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Select Cases

IN

HINDU LAW,

DECIDED BY HER MAJESTY'S PRIVY COUNCIL

AND

THE SUPERIOR COURTS IN INDIA.

WITH NOTES

BY

W. H. RATTIGAN,

Pleader Chief Court, of the Punjab.

LAWRENCE PRESS, LAHORE ;—W. KENNEDY;
PREFACE.

The following pages it is believed will be found to contain the leading decisions of the several High Courts in India as well of the Privy Council in England, on points connected with the Hindoo Law.

The object has been to condense in two moderately sized volumes what the Judge as well as the Practitioner has at present to search for in numerous published Reports, and the alphabetical arrangement has been adopted to facilitate reference. It is also hoped that these volumes will be especially useful to Mofussil Judges and Vakils who have not the advantage of possessing the original Reports, and are compelled to take as their sole guides the ordinary text books, which, although extremely useful in their way, have been on many points considerably modified or entirely over-ruled by more recent decisions.

The Notes subjoined to several of the reported cases will be found to contain a short digest of analogous or subsequent decisions in which the same doctrine has been affirmed, and particular care has been taken to indicate the differences between the various schools of Hindoo Law. The provisions of the Punjab Civil Code have also been kept in view; and although the Chief Court has not been sufficiently long established to supply the Courts of the Province with many authoritative rulings on the Hindoo Law applicable to this part of India, a few important decisions which have already been pronounced will be found either reported in extenso or referred to in the Notes.

The present volume embraces the following subjects:—Adoption; Alienation; Ancestral debts; Ancestral property; Bairagis; Brothers and their issue.

The second volume, which will complete the work, will be published, it is hoped, in the early part of next year (1870)

W. H. RATTIGAN.

Lahore, December 1869.
Table showing the various Schools of Hindoo Law and the principal authorities prevailing in each.

<table>
<thead>
<tr>
<th>School</th>
<th>Mitakshara School</th>
<th>Benares School</th>
<th>Maharashtra School</th>
<th>Dravida School</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Dharma Ratna</td>
<td>Mitakshara &amp; Viramitrodaya, Madhaviya</td>
<td>Vivada, Niranaya</td>
<td>Nirnaya</td>
<td>Mitakshara, Mayukha, Niranaya, Hemadri, Smiti, Kusubha</td>
</tr>
<tr>
<td>2 DyaBhaga and Commentaries</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 Dayakrama and Saugraha</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Smriti, Vivardnara, Vivada, Vivada Tatwa</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 Setu, Sarasvata, Bhangardana</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6 Dattaka, Chandra</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Dravida Division**

- Mitakshara, Madhaviya, Sarasvati, Vifasa
- Dattaka, Chandrika

**Karnataka Division**

- Mitakshara, Madhaviya, Sarasvati, Vifasa
- Mitakshara, Madhaviya, Sarasvati, Chandrika, Vifasa

**Andra Division**

- Mitakshara, Madhaviya, Sarasvati, Vifasa
- Mitakshara, Madhaviya, Sarasvati, Chandrika, Vifasa

**N.B.**—The Bengal School embraces the whole province of Bengal Proper. The *Mitakshara* School prevails in *Tirhut*, or North Behar, the ancient kingdom of *Mithila*. The *Benares* School prevails throughout the N.W. Provinces, the Punjab, and is also current in Orissa. The *Maharashtra*, or Bombay School, prevails wherever the *Marathi* language is spoken. The *Dravida*, or Madras School, prevails throughout the whole of the Southern portion of the Peninsula.
<table>
<thead>
<tr>
<th>TABLE OF CASES REPORTED IN THIS VOLUME.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A.</strong></td>
</tr>
<tr>
<td>Anund Mohun Mozoomdar v. Gobind Chunder Mozoomdar,</td>
</tr>
<tr>
<td>Baboo Ram v. Gajadur Singh,</td>
</tr>
<tr>
<td>Baboo Runjeet Singh v. Baboo Obhye Narain Singh,</td>
</tr>
<tr>
<td>Balmokund and Saligram v. Jhoona Lall,</td>
</tr>
<tr>
<td>Bawani Sankara v. Ambabay Ammal,</td>
</tr>
<tr>
<td>Bhugwandeen Doobey v. Myna Basee,</td>
</tr>
<tr>
<td><strong>B.</strong></td>
</tr>
<tr>
<td>Chinna Gaundan v. Kumara Gaundan,</td>
</tr>
<tr>
<td>Collector of Madura v. Mutu Ramalinga Sathupathy,</td>
</tr>
<tr>
<td><strong>C.</strong></td>
</tr>
<tr>
<td>Deepoo v. Gouree Shunkur,</td>
</tr>
<tr>
<td>Doorga Dayee and others v. Poorun Dayee and others,</td>
</tr>
<tr>
<td>Duttnarain Singh v. Ajeet Singh,</td>
</tr>
<tr>
<td>Dyamoye Chowdrain v. Rasbeharee Singh,</td>
</tr>
<tr>
<td><strong>D.</strong></td>
</tr>
<tr>
<td>Gobindo Hurreekar v. Woomesh Chunder Roy,</td>
</tr>
<tr>
<td>Goolab Singh and others v. Nehal Singh and others,</td>
</tr>
<tr>
<td>Gooroo Churn Sircar and others v. Kylash Chunder Sircar,</td>
</tr>
<tr>
<td>Gopal Dutt Pandy v. Gopal Lal Misser,</td>
</tr>
<tr>
<td>Gour Haree Goose v. Peerree Dosee and others,</td>
</tr>
<tr>
<td>Gournath Chowdri v. Arnopoorma Chowdrain,</td>
</tr>
<tr>
<td>Gunga Deen Rawut v. Madhoo Surun,</td>
</tr>
<tr>
<td>Gunga Mya v. Kishen Kishore Ghose,</td>
</tr>
<tr>
<td>Gungapatram Vireeshvar, v. Vithoba Khandappa,</td>
</tr>
<tr>
<td>Gungaprosaud Rai v. Brijessuree Chowdrain,</td>
</tr>
</tbody>
</table>
( ii )

