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become payable during the insolvency; that no claim or attempt to intercept it was ever made on behalf of the Official Assignee or by the donees under the limitation over; that the plaintiff was a free man and perfectly able to receive the money at the time when the next distribution did, or according to the deed could, take place, and considering that I should be better carrying out the intentions of the settlor by continuing the property direct to the plaintiff rather than to his wife and children—I have on the whole come to the conclusion that the mere filing of the petition and withdrawal of it within less than five months without the fund being in any way claimed or interrupted by the Official Assignee, or by the other donees is not such an insolvency as was contemplated by the settlor, and that the plaintiff's interest has not, therefore, ceased under the proviso, and that he is still entitled to his rights under the deed as if he had never become insolvent.

Attorneys for the plaintiff and third and fourth defendants:—Messrs. *Janardan and Ardeshir.*

Attorneys for defendants Nos. 1 and 2:—Messrs. *Payne, Gilbert and Sayáni.*

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

1895. *October* 3, 7, 8, 10.

TRIBHOVANDA'S MANGALDA'S AND PURSHOTAMDA'S MANGALDA'S (PLAINTIFFS) *v.* YORKE SMITH AND OTHERS, DEFENDANTS.*

Hindu law—Undivided family—Ancestral property—Self-acquired property made ancestral by agreement—Operation of such agreement—Effect of such agreement on accumulations and accretions of the property—Election—Estoppel—Minor members of undivided family—Interest of minors in property made ancestral by agreement—Minor bound by acts of his father as to such property.

Sir Mangaldás Nathubhoy and his three sons Tribhovandás, Purshotamdás and Jugmohandás lived together as an undivided Hindu family. In 1881 the youngest son, Jugmohandás, filed a suit for partition (No. 444 of 1881) against his father and his two brothers. Being apprehensive that his other sons (the plaintiffs) might make a similar claim, Sir Mangaldás on the 28th June, 1881, entered into an agreement with

* Suit No. 114 of 1895.

them (the plaintiffs) which recited (*inter alia*) that he (Sir Mangaldás) alleged that the only ancestral immoveable property belonging to him was the property specified in Part I of the Schedule I annexed to the agreement, but that the plaintiffs (his sons) alleged that the immoveable property specified in Part II of that schedule was also ancestral property, and provided (*inter alia*) that, in consideration of the terms and conditions therein set forth, his sons (the plaintiffs) would not "claim a partition of the said property" during the lifetime of the said Sir Mangaldás.

The terms of this agreement were duly observed by the plaintiffs during their father's lifetime, and they continued to reside with him until his death.

In the interval, however, *viz.* in 1886, the partition suit (No. 444 of 1881) brought by Jugmohandás was decided, and by the decree it was declared that the immoveable property specified in Schedule I of the aforesaid agreement was not ancestral property, but was the self-acquired property of Sir Mangaldás.

On the 9th March, 1890, Sir Mangaldás died, leaving a will dated 27th January, 1888. By this will he directed that his executors and trustees should take possession of all his property both ancestral and self-acquired, and, after referring to the agreement of the 28th June, 1881, and to the property in Part I of the schedule thereto, continued: "Whereas it has been decided by the Court of first instance, and such decision has been confirmed by the Appellate Court, that such property (*i.e.* the property in Part I) is not ancestral property, yet I am unwilling to disturb the said deed as between my said two sons, and I, therefore, hereby confirm the same." Then after making some other provisions he devised and bequeathed to his trustees "all the residue of my self-acquired property," and he directed that such residue when ascertained and realised should be handed over to the Chancellor and Senate of the Bombay University to be devoted to the founding of scholarships.

As directed by the will, the executors took possession of all the testator's property, including the property in Part I of the said schedule. This last named property was subsequently, *viz.* in December, 1890, conveyed by the executors to the plaintiffs.

The plaintiffs now sued the executors, contending that the properties in Part I of the schedule to the agreement being ancestral under the agreement and will, they (the plaintiffs) were entitled not only to them, but to all the accumulations and accretions thereof, which amounted in value to about ten lákhs of rupees. The University, on the other hand, contended that the accumulations and accretions formed part of the self-acquired property of the testator, and went to the University under the residuary clause of the will.

Held (1) that the effect of the agreement was to make the property specified in Part I of the schedule thereto, ancestral property as between the parties to the agreement.

(2) That the agreement was confirmed by the will, and was binding on the executors.

(3) That, although the *corpus* of the said property became ancestral under the agreement, the accumulations and accretions thereof did not. They were the self-acquired property of the testator, and passed to the trustees under the residuary clause of the will.

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The plaintiffs had subsequently to the death of Sir Mangaldás taken possession of the properties in question, and had paid probate duty on them. The plaintiffs had taken conveyances from the executors and had given releases to the executors, and in a previous suit (No. 670 of 1892) the first plaintiff had in his evidence stated that he did not wish to dispute the will, and that he had elected to take under it.

Held, that by their conduct the plaintiffs had elected to take the properties in question under the will, and could not maintain a suit for an account of the rents and profits either under or in opposition to the will.

Held, also, that the sons of the plaintiffs (the minor defendants) were bound by the acts of the plaintiffs. The property in question was not really ancestral. It was only such for the purpose and by virtue of the agreement of 28th July, 1881, and the plaintiffs were entitled to waive it or rescind it if they pleased, and their sons could not prevent them from doing so.

SUIT to recover accumulations and accretions of ancestral property.

The plaintiffs were the sons of Sir Mangaldás Nathubhoy, deceased. Defendants Nos. 1, 2 and 3 were the executors of the will of the said Sir Mangaldás Nathubhoy.

Defendants Nos. 4, 5, 6 and 7 were sons of the first plaintiff. Defendant No. 8 was the son of the second plaintiff. Three of these defendants, *viz.* defendants Nos. 6, 7 and 8, were born after the death of Sir Mangaldás Nathubhoy[1]. Defendant No. 9 was the third son of Sir Mangaldás Nathubhoy. Defendant No. 10 was the University of Bombay.

Sir Mangaldás Nathubhoy was a wealthy Hindu inhabitant of Bombay. Up to the year 1880 he and his three sons, *viz.* the two plaintiffs and defendant No. 9, lived together as members of a joint and undivided Hindu family. In that year, however, disputes arose between the youngest son Jugmohandás (defendant No. 9) and his father, in consequence of which Jugmohandás ceased to live with the family and went to live apart.

