any rate as regards self-acquired property of the father, whether moveable or immoveable, the right of "sons and the rest," which would include grandsons, is an imperfect one, and that the restriction on the father's power of disposal is in the nature of a moral injunction, which may affect the conscience; but that, for all legal purposes as between the father on the one hand and the "sons and the rest" on the other, his power is absolute. It is so expressly ruled in *Muddon Gopál* v. *Rám Buksh*(1) after a full examination of the texts. The same view is adopted by the Allahabad Court in *Sital* v. *Mádho*(2). And, lastly, the right to dispose of self-acquired property by will, as a father may think proper, is distinctly recognized by the Privy Council in *Beer Pertáb* v. *Mahárája Rajendra*(3), and, indeed, has been long treated in the decisions of this Court, such as *Narrotam Jugjeevun* v. *Nárrondás*(4), *Purshotam Shámá* v. *Vásudev*(5), and others, as no longer open to doubt; and it is so stated in West and Bühler, p. 812. It is true that in *Muddon Gopál* v. *Rám Buksh*(1) the right of the grandsons to a partition of self-acquired property of the grandfather, which he had given to their fathers, came under consideration, and was recognised. It appears that the grandfather had provided for his sons by executing several deeds of gifts in their favour at the same time, and the Court held that they must be regarded as being in substitution for the undivided shares of the estate to which the sons were by Mitákshara, ch. 1, pl. 27, entitled, and could not, there-

(1) 6 Calc. W. R., Civ. Rul., 71.
(2) I. L. R., 1 All., 394.
(3) 12 Moore's Ind. Ap., 39.
(4) 3 Bom. H. C. Rep., A. C. J., 6.
(5) 8 Bom. H. C. Rep., O. C. J., 196.

fore, be regarded as simply acts of favour by the grandfather, but were, as the Court says, affected by all the incidents to which the individual shares for which they were substituted would have been subject. The judgment doubtless also contains an expression of opinion, that such a gift would not be excluded from partition between father and sons by chapter 1, section 4, *placitum* 1, because it would not have been acquired "without detriment to the father's estate." If, however, the above section is to be regarded as applicable to all partitions as the Court seemed to think, whether between collaterals or between a father and sons, it would seem that *placitum* 28 of the same section, which exempts what is obtained through the father's favour from partition, must be equally applicable in all cases of partition, and not merely between collaterals, as the Court seemed to think. In *Suraj Bunsi* v. *Sheo Proshád*(1) the Privy Council treats the rights of co-parceners as the same in both cases. The question, therefore, arises, whether Nathubhoy's gift by will to his son was obtained through favour; and, undoubtedly, in the absence of special circumstances or of anything in the context to show a contrary intention, every such gift must be regarded as such.

But it was said that, even if the texts referred to in *Muddon Gopál* v. *Rám Buksh*(2) did not establish the plaintiff's right to partition, the property given to the first defendant by Nathubhoy's will was ancestral as between him and his sons; which, it was said, included everything that had ever formed part of the grandfather's estate. But this broad interpretation of the term ancestral is inconsistent with the very principle upon which grandsons are said to have by birth a right in the grandfather's estate equally with the sons, *viz.*, that they constitute a co-parcenery for the due performance of sacred rites, and, as such, have a common interest in the enjoyment of the grandfather's property, a principle which can have no application to property which the grandfather of his own free will, and, acting *ex hypothesi* within his power, separated from his estate. In other words, the son has acquired by the gift of his father a title in which the grandson has no

(1) 6 Ind. Ap., 88. (2) 6 Calc. W. R., Civ. Rul., 71.

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concern, except as the possible heir when his father dies. That the Smriti writers or their commentators ever contemplated a power of disposition by a father over self-acquired property, such as the decisions of English Courts in this country have conferred on him, may well admit of a doubt. The distinction drawn by those Courts between "moral injunctions" and "legal prohibitions" has led to the large power of alienation which he now must be held to possess (subject only to such influence as the moral injunctions contained in the Hindu texts may have on his conscience) over self-acquired property, and has thus enabled them to adapt the law to the circumstances and exigencies of modern life; but that power being, as we must hold, well settled in this Presidency, the above considerations, both as regards the texts referred to in argument and the principle upon which the grandsons' right over the grandfather's estate is based, are sufficient, we think, to show that the right of the donee or devisee cannot be affected by any claim of the grandsons to regard the property as ancestral. We may add that the learned authors of West and Bühler's Hindu Law in discussing the following decision in the Madras case, *Tárá Chand* v. *Reeb Ram* (1), seem to assume that such property is self-acquired. In this view of the plaintiff's rights it becomes unnecessary to consider the argument as to the will not containing apt words to exclude the right of the grandsons.

It remains to consider the question as to the accretions of ancestral estate during the first defendant's life-time prior to the plaintiff's birth. The case of *Gungá Prosád* v. *Ajudhia Prasád* (2), where Mitter, J., held that the grandson has "no interest in the income of the ancestral estate which has accrued before his birth," was relied on by the first defendant. But this is opposed to the ruling of the Privy Council in *Umrithnáth Chowdry* v. *Goureenáth* (3), where it was held that accretions made by the investment of the profits of the ancestral property were ancestral property, and this ruling is considered both by Mr. Mayne, para. 248, and the learned authors West and Bühler at p. 723, to be the correct view, on the ground that the accumulations would

(1) 3 Mad. H. C. Rep., 50. (2) I. L. R., 8 Calc., 131.

(1) 13 Moore's Ind. Ap., 542.

follow the character of the fund from which they proceeded. We think, therefore, that the learned Judge of the Division Court was right in holding that accretions prior to the birth were part of the ancestral property of which plaintiff was entitled to partition.

As to the form of the account directed to be taken, we think that there is no reason for altering it, as the past dealings with the ancestral property which came to the first defendant on his father's death must necessarily be gone into, unless the plaintiff is bound to accept whatever statement the first defendant may make as to the property, which could not have been intended. We do not understand the first defendant as objecting, under the circumstances, to pay the plaintiff a sum for maintenance, which, in the view taken by the Court below and by this Court, will be more than his share of the income of the ancestral property to be partitioned; nothing, therefore, material seems (at any rate at present) to turn on the question of maintenance.

We must, therefore, confirm the decree on all the points appealed against by the parties.

Decree confirmed.

Attorneys for the appellant (plaintiff):—Messrs. *Macfarlane and Edgelow.*

Attorneys for the respondents:—Messrs. *Little, Smith, Frere and Nicholson,* and Messrs. *Nanu and Hormasji.*