<table>
<thead>
<tr>
<th>H.</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haradhun Rai v. Biswanath Rai,</td>
<td>85</td>
</tr>
<tr>
<td>Hurreemadhub Rai v. Gooroo gobindo Chowdri,</td>
<td>365</td>
</tr>
<tr>
<td>J.</td>
<td></td>
</tr>
<tr>
<td>Jwalanath v. Kulloo and others,</td>
<td>284</td>
</tr>
<tr>
<td>K.</td>
<td></td>
</tr>
<tr>
<td>Kalee Chander Chowdry v. Sheeb Chunder,</td>
<td>168</td>
</tr>
<tr>
<td>Kanhya Lall v. Radha Churn,</td>
<td>213</td>
</tr>
<tr>
<td>Keerut Narain v. Musst. Bhoabinesree,</td>
<td>171</td>
</tr>
<tr>
<td>Kishen Nath Roy v. Hurree Gobind Roy,</td>
<td>5</td>
</tr>
<tr>
<td>Kylash Chander Sircar v. Gooroo Churn Sircar,</td>
<td>356</td>
</tr>
<tr>
<td>L.</td>
<td></td>
</tr>
<tr>
<td>Luddea, v. Koolla and Tunsukh,</td>
<td>87</td>
</tr>
<tr>
<td>Lukhinath Roy v. Shamasoonduree,</td>
<td>3</td>
</tr>
<tr>
<td>Lutchmun Sahoo v. Jubona Bye,</td>
<td>13</td>
</tr>
<tr>
<td>M.</td>
<td></td>
</tr>
<tr>
<td>Maddun Gopal Thakur v. Ram Buksh Pandey,</td>
<td>232</td>
</tr>
<tr>
<td>Madhoo Dyal Singh v. Golbar Singh,</td>
<td>241</td>
</tr>
<tr>
<td>Maharajah Juggutnath Sahai v. Musst. Mukhun Koonwur,</td>
<td>20</td>
</tr>
<tr>
<td>Maharani, Musst. v. Nanda Lal Misser,</td>
<td>295</td>
</tr>
<tr>
<td>Monemothonath Day v. Onauth Nauth Day,</td>
<td>110</td>
</tr>
<tr>
<td>Moran Moe Debiah v. Bejoy Kishto Gossamee,</td>
<td>31</td>
</tr>
<tr>
<td>N.</td>
<td></td>
</tr>
<tr>
<td>Nagappa Adapa v. Subha Sastry,</td>
<td>134</td>
</tr>
<tr>
<td>Narasammai v. Balrama Charlu,</td>
<td>156</td>
</tr>
<tr>
<td>Nobinchunder Chuckerbutty v. Issur Chunder Chuckerbutty,</td>
<td>297</td>
</tr>
<tr>
<td>Nursing Narain v. Bhuttun Lall and others,</td>
<td>163</td>
</tr>
<tr>
<td>P.</td>
<td></td>
</tr>
<tr>
<td>Petumbur Dobey v. Sooburnomee Dabea,</td>
<td>208</td>
</tr>
<tr>
<td>Preag Singh v. Ajoodiah Singh,</td>
<td>39</td>
</tr>
<tr>
<td>Pranjeevandass and others v. Dewcooverbaee,</td>
<td>252</td>
</tr>
<tr>
<td>R.</td>
<td>Page</td>
</tr>
<tr>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>Radha Pearee Dassee v. Doorga Monee Dassia,</td>
<td>371</td>
</tr>
<tr>
<td>Raja Shumshere Mull v. Ranee Dilraj Kour,</td>
<td>54</td>
</tr>
<tr>
<td>Raje Vyankatrav Anandraw v. Jayavantrav bin Malharrav,</td>
<td>141</td>
</tr>
<tr>
<td>Ram Surn Das v. Musst. Pran Koer,</td>
<td>205</td>
</tr>
<tr>
<td>Rayan Krishnamachariyar v. Kuppan Ayyangar,</td>
<td>42</td>
</tr>
<tr>
<td>Rungama v. Atchama,</td>
<td>90</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Singamma v. Vinjamuri Venkatacharlu,</td>
<td>195</td>
</tr>
<tr>
<td>Soolukhna v. Ramdooolal Pandeh,</td>
<td>8</td>
</tr>
<tr>
<td>Sreemutty Joymoney Dossee v. Sreemutty Sibosoodry Dossee,</td>
<td>138</td>
</tr>
<tr>
<td>Sreenarain Raj v. Bhyia Jha,</td>
<td>15</td>
</tr>
<tr>
<td>Srinivasa Ayyangar v. Kuppan Ayyangar,</td>
<td>42</td>
</tr>
<tr>
<td>Subbaluvammal v. Ammakutti Ammal,</td>
<td>170</td>
</tr>
<tr>
<td>Sudanund Mohapattur v. Bono Malee Dass,</td>
<td>320</td>
</tr>
<tr>
<td>Sumbhoo Chunder Chowdri v. Naraini Dibeh,</td>
<td>1</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>T.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Tincowree Chatterjee, v. Dinonath Bannerjee,</td>
<td>18</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>V.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>V. Singamma v. Vinjamuri Venkatacharlu,</td>
<td>195</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Z.</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Zuburdust Khan v. Indurmun,</td>
<td>309</td>
</tr>
</tbody>
</table>
### Table of Cases Cited in Notes

#### A.

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ajjodiah Pershad v. Mussummat Dewa</td>
<td>150</td>
</tr>
<tr>
<td>Ajjodiah Pershad Singh v. Ram Surn</td>
<td>238</td>
</tr>
<tr>
<td>Alank Manjari v. Fakir Chand Sirkar</td>
<td>203</td>
</tr>
<tr>
<td>Anund Mohun Roy v. Chunder Monee Dossee</td>
<td>308</td>
</tr>
<tr>
<td>Anund Moyee v. Shib Chunder Roy</td>
<td>86</td>
</tr>
<tr>
<td>Arnachellum Pillay v. Jyssamy Pillai</td>
<td>82</td>
</tr>
<tr>
<td>Arundodi Ammal’s case</td>
<td>81</td>
</tr>
<tr>
<td>Ayyayu Muppanar v. Niladatchchi Ammal</td>
<td>39</td>
</tr>
</tbody>
</table>

#### B.

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baboo Joy Kurn Lall v. Doolah Singh</td>
<td>240</td>
</tr>
<tr>
<td>Bana Misser v. Raja Bishen Prokash Narain Singh</td>
<td>238</td>
</tr>
<tr>
<td>Basoo Camanah v. Basoo Chinna Vencatasa</td>
<td>132</td>
</tr>
<tr>
<td>Bawani Sankara Pundit v. Ambabay Ammal</td>
<td>151</td>
</tr>
<tr>
<td>Beerchunder Sabraj v. Neel Kishore Takoor</td>
<td>364</td>
</tr>
<tr>
<td>Bhagavatamma v. Pampanna Gaud</td>
<td>296</td>
</tr>
<tr>
<td>Bhaskar Buchajee v. Naroo Ragonath</td>
<td>203</td>
</tr>
<tr>
<td>Bhooaran Koer—Must, and others v. Sahibzadee and others</td>
<td>245</td>
</tr>
<tr>
<td>Bhuggut Singh and others v. Boodhoo and Dyal Singh</td>
<td>175</td>
</tr>
<tr>
<td>Bhya Ram Singh v. Agur Singh</td>
<td>133</td>
</tr>
<tr>
<td>Bisambhur Naik v. Sudasheeb Mohaputtur</td>
<td>239</td>
</tr>
<tr>
<td>Bogooa Jha v. Lall Dass</td>
<td>296</td>
</tr>
<tr>
<td>Brojorakishore Dossee v. Sreenath Bose</td>
<td>364</td>
</tr>
</tbody>
</table>

#### C.

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chemne Base v. Gutto Base</td>
<td>174</td>
</tr>
<tr>
<td>Chetti Colum Prusunna Vencatachella Reddiar v. Chetti Colum</td>
<td>175</td>
</tr>
<tr>
<td>Mudu Vencatachella Reddiar</td>
<td></td>
</tr>
<tr>
<td>Chinn Gaundan v. Kumara Gaundan</td>
<td>150</td>
</tr>
<tr>
<td>Chowdri Padam Singh v. Koer Udaya Singh</td>
<td>81</td>
</tr>
<tr>
<td>Chowdri Purmessur Dut Jha v. Hunooman Dutt Roy</td>
<td>160</td>
</tr>
<tr>
<td>Chummun Mahloon v. Rajendra Sahai</td>
<td>296</td>
</tr>
<tr>
<td>Chunderkanth Roy v. Peary Mohun Roy</td>
<td>308</td>
</tr>
<tr>
<td>Chuttur Dhara Singh v. Mussummat Huromaree</td>
<td>296</td>
</tr>
<tr>
<td>Collector of Masulipatam v. Cavaly Vencata Narainapah</td>
<td>240</td>
</tr>
<tr>
<td>of Tirhoot v. Huropershad Mohunt</td>
<td>49, 81</td>
</tr>
<tr>
<td>Cooty Verty Cootapah v. Sambiah and another</td>
<td>203</td>
</tr>
</tbody>
</table>
Dace v. Motee Nuthoo,  ...  ...  ...  ...  25, 133
Dagumbaree Dabee v. Taramoney Dabee,  ...  ...  ...  ...  161
Dyee Dab and another v. Hur Hor Singh,  ...  ...  ...  ...  82
Dhurm Das Pandey v. Mussummat Shama Soondri,  ...  ...  ...  ...  211
Doe Dem Sitaram,  ...  ...  ...  ...  337
Doolubh Dai v. Manee Bebee,  ...  ...  ...  ...  174
Durgopal Singh v. Roopun Singh,  ...  ...  ...  ...  203
Dyamaye v. Rasbehri,  ...  ...  ...  ...  ib.