In 1881 Jugmohandás brought a suit (No. 444 of 1881) against his father and two brothers for partition, alleging that the whole of his father's property was ancestral and that he was entitled to a share.

(1) Defendant No. 4 was born on the 19th October, 1886; defendant No. 5 on 25th June, 1888; defendant No. 6 on 27th February, 1892; defendant No. 7 on the 1st September, 1893; and defendant No. 8 on the 9th October, 1894.

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Being apparently apprehensive that his other sons (the plaintiffs) might also separate from him and make a similar claim upon the property, Sir Mangaldás on the 28th June, 1881, entered into the following agreement with them :—

"Articles of agreement made and entered into this 28th day of June, 1881, between Sir Mangaldás Nathubhoy, Knight, C.S.I., of Bombay Hindu inhabitant, of the first part; Tribhovandás Mangaldás, of Bombay Hindu inhabitant, son of the said Sir Mangaldás Nathubhoy, of the second part; and Purshotamdás Mangaldás, also of Bombay Hindu inhabitant, son of the said Sir Mangaldás Nathubhoy, of the third part. Whereas the said Sir Mangaldás Nathubhoy has three sons only, *viz.* the said Tribhovandás Mangaldás and Purshotamdás Mangaldás, parties hereto, and a third son named Jugmohandás Mangaldás. And whereas the said Jugmohandás Mangaldás has left the protection of the said Sir Mangaldás Nathubhoy and has gone to reside apart from the said Sir Mangaldás Nathubhoy and his said other two sons Tribhovandás Mangaldás and Purshotamdás Mangaldás and has preferred a claim against the said Sir Mangaldás Nathubhoy for large sums of money by way of allowance and otherwise, the validity of which claim the said Sir Mangaldás Nathubhoy disputes. And whereas the said Tribhovandás Mangaldás and Purshotamdás Mangaldás are living with the said Sir Mangaldás Nathubhoy as members of an undivided Hindu family. And whereas having regard to the fact that differences have arisen as aforesaid between the said Sir Mangaldás Nathubhoy and the said Jugmohandás Mangaldás and that in consequence thereof feelings of mutual distrust have arisen between the said Sir Mangaldás Nathubhoy and the said Tribhovandás Mangaldás and Purshotamdás Mangaldás, *and it is possible that the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or one of them may desire to separate and live apart from the said Sir Mangaldás Nathubhoy and prefer a claim against the said Sir Mangaldás Nathubhoy* either for payment to them or him of sums of money by way of allowance or for partition of the ancestral property of the said Sir Mangaldás Nathubhoy. And whereas the said Sir Mangaldás Nathubhoy denies that such a claim on the part of his said two last mentioned sons or one of them could in such an event as aforesaid be enforced, and whereas the validity of any such claim could not be tried and decided in a Court of law without incurring great expense. And whereas in order to remove the aforesaid feelings of distrust and to promote feelings of mutual love and affection between the parties hereto and to *avoid litigation, expense and disputes and the possibility of a partition* of the ancestral property of the said Sir Mangaldás Nathubhoy being enforced in his lifetime and of such property consequently being to its great detriment divided into four parts it has been mutually arranged between the parties hereto that, in the event of the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or either of them going to live apart from the said Sir Mangaldás Nathubhoy whether of their or his own accord or owing to the directions or request of the said Sir Mangaldás Nathubhoy in that behalf, they the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or such one of them as shall so separate shall accept from the said Sir Mangaldás Nathubhoy and the said Sir Mangaldás Nathubhoy shall pay the sums hereinafter mentioned in full discharge of all claims which they or such one of them as aforesaid may have against the said Sir

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Mangaldás Nathubhoy or his property during his life. *And whereas it is alleged by the said Sir Mangaldás Nathubhoy that the immoveable property mentioned and described in Part I of the schedule hereinunder written and marked with the letter A is the only ancestral immoveable property of or belonging to him the said Sir Mangaldás Nathubhoy.* And whereas it is alleged by the said Tribhovandás Mangaldás and Purshotamdás Mangaldás that the immoveable property mentioned and described in part II of the said schedule A is also the ancestral immoveable property of the said Sir Mangaldás, but the said Sir Mangaldás Nathubhoy denies that the immoveable property mentioned and described in Part II of the said schedule forms part of his ancestral immoveable property, and it has been agreed *that the question as to whether such last mentioned immoveable property is or is not the ancestral property of the said Sir Mangaldás Nathubhoy should remain an open question between the parties to these presents.* Now these presents witness that, in order to effectuate the aforesaid objects and to carry out the said arrangement, and in consideration of the premises and of the covenants on the part of the said Tribhovandás Mangaldás and Purshotamdás Mangaldás hereinafter contained, he the said Sir Mangaldás Nathubhoy covenants and agrees with the said Tribhovandás Mangaldás and Purshotamdás Mangaldás and with each of them as follows:—

"1. That if they the said Tribhovandás Mángaldás and Purshotamdás Mangaldás or either of them separate and go to live apart from the said Sir Mangaldás Nathubhoy either of their own accord or in compliance with the wishes of him the said Sir Mangaldás Nathubhoy, then he the said Sir Mangaldás Nathubhoy will give to each of his said two sons who may separate from him a monthly allowance of Rs. 600, a portion of the family jewels including the jewels which he (such separating son) may have at present in his possession for the use of himself and his wife and children amounting in value to the sum of Rs. 10,000 and a portion of the family furniture including pots, pans, plate and other articles together with a horse and carriage, all which last mentioned effects shall together be of the aggregate value of Rs. 5,000.

"And these presents further witness that, in consideration of the premises and of the covenant agreement hereinbefore contained on the part of the said Sir Mangaldás Nathubhoy, they the said Tribhovandás Mangaldás and Purshotamdás Mangaldás do and each of them doth for himself, his heirs, executors and administrators, covenant and agree with the said Sir Mangaldás Nathubhoy and with each other:—

"1. That they will not respectively, until they respectively separate and live apart from the said Sir Mangaldás Nathubhoy, claim from him the said monthly allowance of Rs. 600, nor the jewels, furniture and other articles respectively abovementioned.

"2. That if the said Sir Mangaldás Nathubhoy shall express to them the said Tribhovandás Mangaldás and Purshotamdás Mangaldás, or either of them, his desire that they or he shall separate and live apart from him the said Sir Mangaldás Nathubhoy, they the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or such one of them as shall be requested so to do by the said Sir Mangaldás Nathubhoy shall separate and live apart with their respective families from and independently of him.