F

Ful Chand Lal v. Rughoobums Sahai,  ...  ...  ...  ...  296

G

Ganendrmohon Tagore v. O Operandmohon Tagore,  ...  ...  ...  ...  239
Gangabai v. Ramanna,  ...  ...  ...  ...  240
Gobind Chandra Mazoomdar v. Anund Mohun Surma,  ...  ...  ...  ...  212
Gobind Coomar Chowdri v. Hurochunder Chowdri,  ...  ...  ib.
Gobind Dass v. Ramsahaya Jamadar,  ...  ...  ...  ...  337
Gobind Kishore Roy's case,  ...  ...  ...  ...  211
Gokul Chand v. Narain Dass and others,  ...  ...  ...  ...  7
Gulab Singh's case,  ...  ...  ...  ...  364
Goor Surun Dass v. Ramsurn Bhukut,  ...  ...  ...  ...  319
Gooroo Pursaud Jana v. Muddun Mohun Soor,  ...  ...  ...  ...  239
Gopalchand Manna v. Gour Monee Dossee,  ...  ib.
Gopalchand Pande v. Baboo Kunwur Singh,  ...  ...  ib.
Gopalmullick v. Onoop Chunder Roy,  ...  ...  ...  ...  308
Goopemohun Deb v. Raja Rajkissen,  ...  ...  ...  ...  44
Gopee Ram v. Buldeo Sahai,  ...  ...  ...  ...  14
Gour Bullub v. Juggernath Prosaud Mitter,  ...  ...  ...  ...  25
Govindnath Roy v. Gulal Chand and others,  ...  ...  ...  ...  175
Govind Soondaree Debia v. Joggo Dumba Debia,  ...  ...  ...  ...  82
Gunes Gir v. Amrao Gir,  ...  ...  ...  ...  337
Gunganath, pauper, v. Joslanath and another,  ...  ...  ...  ...  238
Gungaprosaud Roy v. Brijessuree Chowdrain,  ...  ...  ...  ...  25
Gurmukh v. Gomaneet,  ...  ...  ...  ...  364
Ganpatran v. Vithoba,  ...  ...  ...  ...  160

H

Haradhus Naug v. Issur Chunder Bose,  ...  ...  ...  ...  296
Haradhus Rai v. Biswanath Rai,  ...  ...  ...  ...  89
Harodut Narain Singh v. Beer Narain Singh,  ...  ...  ...  ...  239
Gedmohun Mujoomdar v. Mussummat Tara Munee,  ...  ...  ...  ...  240
<table>
<thead>
<tr>
<th>Name of Parties</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Honoman Pershad Pandey v. Mussummat Babooce Munraj</td>
<td>245</td>
</tr>
<tr>
<td>Koonwaree</td>
<td></td>
</tr>
<tr>
<td>Hubbeehur Rahman v. Rashbehari Bose</td>
<td>7</td>
</tr>
<tr>
<td>Huree Punt Bha v. Nana Nurain Rao</td>
<td>238</td>
</tr>
<tr>
<td>Hursahai v. Bhowani Dass</td>
<td>7</td>
</tr>
<tr>
<td>I.</td>
<td></td>
</tr>
<tr>
<td>Isserechunder Chowdri v. Bhayrubechunder Chowdri</td>
<td>364</td>
</tr>
<tr>
<td>Iswar Chandra Mitter v. Shama Soondari Dasi</td>
<td>212</td>
</tr>
<tr>
<td>J.</td>
<td></td>
</tr>
<tr>
<td>Jagannath Pal v. Bidyanand</td>
<td>337</td>
</tr>
<tr>
<td>Jagannath Vithal v. Apaji Vishnu</td>
<td>296</td>
</tr>
<tr>
<td>Jagendronath Banerjee v. Rajendronath Holdar</td>
<td>211</td>
</tr>
<tr>
<td>Jai Ram Dhami v. Musan Dhami</td>
<td>81</td>
</tr>
<tr>
<td>Janki Dibeh v. Suda Sheo Rai</td>
<td>7b</td>
</tr>
<tr>
<td>Jeynarain Singh v. Roshun Singh</td>
<td>240</td>
</tr>
<tr>
<td>Jivani Bhai v. Jivu Bhai</td>
<td>160</td>
</tr>
<tr>
<td>Joymony Dossee v. Sreemuty Siboscondry Dossee</td>
<td>150</td>
</tr>
<tr>
<td>Judonath Pandey v. Hurdylal Misser</td>
<td>308</td>
</tr>
<tr>
<td>Juggomohun Roy v. Nee moo Dossee</td>
<td>239</td>
</tr>
<tr>
<td>Jymunee Debia—Mussummat v. Ramjoy Chowdri</td>
<td>345</td>
</tr>
<tr>
<td>K.</td>
<td></td>
</tr>
<tr>
<td>Kamavadhani Venkata Subbaiya v. Joysa Narasingappa</td>
<td>296</td>
</tr>
<tr>
<td>Kana Kashaiya Pillai v. Sesbachalu Sastri</td>
<td>240</td>
</tr>
<tr>
<td>Kanth Narain Singh v. Prem Lall Paurey</td>
<td>296</td>
</tr>
<tr>
<td>Kanto Lall v. Girdhari Lall</td>
<td>239, 246, 319</td>
</tr>
<tr>
<td>Katama Natchiar v. Raja of Shivagunga</td>
<td>334</td>
</tr>
<tr>
<td>Keshub Ram Mohaputter v. Nund Kishore Mohaputter</td>
<td>348</td>
</tr>
<tr>
<td>Khem Chand v. Gomaneey Koer</td>
<td>238</td>
</tr>
<tr>
<td>Kishen Devi v. Gunga Devi</td>
<td>7b</td>
</tr>
<tr>
<td>Konwar Duryao Singh v. Konwar Karun Singh</td>
<td>204</td>
</tr>
<tr>
<td>Kora Shunker Takoor v. Bebee Munnee</td>
<td>240</td>
</tr>
<tr>
<td>Kristniengar v. Venamamalai Iyengar</td>
<td>161</td>
</tr>
<tr>
<td>Kullian Singh v. Kirpa Singh</td>
<td>203</td>
</tr>
<tr>
<td>Kurm Kour v. Ramdhun</td>
<td>240</td>
</tr>
<tr>
<td>L.</td>
<td></td>
</tr>
<tr>
<td>Lakshmibai v. Ganpat Maroba</td>
<td>334</td>
</tr>
<tr>
<td>Lehna Singh v. Cheina</td>
<td>204</td>
</tr>
<tr>
<td>Lurhmun Kour v. Madari Lall</td>
<td>239</td>
</tr>
</tbody>
</table>
(iv)

M.

Madhoo Dyal Singh v. Gulbur Singh, ... ... ... 240
Madhoobun Dass v. Hurri Kishen Bhunj, ... ... ... 337
Maha Sookh v. Budree, ... ... ... 238
Maya Dass v. Sawun, ... ... ... 160
Moheer Singh v. Hazara Singh, ... ... ... 239
Mohendronath Bose v. Munshi Syud Amir Ali, ... ... ... 308
Mohunnee Ram v. Mohunna Ram, ... ... ... 364
Moola v. Atma, ... ... ... 251
Morun Moe Debeah v. Rejoy Kisho Gossamee and others, ... 25
Motee Lall v. Mitter Jeeet Singh, ... ... ... 239
Muddun Gopal Thakoor v. Ram Bukah Pandey, ... ... ... 335
Muhunt Rumun Dass v. Muhunt Ashbul Dass, ... ... ... 338
Mukhun v. Nikka and others, ... ... ... 175, 204
Mukhun Lall v. Mussummat Sookhe, ... ... ... 150
Muthusawmy Naidu v. Lutchmeedavumma, ... ... ... 155

N.

Narain Dass v. Mukhun, ... ... ... 296
Narasammai v. Balarama Charlu, ... ... ... 44
Narayan Reddi v. Vedachala, ... ... ... 132
Narayn and Heera v. Dhunna and others, ... ... ... 240
Narottam Jagiivan v. Narsanda Harikisendas, ... ... ... 334
Nusseram Roy v. Shushee Bhooshun Roy, ... ... ... 308

O.

Oodoy Chandjha v. Dhun Monee Debia, ... ... ... 296
Ooman Dutt v. Kunbia Singh, ... ... ... 89

P.

Perkash Chander Roy v. Dhunmonee Dosssee, ... ... ... 203
Pratambarayan Das v. Court of Wards, ... ... ... 239
Prayaga Venkana v. Lachshemg, ... ... ... 89

R.

Radha Kishen Muhapatter v. Sreekishen Muhapatter, ... ... ... 212
Radhamadhub Gossain v. Radhabullub Gossain, ... ... ... 203
Raja Haimun Chull Singh v. Koomer Gunshean Singh, ... ... ... 81
Raja Nobkissen's case, ... ... ... 202
Raja of Shivagunga's case, ... ... ... 334
Raja Shumshere Mull's case, 81
Raja of Tanjore's case, 203
Raja Upendra Lal Roy's case, 150
Raja Vyankatram Anandram v. Jayavantram, 175
Rajmohun Gossain v. Gour Mohun Gossain, 334
Rama Kutta Aiyar v. Kulatturaiyan, 240
Ramalinga Pillai v. Sadasiva Pillai, 160
Rambunsee Kunwur v. Moheshwur Koonwur, 296
Rambhander Chatterjee v. Sumboochucher Chatterjee, 160
Ramchunder Surma v. Gunga Gobind Bannerjee, 239
Ramdhone Ghose v. Ranee Doorga Sundry, 240
Ramkishore Acharjee Chowdhry v. Bhoobumnoyee Debia, 174
Ram Kissen Surkheyl v. Mussummat Sri Muttee Dibbia, 25
Ramkoomar Neecee Bachespatee v. Kishenkunkur Turk Bhosun, 239
Rampershad Singh v. Mussummat Nagbungshee Koer, 240, 245
Rampershad Sookul v. Rajandur Sahoy, 245
Ramsurn Das v. Mussummat Pran Koer, 25, 133
Ramtoonoo Mullick v. Ramgopal Mullick, 239
Ranee Bhuwani Dibeb v. Ranee Sooruj Munee, 44
" Kishen Munee v. Raja Oodwunt Singh and others, 14
" Nitrodaye v. Bholanath Dass, 174, 175
" Sevagamy Nachiar v. Streemathoo Heraniah Gurbah, 81, 174
Rugonath v. Rahim Bux and others, 246, 319
Rungama v. Atchama and others, 14
Runganaigum v. Namasevoya Pillai, 161

S.

Sahiba v. Amir Chand, 364
Sahibzadeh Muhespertab Singh v. Ramghureeb Choubee, 239
Saho Bewa and another v. Nuboghun Mytee, 203
Sarbo Chunder Sein v. Muthoor Nath Puddoik, 296
Seeta Ram v. Dhunnuk Dharee Subhye, 150
Sheopershad Jha v. Gunga Ram Jha, 239
Shibob Koeree and others v. Joogun Singh and others, 7, 49, 81
Shumboochucher and another v. Narain Debia, 84
Siddesorry Dossee v. Doorga Churn Set, 132
Singamma v. Vinjamuri Venkatacharlee, 150
Soondur Koomree Debea v. Gudadhur Pershad Tewarree, 82
Soorjeemoney Dossee v. Denobundo Mullick, 239
Sree Brijbhookunjee Muharaj v. Sree Gokoolootasajee Muharaj, 81
Sreemutty Joyomony Dossee v. Sreemutty Sibosoodry Dossee, 174, 175
Sreenarain Mitter v. Kishen Soonduree Dossee, 203
Sreenarain Rai v. Bhyo Jha, 14
Sudanund Mohaputtr v. Bonomalee and others, 133, 238
Sukeyenah Banoo v. Huro Churn Buruj, 239, 240
Sulukhna—Mussummat v. Ram Doolal Pandey, 211
Sundr Pillai v. Tegaraja Pillai, 240
Sutputtee v. Indranund Jha, 49
<table>
<thead>
<tr>
<th>Case/Party</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tanjore case</td>
<td>202</td>
</tr>
<tr>
<td>Tarachund Ghose v. Padam Lochan Ghose</td>
<td>349</td>
</tr>
<tr>
<td>Taramohun Bhattacharjee v. Kirpa Moyee Dabia</td>
<td>7, 40</td>
</tr>
<tr>
<td>Tarini Charan Chowdry v. Saroda Sundari Dasi</td>
<td>212</td>
</tr>
<tr>
<td>Thakur Rai and another v. Sakut Ballee Rai</td>
<td>240</td>
</tr>
<tr>
<td>Tikdey v. Lalla Hurree Lall</td>
<td>150</td>
</tr>
<tr>
<td>Tilokchunder Roy v. Ram Lukhi Dossec</td>
<td>364</td>
</tr>
<tr>
<td>Tincourree Chatterjee's case</td>
<td>25</td>
</tr>
<tr>
<td>Tipperah Raj case</td>
<td>364</td>
</tr>
<tr>
<td>Veerapermall Pillay v. Narain Pillay</td>
<td>202</td>
</tr>
<tr>
<td>Venkatachellum v. Venkatasawmy</td>
<td>203</td>
</tr>
<tr>
<td>Venkatesaiya v. Venkata Charlu</td>
<td>175</td>
</tr>
<tr>
<td>Virasvami Gramini v. Ayyas Vami Gramini</td>
<td>240</td>
</tr>
<tr>
<td>Vishvanath Gangadhor v. Krishnaji Ganesh</td>
<td>349</td>
</tr>
<tr>
<td>V. Singamma v. Vinjamuri Venkatacharee</td>
<td>150</td>
</tr>
<tr>
<td>Vyankatrav Anandraw Nimbalkar v. Jayavantrav bin Malhar-rav Ranadive</td>
<td>175</td>
</tr>
<tr>
<td>White v. Bishtochunder Biswas</td>
<td>239</td>
</tr>
<tr>
<td>Woomachurn Bannerjee v. Haradhum Mojomdar</td>
<td>308</td>
</tr>
<tr>
<td>Yachereddy Chinna Bassapa v. Yachereddy Gowdapa</td>
<td>133</td>
</tr>
<tr>
<td>Zuburdust Khan v. Indurman</td>
<td>318</td>
</tr>
</tbody>
</table>
ADDENDA.