"3. That they the said Tribhovandás Mangaldás and Purshotamdás Mangaldás will not at any time during the life of the said Sir Mangaldás Nathubhoy claim a partition of any of his property, ancestral or otherwise, moveable or immoveable, nor

during his lifetime claim or seek to exercise any rights over any of his property other than what is abovementioned, whether the said Jugmohandás Mangaldás shall or shall not claim a partition of the said property or seek to obtain his share therein and whether or not he shall succeed in such claim or in obtaining possession of his said share or any part thereof or in obtaining from the said Sir Mangaldás Nathubhoy any allowance, gift of money or property.

"4. That they will not respectively alienate their respective shares and interests in the ancestral property of Sir Mangaldás Nathubhoy or do suffer or omit any act or thing whereby the same shall or may be incumbered or transferred to third persons.

"5. That they will not respectively interfere, or attempt to interfere, in any way, with the mode in which Sir Mangaldás Nathubhoy may think proper to manage, invest or deal with his ancestral property unless he shall take any steps with the object of or which may have the effect of depriving his sons the said Tribhovandás Mangaldás and Purshotamdás Mangaldás of their respective shares therein, but such exception shall not have the effect of depriving the said Sir Mangaldás Nathubhoy of making donations reasonable in amount and such as he has hitherto been in the habit of making out of such property.

"6. That, if in the event of the said Jugmohandás Mangaldás claiming and succeeding in obtaining a share of the ancestral property in the hands of the said Sir Mangaldás Nathubhoy, the whole of the ancestral property of the said Sir Mangaldás Nathubhoy shall be required to be divided actually or constructively into four parts, to be allotted one part to each of them the said Sir Mangaldás Nathubhoy, Tribhovandás Mangaldás, Purshotamdás Mangaldás and Jugmohandás Mangaldás, the said Tribhovandás Mangaldás and Purshotamdás Mangaldás shall re-unite their parts with that of the said Sir Mangaldás Nathubhoy in order that they the said Tribhovandás Mangaldás and Purshotamdás Mangaldás may in accordance with the terms of this agreement legally be entitled to share according to Hindu law if they survive the said Sir Mangaldás Nathubhoy the entire share which shall have actually or constructively as aforesaid fallen to the lot of the said Sir Mangaldás Nathubhoy to the exclusion of the said Jugmohandás Mangaldás.

"Provided always and it is hereby agreed by and between the said parties to these presents that the said monthly payments of Rs. 600 in the event of the same being made shall not be debited to the respective shares of the said Tribhovandás Mangaldás and Purshotamdás Mangaldás in the ancestral property of Sir Mangaldás Nathubhoy, but the value of the family jewels and the value of or the money paid for the furniture, horse and carriage which may be given to each of them the said Tribhovandás Mangaldás and Purshotamdás shall be debited to their respective shares in the aforesaid ancestral property: Provided also and it is hereby agreed that if the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or either of them go to live separate as aforesaid and their or his aforesaid monthly allowance of Rs. 600 shall be withheld by the said Sir Mangaldás Nathubhoy, then the said Tribhovandás Mangaldás and Purshotamdás Mangaldás or either of them upon their or his allowance being stopped shall be at liberty to apply for a partition of the said property, but shall not otherwise be at liberty to compel the said Sir Mangaldás Nathubhoy to pay the said monthly sum of Rs. 600."

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Annexed to this agreement was a schedule which set forth all the immoveable properties (seventy-nine in number) referred to in the agreement. Part I of the schedule comprised fourteen properties situate in the Fort of Bombay, Warli and Girgaon. Part II of the schedule comprised sixty-five properties situate in Bombay, Thána, Poona, &c.

Subsequently to this agreement and until his death the plaintiffs continued to reside with Sir Mangaldás.

In 1886 the above-mentioned suit for partition (No. 444 of 1881) brought by Jugmohandás (defendant No. 9) was decided. By the decree therein made it was declared that a certain portion of the property claimed by Jugmohandás was ancestral property. But a large portion of the property claimed, including the fourteen properties in Part I of the schedule to the agreement, was held to be not ancestral but self-acquired by Sir Mangaldás, to which, therefore, Jugmohandás had no claim. The suit was referred to the Commissioner to take accounts of the partible property. For the report of the case see I. L. R., 10 Bom., 528.

Sir Mangaldás died on the 9th March, 1890, leaving a will dated 27th January, 1888.

By his will he directed as follows :—

"I direct my executors and trustees immediately on my death to take charge of all my moveable and immoveable property of every description, *both ancestral and self-acquired*, and for such purpose I have given them a power of attorney to take possession of the same during my lifetime, and I direct them, except as is hereinafter specially provided, to retain the same after my death until it has been finally decided in the Suit No. 444 of 1881 brought by my son Jugmohandás against me and my other two sons as to how much of my property is ancestral and what self-acquired, and after which they are to deal with the same in manner hereinafter directed."

Then after referring to the decree in Suit No. 444 of 1881, which directed accounts to be taken, the will continued as follows :—

"And whereas the accounts are now being taken in the office of the said Commissioner for the purpose of carrying out the directions and orders contained in the said decree of the 30th July, 1885, and according to the above direction I have filed an account of the ancestral property on the 19th day of January, 1888. Now, I hereby direct that if the said suit or any appeal in connection therewith or the said proceedings in the Commissioner's office shall be pending and undetermined at the date of my decease, my said executors and trustees do and shall continue my defence to the said suit or to any appeal in which I am respondent, and also all proceedings in the said Com-

missioner's office, and do and shall continue the prosecution of any appeal from any order or decree or from any report of the Commissioner, which may have been commenced by me, and do and shall also be at liberty in their discretion to institute and prosecute any appeal in the said suit from any report or order by the said Commissioner or hereafter to be made in the said suit by any Court as to them shall seem expedient in the interest of my separate estate, and to carry up such appeal to the Appellate Court of Bombay, and shall be at liberty to defend all appeals whatever which may be instituted hereafter by the plaintiff or second and third defendants in the said suit from any such report or from any order by the said Commissioner or from any order or decree of any Court in India whether of original or appellate jurisdiction, and I do further direct that upon the final order for partition (if any) being made in the said suit my executors and trustees shall make over to my son Jugmohandás his fourth share in such of my property as shall be finally determined to be ancestral and to which he may be decreed to be entitled.