The following decisions have been published during the progress of this Volume through the press, and may be noted in the pages indicated in the margin.

The same doctrine has been affirmed by Scotland C. J. and Collett J., in the recent case of N. Chandrasekhara v. N. Bramhanna, 31st March 1869, IV, M. H. C. Reps. 270. The authorities on the subject were all thoroughly discussed in this case, ... Continuation of the note at p. 135.

A Hindu widow who has inherited immovable property from her husband, though possessed of a limited power of alienating portions of such property for necessary purposes or spiritual uses, cannot dispose by a gift in Dharm or Krishnarpan of the whole or all but the whole of such immovable property without the consent of the heirs of the husband. Bhaskar Trimbak Acharya v. Mahadev Ramji and others, 7th January 1869, VI, Bombay H. C. Reps., 14, ... Pages 239-240, note 6.

But according to Hindu Law sons acquire rights only in the property which belonged to their father at the time of their birth and have no legal claim to property of which a bona fide disposition, effectual as against their father, had been made long before they were born. The right of an after born son to share as a co-parcener divided property depends upon his mother being pregnant with him at time of partition. Yekemyian v. Agnievarian, 26th April 1869, IV, M. H. C. Reps., 307, ... At end of para. 4, note, p. 239.

A recital in a deed of sale by a Hindu widow of her deceased husband's property, setting forth that the alienation was necessary for the purpose of paying his debts, is not of itself evidence of such necessity; nor does the attestation of a relative import his concurrence. Such a transaction may become valid by the consent of the husband's kindred, but the kindred in such case must be understood to be all those who are likely to be interested in disputing the transaction. At all events there ought to be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and justified by Hindu Law. Rajaikhi Debia v. Gokal Chandra Chowdry, 22nd July 1869, III, B. L. R. 57, P. C., ... Page 245 note.
In Nabakumar Haldar v. Bhabasundari Debi, 25th August 1869, III B. L. R. 375, a. c. j., Mr. Justice Markby remarked with reference to an objection that the widow ought to have raised the money by a mortgage and not parted with the property out and out, as follows:—"Now I feel almost certain that this point has been already disposed of by some of the Benches of this Court, but whether it is so or not, I have no doubt whatever that in such a case as this, there is no precise rule of law which obliges a widow to proceed in any particular way, and the only question for the court to consider is whether she has exceeded her powers, and these are always to be measured by the necessities of the case." Page 296, note 2.

Where a widow held her husband's property for some time and then gave it up to a third party who claimed it as his, it was held in a suit brought by a reversionary heir of the husband, that he was entitled to sue for a declaration of title within 12 years from date of the adverse possession; that as the widow refused to have anything to do with the property, and the reversioners had no right to possession till after the death of the widow, the proper course was to appoint a manager to collect assets of the estate, who should account for them to the Court; and the Court should hold them for the benefit of the reversionary heirs. Radha Mohun Dhar v. Ram Das Dey, 11th August 1869, III, B. L. R., 362, a. c. j., End of note I, page 296.
CORRIGENDA.

Page 5, last line in margin, for "S. D. A. P.," read "S. D. A. R."

24, line 12 of note from bottom, for "Gowindpershad" read "Gungapershad."

44, line 7 of note from bottom, for "Salarama," read "Balarama."

71, line 15 from bottom, for "Zajnavalkya," read "Yajnavalkya"

75, line 26 for "Minansa," read "Mimansa."

86, line 6 for "fifteenth," read "eighteenth."

132, line 19, of note, omit "v." between "Basoo" and "Camanah," and insert "v." after "Camanah."

133, line 5 of note from bottom, for "Ram Koer," read "Pram Koer."

150, line 48 add commas after "that," and "modern times."

150, line 47 of note from bottom, for "an elder sons" read "and elder sons."

151, line 13 of note from bottom, for "intelligent" read "intelligible."

207, line 7 from top, for "descrredit" read "discredit."

208, line 1 for "Limitations" read "Limitation."

211, line 14 of note from bottom, for "begotten" read "begotten."

238, line 6 of note from bottom, for "and" read "versus."

239, line 14 from top, after "Soorjeemoney Dossee," add "v."

240, line 13 of note 7 from bottom, for "above" read "whom."

ib. line 2 of note 9 for "Couor" read "Court."

ib. line 3 for "fet" read "for."

ib. line 4 for "sharr" read "share."

245, line 16 from top, for "Markly" read "Markby."

255, line 2 of foot note from bottom, for "Juggernath Tagore" read "Juggernath Tagore."
ADPTION:—Inheritance by.

According to Hindu Law, an adopted son succeeds, not only lineally but also collaterally, to the inheritance of his adoptive father's relations.

SUMBHOOCUNDER CHOWDRI, AND ROODERCHUNDER CHOWDRI.

Versus.

NARAINI DEBIA AND RANKISHORE.

Before the Lords of the Privy Council.

This was an appeal from the decision of the Sadr Dewani Adalat in a suit in which the Plaintiffs below sought to recover a fourth part of the revenue of the Zemindary of the Pergunnahs Mymensing and Zuffershoe; and their Lordships of the Privy Council after reviewing the proceedings of the lower courts, and disposing of the factum of adoption, thus proceeded to determine the question of law as to the right of an adopted son to succeed collaterally to the relations of his father.

Mr. Baron Parke:—It may be admitted that, in the answers given by the Pundits, there is not an agreement upon the question of law, whether the son by adoption can succeed collaterally to the relations of his father. There is a difference of opinion, but the weight of
the opinion is that he may so succeed. There are opinions cited by
the appellants themselves to the same effect, and the learned Counsel
has cited the *Daya Bhaga*, and there is another authority to the same
effect in Colebrooke's *Principles of Hindu Law*, page 177, and again in
Sutherland's *Synopsis*, page 219, where it is expressly laid down that
an adopted son, not only succeeds his adopted father, but also suc-
cedes collaterally, and there are other authorities to the same effect.
The *Mitakshara* is cited to the same effect.

Now, these are very strong authorities in favor of the proposi-
tion, that an adopted son, is to succeed lineally and collaterally,
and the reason pointed out, according to the Hindoo Law, is that he
becomes for all purposes the son of the father.

Now, coupling those authorities with the opinions given by the
Pundits in the course of the cause tending in the same direction, it
appears to their Lordships, unless some authorities are cited, to the
contrary, and the learned Advocates for the Appellants have neither
of them cited a single authority from the Hindoo Law of a contrary
tendency, the whole of their argument is founded upon this, that by
the course of the proceedings they have been prevented raising the
question of Hindoo Law. But no proposition is more clear than
that this court is bound to take notice of what the law is in that
country. We are bound to take notice of it, and decide it as well as
we can. We have not the advantage of the decree of the Court upon
the Hindoo Law, and we are not so sure we are right because this
decree has gone upon a different point; but it is upon a point that,
to some extent affirms the notion that their Lordships are about to
adopt, for the decree adopts the notion that a brother may succeed
to his brother collaterally. There may be a distinction between a
succession in the direct line, and a succession to collateral relations;
but the decision is a decision in support of the proposition of Hindoo
Law, which their Lordships now are about to recognize. Their Lord-
ships think, therefore, looking at these authorities and the weight
that is due to them, that an adopted son succeeds not lineally but
collaterally to the inheritance of his relations, and if so, these ap-
PELLANTS ARE NOT IN A CONDITION TO SUCCEED, BECAUSE THEY HAVE DISTINCTLY ADMITTED IN THEIR OWN PLEADINGS, AND BY THE ANSWERS OF THEIR OWN PLEADERS GIVEN TO THE COURT, THAT AN ADOPTED SON OF THE WHOLE BLOOD WAS IN EXISTENCE AT THE TIME OF THEIR SUIT BEING COMMENCED. IF AN ADOPTED SON OF THE WHOLE BLOOD IS IN THE SAME SITUATION AS THE NATURAL SON OF THE WHOLE BLOOD, THEN THE ONLY REMAINING QUESTION IS, WHETHER THE BROTHER OF THE WHOLE BLOOD SUCCEEDS IN PREFERENCE TO THE HALF BLOOD? UPON THAT POINT THERE IS NO DISPUTE, FOR THE AUTHORITIES ARE UNIFORM.