"I direct that as soon as such share has been made over to my son Jugmohandás Mangaldás in pursuance of such final decree, my said executors shall distribute the rest and residue of my ancestral estate including my one-fourth share therein amongst and for the benefit of my sons, *viz.* Tribhovandás Mangaldás and Purshotamdás Mangaldás and their issue according to the rules of Hindu law, or shall make over the same undivided to them as co-parceners according as my said sons Tribhovandás Mangaldás and Purshotamdás Mangaldás shall then elect and determine.

"And whereas although I consider that I was in law justified in contending that none of the property of which I am in possession is ancestral property, I have yet in a certain indenture bearing date the 28th day of June, 1881, made between me of the first part, my son Tribhovandás of the second part and my son Purshotamdás of the third part, in order to promote feelings of mutual love and affection between me and my said sons and to avoid at the time litigation, expense and disputes admitted that the immoveable property mentioned and described in part I of the schedule, under the said indenture written (which is the immoveable property mentioned and described in the said schedule hereunder written) is ancestral property; and whereas it has been decided by the Court of first instance and such decision has been confirmed by the Appellate Court that such property is not ancestral property, *yet I am unwilling to disturb the said deed as between my said two sons, and I, therefore, hereby confirm the same.* I direct that my said executors and trustees shall divide and distribute such part of my estate as is mentioned in the schedule hereto (except the property No. 14 in the said schedule) amongst and for the benefit of my two sons named, respectively, Tribhovandás Mangaldás and Purshotamdás Mangaldás, and their issue according to the rules of Hindu law. I devise and bequeath all my property at Girgaon Back Road and Khetvádi Road, as well as all the furniture, pictures, glass and crockery ware and cooking utensils, that it may contain at the time of my death to my said executors and trustees upon trust for my son Tribhovandás and his heirs from the time of my death to allow him to occupy and use the same, and to enjoy the income thereof, and after the death of my said son Tribhovandás in trust to allow his widow to occupy and use the same and enjoy the income thereof, and after the death of my said son Tribhovandás in trust to allow his widow to occupy and use the same and enjoy the income thereof during her life; but if the said Tribhovandás Mangaldás

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shall die without leaving male issue him surviving, then in trust (after the death of the survivor of them without leaving such male issue) to my son Purshotamdás and his heirs according to the rules of Hindu law.

"I devise my bungalow at Malabár Hill with its two separate compounds, outhouses and the furniture, pictures and cooking utensils, which shall be therein at the time of my death, unto my son Purshotamdás to be transferred to him twelve months after my decease.

"I devise all my property at Poona, moveable and immoveable, to my son Purshotamdás as an absolute devise, but the above devise to my said son Purshotamdás of my house and property at Malabár Hill and my property at Poona are only made on condition that he gives up to his brother Tribhovandás all his right and interest to the property or share in the property mentioned in the said schedule hereto, as piece of garden ground at Girgaon outside the Fort, and containing 12,000 square yards, and numbered 14 in such schedule hereto attached, being a portion of the ground under the bungalow and in the compound of my Girgaon residence, which is part of the subject-matter of the said deed of 28th June, 1881, and in the event of the said Purshotamdás not being willing to give up his claim to the said property, then I devise my said house and furniture at Malabár Hill and my said Poona property to my said son Tribhovandás."

Then after making various bequests the will gave the residue of the testator's self-acquired property to the University of Bombay as follows:—

"I devise and bequeath to my said trustees all the residue of my self-acquired property, both moveable and immoveable. I empower and direct my said trustees to sell and convert the same into money immediately after my decease and to recover all outstandings and to invest the proceeds in Government securities, and I direct that such conversion and investment shall, if possible, take place within six months after my decease and notwithstanding that the said Suit No. 444 of 1881 shall be still pending, and that the said residue shall be unascertained, it being my wish that all the residue of my property shall be invested in Government paper so soon as possible after my decease. I direct my said trustees as soon as such residue has been finally ascertained and realized in manner aforesaid to devote the whole of the said residue to the founding of as many scholarships as possible at the Bombay University of the following description, and on the following conditions and to hand over all such residue to the Chancellor and Senate of the Bombay University on their agreeing to such conditions."

(Then followed the conditions).

In December, 1890, the executors agreed to deliver over to the plaintiffs such portions of the estate of Sir Mangaldás as were specifically or otherwise devised or bequeathed to them by his will, and (*inter alia*) they handed over the fourteen properties comprised in part I of the schedule, annexed to the agreement of the 28th June, 1881, and referred to in the above clause of the will.

The plaintiffs now sued the executors, contending that the said fourteen properties being ancestral under the agreement and the will, they (the plaintiffs) were entitled not only to them but to all the accumulations and accretions thereof, which amounted in value to ten lákhs of rupees or thereabouts.

The University of Bombay (defendant No. 10) on the other hand claimed that the accumulations and accretions of the said properties formed part of the self-acquired property of Sir Mangaldás, and went to the University as part of the residue under the concluding clause of the will.

The following clauses of the plaint set forth the plaintiffs' claim:—

"9. The plaintiffs say that the executors of the said Sir Mangaldás have given possession to the plaintiffs of the said immoveable property mentioned in the said schedule hereto annexed and marked B as the ancestral property of the said Sir Mangaldás, but they have not delivered over to the plaintiffs the accumulations and accretions of and to the said ancestral property and which accumulations and accretions amount as the plaintiffs believe to the sum of rupees ten lákhs or more, on the ground that the same do not form a part of the said ancestral estate and that the same are or may be required for the purpose of paying the legacies directed to be paid by the said will, and that the same forms a part of the residue under the said will.

"10. The plaintiffs, however, charge and submit that the said Sir Mangaldás Nathubhoy had no power or authority to dispose of the said ancestral property or its accumulations or accretions as aforesaid, and that such ancestral property and its accumulations and accretions are and must be deemed to be entirely unaffected by the said will of the said Sir Mangaldás Nathubhoy and belong to the plaintiffs and their heirs.

"11. The plaintiffs further charge and submit that on a true construction of the said will of the said Sir Mangaldás Nathubhoy neither the said ancestral property nor its accumulations or accretions have been disposed of to the prejudice of the plaintiffs and their heirs, and that the intention of the said Sir Mangaldás Nathubhoy was that the legacies and payments directed by his will should be paid out of his self-acquired property only, and not otherwise.