FOR THESE REASONS IT APPEARS TO THEIR LORDSHIPS THAT THE GROUND UPON WHICH THE COURTS HAVE PROCEEDED IS NOT A CORRECT GROUND, BECAUSE THEY HAVE PROCEEDED UPON A FACT WHICH THE APPELLANTS HAD NO MEANS OF LITIGATING, YET THEY ARE RIGHT UPON THE POINT OF LAW THAT THE APPELLANTS ARE NOT ENTITLED TO THE PROPERTY. THE DECREES OF THE COURT OF SUDDER DEWANNY ADAWLUT WILL THEREFORE BE AFFIRMED, BUT WITHOUT COSTS.

11.—LUKHI NATH ROY AND OMKAUNT ROY.
VERSUS
SHAMASOONDBEE.
BEFORE THE SADR DEWANI ADALAT BENGAL.

THE REAL QUESTION RAISED BEFORE US IN SPECIAL APPEAL IS WHETHER, ACCORDING TO THE LAW OF ADOPTION, PREVALENT IN BENGAL, AN ADOPTED SON SUCCEEDS COLLATERALLY AS WELL AS LINEALLY IN THE FAMILY OF HIS ADOPTED FATHER. MACNAGHTEN IN HIS ELEMENTS OF HINDOO LAW (VOL. I, PAGE 69,) USES THE FOLLOWING LANGUAGE:—THE ADOPTION (ACCORDING TO THE DATTAKA FORM) BEING ONCE COMPLETED, THE SON ADOPTED LOSES ALL CLAIM TO THE PROPERTY OF HIS NATURAL FAMILY, BUT HE IS ESTRANGED FROM HIS OWN FAMILY PARTIALLY ONLY. FOR THE PURPOSES OF MARRIAGE, MOURNING, &c., HE IS NOT CONSIDERED IN THE LIGHT OF A STRANGER, AND THE PROHIBITED DEGREES CONTINUE IN FULL FORCE AS IF HE HAD NEVER BEEN REMOVED. HIS OWN FAMILY HAVE NO CLAIM WHATEVER TO ANY PROPERTY TO WHICH HE MAY HAVE SUCCEEDED, AND IN THE EVENT OF A SON SO ADOPTED HAVING SUCCEEDED TO
the property of his adopting father, and leaving no issue, his own
father cannot legally claim to inherit from him, but the widow of his
adopting father will succeed to the property. He becomes
(with the exception above noticed) to all intents and purposes
a member of the family of his adopting father, and he suc-
ceeds to his property collaterally as well as lineally (Manu,
Chapter IX); but excepting the case of the peculiar adoption termed
Dwayamushayayana he is excluded from participating in his natural
father's property.” Again at page 78 of the same work, the learned
author observes:—“Another point which has been the subject of much
discussion is as to whether an adopted son by the Dattaka form
succeeds collaterally as well as lineally, but this may now be fairly
said to be at rest and decided in the affirmative. It is true that
Jimuta Vahana in the Daya bhaga has contended that the son adopted
in the Dattaka form cannot succeed to the property of his adopting
father's relations; but the doctrine, being in opposition to the text
of Manu, cannot be held entitled to any weight.”

In conformity with the doctrine laid down in the above text
book, this Court has on two several occasions answered the question
before the Court in the affirmative, on two cases coming up severally
from Mymenaing and Bajshahye, parts of the country in which the
Daya bhaga is current. In the first case, reported at page 709 of the
1st Volume of the Select Reports (Messrs. Colebrooke and Fombelle)
the former, a name of great weight in a question of Hindoo Law, gave
their authority to the doctrine, and in the second case, reported at
page 203 of the 6th Volume of the Select Reports, the Pundits of
this Court in their Vyavastha, held:—“that a valid adopted son must be
considered as a member of the gotra of his adopting father; and legally
entitled to the property of his adopting father's Sapindas. This opinion
is conformable to Manu, although the Court directed that our Vyavastha
should be delivered according to the law of Bengal; and of all the
authorities the Daya Bhaga is there most prevalent, and although it
is the opinion of Jimuta Vahana, quoting the text of Devala, and
adopting his order of enumeration, that the son affiliated in the
Dattaka form is not an heir of collateral relations (Sapindas, &c.);
nevertheless, as many Vyavasthas have been delivered in the Court,
establishing the son's collateral succession according to the law
promulgated by Manu, this opinion is delivered according to the same
law." In accordance with this Vyavastha the Court gave judgment
in favor of a son of an adopted son urging his right to succeed to
the property of kinsmen, Sapindas, of the family of his adopting grand-
father. It would seem therefore that in the particular form before us
the text of the Daya Bhaga has been declared by a writer of great
authority to be opposed to the general doctrine of Hindoo Law: and
being such it has been disregarded by this Court on two several
occasions. Such being the case we do not feel ourselves at liberty,
even if we desired so to do, to revert to the bare text of the Daya
Bhaga as a supreme authority, but, in accordance with the precedents
of the Court, answer the question before us in the affirmative. It
will be observed that the present question only refers to succession
to the property of Sapindas, agnates of the adopting father. With
the case of Bandus, or cognate relations, the question before us
has no concern. As thus the adopted son has a right to succeed,
there can be no question that, having succeeded, his daughter,
in Bengal is entitled to succeed him. With this view of the case we
dismiss the Special Appeal with costs.

III.—KISHEN NATH ROY.

Versus

HURRI GOBIND ROY AND OTHERS.

Before the Sadr Dewani Adalat Bengal.

It is averred by the Counsel for the special petitioner, that
Nursingh-deb Roy died in 1215, leaving a widow Tara-moonco who

12th January
1850. 8 D. A. P.
18.
continued in the enjoyment of his property till her death in 1228. Her daughter-in-law, Komul-moonoo, then succeeded, and after her death, as alleged by the plaintiffs, Hursoondee, widow of Gokool Chunder Boy, a full brother of Nursingh-deb Roy, adopted without permission a son named Bhoobunneswer, and in collusion with the defendant, special petitioner obtained possession of the property of Nursingh-deb: the five plaintiffs, who are the sons and grandsons of two half brothers of Nursingh-deb, sued to set aside the adoption and to obtain possession of the property left by Nursingh, and made the special appellant Kishen-Nauth Roy, a defendant in the suit.

His answer disclosed that his father, Kallee-Nauth Boy, had been adopted by Teloke Chunder Boy, another half brother of Nursingh-deb Roy, and as one of the family by adoption, he claimed a sixth of the property in litigation. The Lower Courts have given decrees for the plaintiffs, and rejected the (defendant's) special appellant's claim, on the ground that the son of an adopted son is not entitled to share with the other collateral heirs; and the point to be determined is, whether the heir of an adopted son can succeed collaterally as well as directly; and whether the Vyavastha of the Fundits of Dacca and 24 Pergunnah Courts, on which the present decision is based, is not erroneous. We think that, with reference to the decisions of this Court, reported at Volume VI of the Select Reports page 203, and Volume I, page 209, and the doctrine laid down in Macnaghten's Principles of Hindoo Law Volume I, page 78, and in Sutherland's translation of the Dattaka Chandrika, page 202, an adopted son is entitled to succeed collaterally, and the special appellant being the son, and representative of such adopted son, is entitled to succeed to the rights and interests of his father in the property, whatever they may be; and we, accordingly, reverse the decision of the Lower Court, and direct that the case be returned to the Principal Sadder Ameen, who, after determining what are the
rights of the Special appellant, will pass a decision in conformity with the provisions of Section 18, Regulation III of 1798.*

*The right of a son adopted according to the Dattaka form to succeed to the property of his adoptive father's collateral relatives may be said to be set at rest by the above decisions; and two still later decisions, one by the Sadr Dewani Adalat, (Hubbecher Rukman v. Roshbheri Bose, 2nd April 1860, S. D. A. page 411), and the other by the High Court of Calcutta, Taramohan Bhattacherjee v. Kripa Moyee Debia, 31st March 1868, V, Wyman's Rep. 251.) are to the same effect: but in a recent decision by the Chief Court of the Punjab, in a case in which this point was again raised, the learned judges considered it necessary to refer it to Local Custom, and in directing a remand for that purpose they observed:—"that the right of an " adopted son to succeed collaterally is a " point of Hindu Law on which there " has been much discussion, and al- " though the opinion given by Managh-" ten, page 73, in favor of the right of " a son adopted by the Dattaka form " seems to be better supported, authori-" ties are not wanting on the other side " also," Hureshai v. Bhawani Das, III F. B. page 33, Civil Judgments. The sect which formerly existed on the point arose from seven holy saints, such as Dewala, Narada and Harita, not including the Dattaka, or son given in adoption, among the first six classes of sons who were heirs to the father as well as to kinsmen; but the Dattaka Chandrika, a treatise of great authority in Bengal, attempts to reconcile the conflicting doctrines of the text writers, by referring to the distinction of the adopted son being endowed with good or bad qualities, and gives his own conclusion in favor of the doctrine which may be said to be now universally accepted, that the adopted son inherits collaterally as well as lineally, vide Kishen Kishore's edition (1866) page 169, paras. 23 and 24. The Mitakshara also referring to Menu's text expounds it as meaning that the first six sons among whom the Dattaka is ranked as one, inherit lineally as well as collaterally—vide, Chapter I, Section XI, para. 31, to the same effect is the Vyasastha given in the Vyasastha Durpana of Baboo Shana Churn Sircar, page 958, second edition, a work which displays great research and learning, and has attained considerable authority in Bengal. Macnaghten likewise writing in 1829, long before any of the above decisions were passed, pronounced the right of the adopted son to inherit collaterally, as beyond dispute; and that the contrary doctrine of Jumna Vahana in the Dayabhaga, being opposed to the text of Menu was not entitled to any weight, vide Principles of Hindu Law, page 81, Wilson's edition.

In the case of Gokul Chund, adopted son of Koonjbehari Lal v. Narain Das and others, it was held by the Agra Sadr Court that under the law and customs obtaining among the Surrougee sect of Hindoes, an adopted son had in all respects equal rights with a begotten son, and was therefore entitled to share collaterally in an ancestral property, Vol. I Dec. 8. D., N. W. P. for 1862, page 47, 21st January 1863. But an adoption in the Kritima form current in the Mithila country does not give collateral heirship, the relation of Kritima for the purposes of inheritance extending only to the contracting parties, Must. Shibo Kooree and others v. Joogun Singh and others, 9th July 1867, VIII Suth. W. B. 155.
I. Immediately on the adoption of a son by the widow, under due authority from her husband, the Estate to which she succeeded in default of male issue, becomes the property of the son adopted.

II.—But if the adoption was without the permission of her husband and was her sole act, the adopted son has no right to the property of his adoptive mother, until her death.

MUST. SOOLUKHNA, WIDOW OF SOONDERNARAIN.

Versus

RAMDOOLAL PANDAH AND OTHERS.

Before the Sadr Dewani Adalat Bengal.

This suit was brought by Govindram, father of the minor Shama-pershad, in the Zillah Court of Midnapore, on the 15th February 1805, against Soondernarain, and others, for the Zemindari right of the pergunahs Durodumna &c., 12 in number, on the ground that the Zemindari claimed was the right of the minor, grandson of Jadooram by the Hindu Law of succession. The defendant Soondernarain pleaded, that after the demise of Jynarain Rai, son of Kœarnarain Rai; and grandson of Jadooram Rai, the Zemindari having devolved to Ranes Sogunda, the 2nd wife of Kœarnarain, she under authority delegated from her husband, adopted him, Soondurnarian, in the year 1196, corresponding with 29th January 1796 A. D. executing at the same time to his father, an instrument termed Niyumputra; after which she continued in possession of the Zemindari till 1210 when shortly before her death, she made it over to the defendant. The Niyumputra alluded to, recited, that with permission of her husband, the Ranes Sogunda, had adopted defendant as a son, and performed the requisite ceremonies; that during her life he should be maintained and educated, and at her death should succeed to the Zemindari and other property; The Zillah Judge on 28th May 1806 pronounced the defendant's allegation as to his adoption false, and the Niyumputra a fabrication, and accordingly pronounced a decree in favor of plaintiff. The Provincial Court of Murshedabad affirmed this decree on the 13th April 1808, and an appeal was then preferred by defendant to the Sadr Dewani Adalat of Bengal, and the defendant having died shortly
after the institution of appeal, he was succeeded by his widow, as Appellant. After consideration of the proceedings held, and of objections urged against the decrees of the Zillah and Provincial Courts, the 'Udar Dewani Adulat directed (present J. H. Harrington,) that the Niyumputra set up by the Appellant, and the genealogical table of the family, should be given to their pandits for an exposition of the Hindu Law, on the points which appeared material in the case, as contained in the following questions:—1st:—If a widow with authority from her husband, adopts a son, is it usual or not for her to execute a document of the nature of the Niyumputra exhibited by Soondernarain? And if such document be executed by the widow, does it not preclude the right of the adopted son to succeed to the husband’s Zemindari during the life of the widow? 2nd:—If a widow adopts a son with the sanction of her husband, does the widow or the son, thenceforward, perform the obsequies, and other religious ceremonies, in the name of the husband and his ancestors? 3rd:—If a Zemindar die leaving a son, whose mother is dead, and a second wife, is it customary and legal, or not, to authorize the second wife to adopt a son, on account of probable disagreement between her and the son of the first wife, or on any other account, except in the event of the death of the son by the first wife. 4th Soondernarain was not adopted by Sogunda under authority from her husband; or if his adoption be not proved, or though established, be not of avail in law, who were the legal heirs at the demise of Ranee Sogunda to the Zemindari in dispute, possessed formerly by Raja Jadooram, then by his son Koonwurnarain, then by Jynarain son of Koonwurnarain, and after Jynarain’s death by Sogunda, his step mother, there existing at Sogunda’s demise Bishenperea, and Hurreeperea, daughters of Raja Jadooram, Shampershad, Anundlal, and Lukhinarain, sons of the said daughters of Jadooram; and there now existing also Moodoo Soodun, and Gungana rain, two other sons of the daughter of Jadooram, who have been born since the demise of Sogunda. The answers returned to these questions by the Pundits were as follows; 1st:—When, a woman, after the death of her husband, adopts a son under authority received from him for that purpose, it is not lawful or customary to execute an instru-
ment of the purport of the Nyumputra, and though such an instrument be executed, the adopted son, during the life of the woman adopting him, becomes the proprietor of the estate left by the husband and his deceased son; the widow is not entitled to possess the estate by virtue of such a document. 2nd:—When a woman under authority from her deceased husband adopts a son, thenceforward the ceremonies mentioned must be performed by the adopted son in whom the right rests; not by the widow. 3rd:—If a Zemindar have two wives, and by the first, who is deceased, a son eleven years of age, and no son by the second, in such case it is not lawful for the Zemindar, when ill, a few days before his death, on the representation of his second wife, that there would not be cordiality between her and the son of the first wife, to give authority to his second wife to adopt a son in case of disagreement with the said son. But provisional authority to adopt in the event of the death of such a son would be lawful. And if a Zemindar having a son of his body, with the consent of such son, or from a wish to have more sons, (for the preformance of religious acts) give authority to his wife to adopt a son, such authority, according to the Shaster, and usage of the country, is lawful.