"12. The defendants, the University of Bombay, however, contend that the aforesaid accumulations and accretions form a part of the self-acquired property of the said Sir Mangaldás Nathubhoy, and they accordingly claim the said accumulations and accretions as a part of the residue under the residuary clause of the said will.

"13. The plaintiffs, however, submit that the said contention is groundless and invalid in law, and that the plaintiffs and their heirs are entitled to the said accumulations and accretions as a part of the said ancestral property."

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The plaintiffs prayed (*inter alia*) as follows:—

"(1) That it may be declared that the will of the said Sir Mangaldás Nathubhoy is wholly inoperative and void so far as it purports to dispose of or to deal with the ancestral property, or any part thereof.

"(2) That it may be declared that as between the plaintiffs and the defendants (Nos. 4 to 8, the plaintiffs' children) Kissondás, Jamnádás, Goverdhandás, Ambádás, and Bába Purshotamdás on the one hand, and the executors of the said Sir Mangaldás Nathubhoy on the other hand, the said immoveable properties mentioned in the said schedule B and all their accumulations and accretions are ancestral property, and as such devolved upon the plaintiffs and their heirs according to Hindu law ir respectively of the said will.

"(3) That an account may be taken of the accumulations and accretions of the said ancestral property left by the said Sir Mangaldás Nathubhoy and come to the hands of his executors, and that such accumulations and accretions may be ordered to be handed over to the plaintiffs for the benefit of themselves and their issue as members of an undivided Hindu family.

"(4) That it may be declared that as against the plaintiffs and their heirs the said accumulations and accretions do not form a part of the self-acquired property of the said Sir Mangaldás Nathubhoy, and that no part thereof was or could be validly disposed of by the will of the said Sir Mangaldás Nathubhoy, and that no part thereof is or could be made available for paying any of the legacies directed to be paid by the said will.

"(5) That it may further be declared that the defendants, the University of Bombay, are not entitled to any part of the said accumulations and accretions, and that the same wholly belong to the plaintiffs and their heirs as aforesaid."

The executors put in a written statement in which they denied the plaintiffs' claim, and raised the various contentions which were subsequently discussed at the hearing.

The University of Bombay filed a merely formal written statement submitting its rights and the construction of the will to the Court, and at the hearing the counsel who appeared on its behalf withdrew after the issues were raised, and did not appear to argue the case.

The main points raised at the hearing were as follows:—

1. The properties comprised in part I of the schedule to the agreement of 28th June, 1881, having been declared by the decree in Suit No. 444 of 1881 to be the self-acquired property of Sir Mangaldás Nathubhoy, what was the effect of the agreement of the 28th June, 1881, between him and his two sons (the plaintiffs) based upon his admission therein that these properties were

ancestral, and of the confirmation of that agreement by his will and the direction therein that the said properties should be divided and distributed between his two sons and their issue according to the rules of Hindu law?

2. Whether, if the *corpus* of the said properties became ancestral by virtue of the agreement confirmed by the will, the accumulations and accretions thereof were also ancestral?

3. Whether the will was not inconsistent with the agreement and did not override its provisions, and whether the will did not purport to dispose of the said properties?

4. Whether Sir Mangaldás could dispose of the said properties, or the accumulations thereof, by his will?

5. Whether the plaintiffs had not, in fact, elected to take the said properties under the will, and not as ancestral property independently of the will, and were not now estopped from claiming the properties as ancestral?

6. Whether the claim of the minor defendants to the properties as ancestral property could be barred by any election or estoppel of the plaintiffs?

7. Whether the accumulations and accretions of the said properties were not the self-acquired property of Sir Mangaldás and were not devised by the residuary clause of his will to the University of Bombay?

On the questions of election and estoppel, the defendants (executors) contended that the plaintiffs by their conduct had clearly elected not to assert their alleged rights to the properties in question, but to take them under the will which had been duly proved and the provisions of which they had observed and obeyed since the death of Sir Mangaldás. The executors relied (*inter alia*) on a deed of indemnity dated the 1st December, 1890, passed to them by the plaintiffs from all liability in respect of any of the testator's properties specifically devised or bequeathed to them by the said will which the executors had made over, or might thereafter make over, to the plaintiffs, pending the Suit No. 444 of 1881, by which the ancestral estate was to be ascertained; also upon another release, dated 23rd July, 1891, passed by the plaintiffs to the executors which released the latter from "all actions, suits,

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accounts, claims and demands for or in respect of the said properties or the rents and profits thereof;" also upon certain evidence given by the first plaintiff (Tribhovandás) in a previous suit (No. 670 of 1892) in which he said: "I don't wish to dispute any of the provisions of the will. I have considered my position and elected to take under the will;" and upon correspondence which had passed between the executors and the plaintiffs.

Vicáji (*Lowndes* with him) for the plaintiffs:—We take the properties in question as ancestral and also their accretions. The properties in dispute were no doubt declared by this Court in 1886 (Suit No. 444 of 1881) to be the self-acquired property of Sir Mangaldás. But self-acquired property may be treated as ancestral property and may by agreement acquire that character—Mayne's Hindu Law (5th Ed.), para. 254; *Gopálasámi* v. *Chinnasámi*[1]; *Krishnáji Mahádev* v. *Moro Mahádev*[2]; *Shankar Baksh* v. *Hurdeo Baksh*[3]. By the agreement of 28th June, 1881, it was agreed that these properties should be ancestral. That agreement was a family arrangement, and is binding. It was acted upon, and the plaintiffs observed its provisions until the death of Sir Mangaldás—Leake on Contracts (3rd Ed.), p. 289; *Stapilton* v. *Stapilton*[4]. The property having thus been made ancestral by agreement, Sir Mangaldás could not dispose of it by will even if he desired to do so. But he clearly did not intend to dispose of it. He recognises in his will that the property had become ancestral, and expressly confirms the agreement which made it ancestral, and directs that the property should be distributed according to the rules of Hindu law. But by Hindu law, if the *corpus* of property is ancestral, its accumulations are also ancestral: see Mayne's Hindu Law (5th Ed.), para. 251. Neither the *corpus* of these properties nor their accumulations, therefore, vested in the executors, but devolved at once, on Sir Mangaldás' death, on the plaintiffs and their children who were joint with him (Act V of 1881, sec. 4)—Henderson on Wills, p. 314. No doubt the will directs that the executors should take possession of the ancestral property, and they did so; but that was permitted by the plaintiffs merely out of respect for their father's wishes.

(1) I. L. R., 7 Mad. 458.
(2) I. L. R., 15 Bom., 32 at p. 41.
(3) L. R., 16 I. A., 71.
(4) 2 W. & T., 920 (6th Ed.)

and did not affect their legal rights. As to estoppel, the releases only relate to the rents or profits subsequent to the death of Sir Mangaldás—Leake on Contracts (3rd Ed.), pp. 796, 797; *Turner* v. *Turner* (1). There is no case here of election—Succession Act (X of 1865), sec. 167; Serrell on Election, 94. They also referred to *Hurpurshád* v. *Sheo Dyal* (2); *Rámpershád* v. *Sheochurn*.(3)

Kirkpatrick (*Russell* with him) for the minor defendants Nos. 4 to 8 in the same interest:—The agreement of June, 1881, was not that the properties in question should then for the first time become ancestral. It was a formal declaration and admission that they were then and had previously been ancestral in Sir Mangaldás' hands, *i.e.*, ancestral according to Hindu law. That was the basis of the agreement. The agreement does not limit the sense of the word, and Hindu law recognises no limitations or variety in its use and meaning. There are not different classes of ancestral property with different incidents. If once property is ancestral, the legal result is that its accumulations are also ancestral. Therefore, in the absence of any limitation, the effect of the admission in the agreement was that the *corpus* and the then existing accumulations were ancestral. *A fortiori* all the accumulations since the agreement have been ancestral. The plaintiffs' children (the minor defendants) at birth took an interest in all this ancestral property. Sir Mangaldás could not dispose of any part of such property by will, and he recognises that he had no power to do so by the provisions with respect to the Girgaon property.

There is no case of election here. In order to put the plaintiffs to election, there must be, in the will, a clear intention on the part of the testator to give property not his own (White and Tudor, 6th Ed., Vol. I, p. 409). There is no such intention apparent. The will does not give the plaintiffs anything not the testator's own. Even if it be held that it gives them the properties in dispute (which we deny), it only gives them what was their's already by law. And it does not give them anything which should of right go to other persons. How, then, are the plaintiffs put to election? They, no doubt, have

(1) 14 Ch. D., 829. (2) L. R., 3 Ind. Ap., 259.
(3) 10 Moore's Ind. App., 490 at p. 506.

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allowed the executors to convey these properties to them and to pay probate duty on them and have executed releases, &c., but these acts were wholly unnecessary. Mere careless expenditure of the estate in this way could not affect their legal rights in that estate. In his evidence in Suit No. 670 of 1892 the plaintiff did not use the word 'elect' in its legal sense. Further, the plaintiffs have never been in a position to elect, as the accounts have not been taken (White and Tudor, 6th Ed., Vol. I, pp. 429, 430).

But, in any case, the minor defendants are not bound by the plaintiffs' election or estoppel. They have an interest independent of the plaintiffs in all ancestral property, and the plaintiffs' conduct could not destroy their right. They claim only their own. Defendants Nos. 4 and 5 were living at the death of Sir Mangaldás.

Nor is there an estoppel. The plaintiffs make no claim against the executors personally. The contest is with the case made by them on behalf of the University. The plaintiffs' conduct towards the executors cannot estop them as against the University. A plaintiff claiming against one party is not estopped by his conduct towards another. The executors are mere trustees and ought to be passive in this matter. The University does not plead the election or estoppel of the plaintiffs. It only submits its rights to the Court. The executors ought to be indifferent. They have no right to fight for one claimant at the cost of the estate. A claimant should fight his own case and at his own risk. But in no case could dealings with the executors estop the plaintiffs as against the University. They cited *Gopálasámi* v. *Chinnasámi*[1].

Scott (with *Inverarity*) for the executors:—The properties in question were self-acquired, and were declared to be so by the decree in Suit No. 444 of 1881. The accumulations are, therefore, also self-acquired. The agreement only dealt with the *corpus* of the properties. But the agreement did not make the properties ancestral. It only estopped Sir Mangaldás from dealing with them as self-acquired. He could not deal by will with the plaintiffs' share, but he could deal with his own share, and he

(1) I. L. R., 7 Mad., 458.

could deal with the accumulations. The latter he has bequeathed as residue to the University.

Next, we say the plaintiffs clearly elected to take these properties under the will and not as ancestral property. The will vested the whole estate in the executors and directed them to divide his estate. The will was proved, and the executors took possession without objection. Probate duty was paid on all the estate, including the properties in question. The plaintiffs have taken conveyance of them from the executors, who paid all the costs of the conveyance. The executors have dealt with the properties since Sir Mangaldás' death, and the plaintiffs have recognised their right to do so under the will. They cannot now claim to ignore the will.

No claim for these accretions was made by the plaintiffs until the 14th July, 1893, and then the claim was only for the accumulations between the date of agreement and Sir Mangaldás' death. We rely on the correspondence between the executors and the plaintiffs, which shows that the plaintiffs elected to take under the will. We also rely on the releases given by the plaintiffs to the executors dated 1st December, 1890, and 23rd July, 1891, by which the executors were released from all liability in respect of these properties, and on the evidence given by plaintiff No. 1 in Suit No. 670 of 1892, where he explicitly stated that he elected to take under the will. They referred to *Howkins* v. *Jackson*[1], *Antáji* v. *Dattáji*[2].

Rivett-Carnac and *Lowndes* for Jugmohandás Mangaldás (defendant No. 9).

B. TYABJI, J.:—This suit was filed on 28th February, 1895, for the purpose of having it declared that the will of Sir Mangaldás Nathubhoy is inoperative and void so far as it purports to dispose of or to deal with the ancestral property or its accumulations and accretions, and for a declaration that the properties mentioned in schedule B to the plaint and all the accumulations and accretions are ancestral property, and as such devolved upon the plaintiffs and their heirs according to Hindu law irrespective of the said will, and for an account of such accumulations and accretions, and that the same may be handed over to the plaintiffs for the benefit of themselves and their issue as members of an undivided Hindu family.

(1) 2 Mac. and Gor., 372. (2) I. L. R., 19 Bom., 36, at p. 40.

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The undisputed facts of the case are as follows. Sir Mangaldás Nathubhoy, a well-known and wealthy inhabitant of Bombay, died on 9th March, 1890, having previously made his will, dated 27th January, 1888, probate of which was obtained by the first, second and third defendants on 8th May, 1890. At the time of his death, Sir Mangaldás had three sons, namely, the plaintiffs Tribhovandás and Purshotamdás, and the defendant Jugmohandás. The defendants Kissondás and Jamnádás, who are both sons of the plaintiff Tribhovandás, were also born before and living at the time of Sir Mangaldás' death. The defendants Gordhandás and Ambádás, who are sons of the plaintiff Tribhovandás, and also the defendant Bába, who is son of the plaintiff Purshotamdás, were all born after Sir Mangaldás' death. The defendant Jugmohandás had separated from Sir Mangaldás some time before his death, but the plaintiffs and their sons, who were living at Sir Mangaldás' death, were joint with Sir Mangaldás during the whole of his life, and are now still members of an undivided Hindu family.

It appears that some time before 1881 there were disputes between Sir Mangaldás and his son Jugmohandás and that there was apprehension of similar disputes arising between Sir Mangaldás and his other sons; and for the purpose of quieting and settling such disputes an agreement was made between Sir Mangaldás of the first part, the plaintiff Tribhovandás of the second part, and the plaintiff Purshotamdás of the third part. This agreement, which is dated 28th June, 1881 (Exhibit A), recites (*inter alia*) as follows:—[His Lordship read the agreement as above set forth, and continued:—]

It is admitted by the parties to the suit that, as a matter of fact, the properties mentioned in part I of the said schedule to the said agreement was not ancestral property, but was in reality the separate and self-acquired property of Sir Mangaldás, and that they were so declared in Suit No. 444 of 1881, a decree in which was passed on 30th July, 1885, and was confirmed on appeal on 30th April, 1886 (Exhibits D and E). This suit (No. 444 of 1881) was a partition suit brought by Jugmohandás alone against his father Sir Mangaldás and his brothers the plaintiffs Tribhovandás and Purshotamdás.

By the will dated 27th January, 1888, Sir Mangaldás appointed the first, second and third defendants to be his executors, and directed (*inter alia*) as follows:—[His Lordship read the passages of the will above set forth and continued:—]

Under these circumstances it was argued before me on behalf of the plaintiffs,

1st. That the effect of the agreement was to make the property mentioned in part I of the schedule to that agreement absolutely ancestral.

2ndly. That the proceedings and decree in Suit No. 444 of 1881, by which the said property was declared to be self-acquired, did not affect the agreement.

3rdly. That the agreement was confirmed by the will, and was, therefore, binding upon the executors.

4thly. That the *corpus* of the property being ancestral, all the accretions and accumulations, both prior and subsequent to the agreement, are also ancestral and have become a part of the ancestral property.

5thly. That the property and the accretions and accumulations being ancestral, the will is invalid and inoperative so far as it purports to dispose of the same.

I will deal with these contentions in their order:—

1st. It seems to me that the whole object of the agreement was to settle the disputes between Sir Mangaldás and his two sons amicably as far as possible. It is clear that one main dispute was as to the nature of the property in the hands of Sir Mangaldás, and, if no arrangement had been come to on that point, litigation would have certainly arisen between the parties. They came to an absolute agreement as to the nature of the property in part I of the schedule. As between the father and the sons it was, I think, declared to be ancestral. The rights of the parties were regulated and safeguarded on that footing, and I think, therefore, that whatever be the real nature of the property, it must as between the parties to the agreement be treated as ancestral.

2nd. As to the second point, I do not think it is necessary for me to decide it, as I am clearly of opinion that the third point

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must be decided in favour of the plaintiffs. Sir Mangaldás in his will specially recites the decision of the Court in Suit No. 444 of 1881, and says in express terms that he is unwilling to disturb the agreement, and indeed expressly confirms it.

As to the fourth point, it is no doubt true that under the general Hindu law the accretions and accumulations of the ancestral property would become a part of such property—*Jugmohandás* v. *Sir Mangaldás*[1]. In this case, however, the property itself is not only decided by the Court to be self-acquired, but has been expressly admitted before me to have been of that nature. If it is to be treated as ancestral, it is not because it was so in reality, but because it is so admitted in the agreement, and because Sir Mangaldás himself was estopped, and, therefore, his executors are now estopped from disputing its character as ancestral property. But I find no provision in the agreement that the accretions and accumulations of the property were to be treated as ancestral. Indeed, the agreement in express terms leaves the nature of his other properties described in part II of the schedule, a part of which must according to the plaintiffs' contention have been acquired out of the accretions and accumulations of the property which was admitted to be ancestral, as an open question. In other words, Sir Mangaldás was in his lifetime and, therefore, his executors are now entitled to contend that all Sir Mangaldás' property (including the accretions and accumulations in question except that mentioned in part I of the schedule) was and is Sir Mangaldás' self-acquired property. If the other property was, in fact, acquired out of the rents and profits of the property in part I of the schedule, it would, in my opinion, be self-acquired property, because the property from which it was derived was in reality self-acquired, though admitted to be ancestral for the purposes of the agreement. In fact, I hold that there is no estoppel against Sir Mangaldás or his executors in regard to the nature of the accretions of the property, though there is an estoppel as regards the *corpus* of the property itself.

The fifth point assumes that both the *corpus* and the accretions

(1) I. L. R., 10 Bom., 528.

and accumulations of property must be treated as ancestral; but, as I have already pointed out above, that is not necessarily the case here, and I am, therefore, of opinion that the will is inoperative only as regards the *corpus* of the property (which is ancestral by estoppel) and not necessarily as regards the accretions and accumulations, as to which there is no estoppel. In connection with the above points it must be remembered, that under the express terms of the agreement, Sir Mangaldás had wide powers of dealing with the ancestral property and of making donations out of it, unless they were made with the object of depriving his sons of their shares in such property.

The next question I have to determine is whether, as a matter of fact, Sir Mangaldás has disposed of the accretions and accumulations of the so-called ancestral property or not under the residuary clause of his will. It is to be observed that throughout the will he uses the expression "ancestral property" as equivalent to the immoveable property mentioned in the schedule to his will which corresponds with part I of the schedule to the agreement A. It is this property which he wishes to be divided between his two sons, Tribhovandás and Purshotamdás. All the rest of the property, whether immoveable or moveable, he evidently treats as self-acquired, and I am, therefore, of opinion that the expression "my self-acquired property, both moveable and immoveable," as used in the residuary clause of the will, must be construed to mean all property which was really self-acquired, except only so much of it as was included in part I of the schedule to the agreement A which Sir Mangaldás was desirous should be treated as ancestral property. I have, therefore, come to the conclusion that the accretions and accumulations of any of the property mentioned in part I of the said schedule, being in reality self-acquired property, passed to the trustees under the residuary clause, although the *corpus* of the property was treated both under the agreement and the will as ancestral property.

I am, however, further of opinion that, having regard to the conduct of the plaintiffs and to the deeds passed by them subsequently to the death of Sir Mangaldás, they must be held to have accepted the will in its entirety, and to have acquiesced in all its provisions, and to have elected to take under it, and that it is now

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too late for them to contend that they are entitled to an account of the accretions and accumulations of the so-called ancestral property. On 1st December, 1890, both the plaintiffs passed a deed of indemnity to the executors. On the same day the plaintiff Purshotamdás executed a release to the plaintiff Tribhovandás in respect of the 12,000 square yards forming a part of the Girgaon property. On the 11th July, 1891, both the plaintiffs obtained conveyances from the executors of the property devised to them under the will (Exhibits I, J, K). Similarly, the executors conveyed to Purshotamdás the Poona property on 1st December, 1890 (Exhibit No. 10), and obtained from Purshotamdás a release in respect of such property (Exhibit No. 11). They also conveyed the Malabár Hill property to Purshotamdás on 15th March, 1893 (Exhibit No. 12), and obtained from Purshotamdás a release in respect of such property, &c., on 25th March, 1893 (Exhibit 13). Moreover, the petition for probate was filed on 17th April, 1890, and citation was served upon both the plaintiffs, but no objection was made by them. Further, both the plaintiffs were not only parties to, or cognisant of, the correspondence, accounts, receipts, &c., collectively put in as Exhibit No. 1, but actually executed a release to the executors on 23rd July, 1891 (Exhibit L), which, after reciting that the executors had rendered account of the rents and profits to Tribhovandás and Purshotamdás with which they were satisfied, and that they had requested the executors to hand over to them the properties in pursuance of the directions contained in Sir Mangaldás' will, provides that,

"In consideration of the premises, each of them the said Tribhovandás and Purshotamdás doth hereby release the executors and every of them and their and every of their heirs, executors and administrators estates and effects of and from all actions suits accounts claims and demands for or in respect of the said properties or the rents or profits thereof or any part thereof or for or in respect of the said direction contained in the hereinbefore recited will regarding the distribution of the said properties between the said Tribhovandás and Purshotamdás or for or in respect of any act or thing made, done or omitted by them the said executors or any of them in or about the execution of the trusts of the said will of the said testator Sir Mangaldás so far as relates to the said properties specified in the schedule hereto or in any wise relating thereto."

It must be observed that this schedule to the release (Exhibit L) corresponds with part I of the schedule to the agreement

A. The release (Exhibit L) is, therefore, a complete release, not only in respect of the *corpus* of the so-called ancestral property, but also in respect of the "rents and profits thereof and all actions, suits, accounts, claims and demands for or in respect of the same."

It seems to me, therefore, impossible for the plaintiffs to contend that they can now maintain a suit for an account of the rents and profits of the so-called ancestral property either under or in opposition to the will. How completely the plaintiffs have, or at least the plaintiff Tribhovandás has acquiesced in the will, is further shown by Tribhovandás' own evidence in Suit No. 670 of 1892 (Exhibit 5) in which he says: "I don't wish to dispute any of the provisions of the will. I have considered my position and elected to take under the will."

On the whole, therefore, I am of opinion that the plaintiffs are not now in a position to maintain this suit for an account of the accretions and accumulations of the so-called ancestral property even if they could have done so immediately after Sir Mangaldás' death and before they so completely acquiesced in the provisions of the will, or at least before they had executed a complete release to the executors.

It was contended before me that the release must be so construed as to confine its operation to the plaintiffs' claims which accrued subsequently to the death of Sir Mangaldás. I am, however, of opinion that, having regard to the circumstances under which the release was executed, its construction ought not to be so limited, and that it was intended to extend to all claims in respect of the properties in question up to the date of the execution of the release.

It was also contended by Mr. Kirkpatrick that any acts of the plaintiffs prejudicial to the interests of their sons in regard to the property in question could not bind the sons after the property was once admitted to be ancestral. I do not think that this contention is well founded. The property was not in reality ancestral. It was only such for the purposes and by virtue of the agreement and I am of opinion that the plaintiffs, who made the agreement, were entitled to waive it or to rescind it if they

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pleased, and that their sons could not prevent them from doing so. Under any circumstances this is a suit by Tribhovandás and Purshotamdás (and not by their sons), and in my opinion they could not maintain it. I record my findings upon the issues as follows:—[His Lordship stated his findings.]

I, therefore, dismiss this suit; but, having regard to the complicated and difficult nature of the case, I think the most equitable course is to direct that the costs of all parties (those of the executors to be taxed as between attorney and client) should come out of the estate, that is, out of the estate which is not ancestral.

Suit dismissed.

Attorneys for the plaintiffs and minor defendants:—Messrs. *Nanu and Hormasji* and Messrs. *Roughton and Byrne.*

Attorneys for the executors:—Messrs. *Little and Co.*

Attorneys for defendant No. 9:—Messrs. *Edgelow and Gulábchand.*

Attorneys for the University of Bombay:—Messrs. *Craigie, Lynch and Owen.*

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1895. *February* 14.

DAVALAVA AND OTHERS (ORIGINAL PLAINTIFF), APPELLANTS, *v.* BHIMA'JI DHONDO AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Mahomedan family—Mortgage by Mahomedan father—Suit by mortgagee against minor son after mortgagor's death—Decree—Possession—Minor son represented by his mother—Widow represents heirs—Decree—Daughters not parties, but bound by decree—Subsequent suit by daughters as heirs of mortgagor for redemption.

When in a mortgage suit the debt is due from the father, and after his death the property is brought to sale in execution of a decree against the widow or some of the heirs of the mortgagor; and the whole property is sold, then the heirs not brought on the record cannot be permitted to raise the objection that they are not bound by the sale simply because they are not parties to the record. This principle of law applies as much to a Hindu family governed by the Mitákshara law as to a Mahomedan family.

* Second Appeal, No. 671 of 1893.