4th. If Rance Segundo adopted Soondernarain without authority from her husband; or his adoption be not valid in law; the Zemindary in dispute, formerly held by Raya Jadooram, and his son Koonwurnarain, and by the son of the latter Jynarain, and after Jynarain's death by Segundo, his stepmother, the second wife of Koonwurnarain legally devolves after the death of Segundo, to Shamapershad, Annundlal, Nundlal, and Lukhinarain, sons of the daughters of Jadooram, who were then alive; and to Gunganarain and Muddoosoodun, two other sons of the daughters of Jadooram, who are since born, the whole six heirs being now alive, in equal proportions.

The Pundits were further questioned by the Court, whether supposing one or more sons, to be thereafter born to Hursepereea
the surviving daughter of Jadoorain, they would be entitled to any share of the inheritance? And it was declared in answer that they would be entitled to share with the other daughter's sons of Jadoorain who are now living.

The principal authorities cited by the Pundits in their Vyavastha were the following texts:

In support of answer 1st.

Menu.—"The true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin, and one rejected (by his parents) are the six heirs and kinsmen."

Devata.—"All these adopted sons are pronounced heirs of a man who has no son by himself begotten."

In support of answer 2nd.

Marichi.—"A son shall perform the funeral obsequies and other rights of his deceased father."

Sanoha and Vrihaspati.—"A son should present the funeral cake and offer libations of water to his deceased father; if there be no son left the widow (of the deceased owner), and in her default, his uterine brothers, perform his obsequies."

In support of answer 3rd.

Vrihaspati.—"A son should be anxiously adopted by one destitute of male issue, for the sake of the funeral cake and libations of water, solemn rites, and for the celebrity of his home."

Atri.—"A subsidiary son should even be adopted by one who has no male issue for the sake &c., ut Supra.

Juggunauth's Digest.—"Sridhara Swami in his gloss on the following verse of the Bhagvata:—(To Reechi, O King, with the consent of Setarupa, he gave Acuti, imposing on her the duty of an appointed daughter although she had brothers living,"

) quotes a text of law on the benefit arising from a multitude of sons to
explain the motive for desiring many children, when a subsidiary son is adopted even though a principal one be living, "many sons are to be desired, that some one of them may travel to Gaya." The adoption of a son given, although a son of the body be living, being thus valid he shall have a third part as his share. Dattaka Mimansa. Since Viswamitra during the lifetime of his legitimate son adopted Devarata, whose filiation he rendered complete by obtaining the consent of that son, it must be allowed that a man having already a son living, is nevertheless competent to adopt another.

In support of answer 4.

Jimuta Vahana.—"The right of succession (to the estate of a deceased Hindoo) of the offspring of the grandfather and of the great grandfather, including the daughter's son, must be understood with reference to the order of proximity observed in offering the funeral cake. For a daughter's son like a son's son is without distinction the means of the preservation (of a deceased owner) in the next world."

Juggernaut's Digest.—"In the Daya Bhaqa, the following text and gloss occur:—In default of a son a grandson (a great grand-son, a widow, and a daughter) the daughter's son shall obtain the inheritance. For a daughter's son, equally with a son's son, preserves the deceased owner in the next world; there is consequently not any distinction between them. And a father's daughter's son also is the means of the preservation of the deceased owner (equally with his own daughter's son) since he (the father's daughter's son) presents an oblation (namely to his maternal grand father) in which the deceased owner participates.

Jimuta Vahana—The succession of the grand father's great grand father's lineal descendants, including the daughter's son, must be understood in a similar manner, according to the proximity of the funeral offering; since the reason stated in the text for even the son of a daughter delivers him in the next world, like the son of a son is equally applicable: and his (i.e., the deceased owner's) father' or
grandfather's daughter's son, like his own daughter's son, transports his manes over the Abyss, by offering oblations of which he may partake.

Juggennauth's Digest.—In the Daya Bhaga, it is thus written:—
"if one die leaving neither son nor grandson the daughter's son shall inherit the estate; for by consent of all the son's son and the daughter's son are alike in respect of the celebration of obsequies, since the reason, &c., ut supra.

After considering the answers given by the Pundits, the Court (present J. H. Harington) observed, that the decision, as far as related to the appellant, depended on proof of the fact whether Ranee Sogunda actually adopted Soondernarain or not, with sufficient authority delegated from Koonwurnarain, her husband. After reviewing the evidence, the Court considered it insufficient to establish the fact of authority having been delegated to Sogunda by her husband for the adoption of Soondernarain, and consequently, no title of succession to the disputed estate was deemed to have vested in him.

The decrees of the Zillah and Provincial Courts as far as they rejected the alleged adoption, and title of Soondernarain, were affirmed, but in accordance with the exposition of the Hindoo Law, delivered by the Pundits, the zemindary in dispute was adjudged with reservation of the eventual birth of other sons to Hurreperea, to the six daughter's sons of Jadooram above specified, as being the heirs at law to Jynarain who held the estate before Sogunda, with an account of mesne profits.

II.—LUTCHMUN SAHOO (PLAINTIFF) APPELLANT.

Versus

JUBONA BYE (DEFENDANT) RESPONDENT.

Before the High Court of Bengal.

Present:—H. V. Bayley and Shumoonath, J. J.

Plaintiff sues, alleging he is the adopted son of the Defendant. He states in his plaint that the Defendant herself adopted him of her own act, and thus his adoption was not under permission of her

15th March 1863.

Hay's Reports for 1863, page 410.
husband. The object of the suit is to get possession of the property of the Defendant, the plaintiff's alleged adoptive mother.

The Defendant denies adoption.

The Lower Appellate Court does not find clearly the nature of adoption, but does find that plaintiff's name was registered in lieu of defendant, that the defendant allowed plaintiff to act for her; and to represent her; doing so, however, in ignorance of the language in which the necessary deed was written. The Plaintiff's case was therefore, dismissed by the Lower Appellate Court. The plaintiff now appeals specially, relying on the admissions, that he was the representative of the Defendant, and that his name stood in lieu of her in the mutation register.

But under the facts of this case, these pleas cannot avail the Special Appellant, as a son adopted by Defendant of her own act (not ?* under permission of the father. Plaintiff could by law have no right to defendant's property until after her death.

*Note.—The word "not" is omitted in the published report of this case, but it is evidently required, for, as shown in the first paragraph of the Judgment, the Plaintiff's contention was that his adoption was not under permission of his adoptive Mother's husband; and moreover the preceding case shows that if the adoption had been effected with the husband's permission the adopted son would have been entitled to immediate possession. He would, in fact, have at once succeeded as heir to the husband, (Gupes Ram v. Buldeoahai and others, 23rd August 1866, 1st Punjab Record 130), whereas under an unauthorised adoption he could merely claim to be constituted heir to his adoptive mother, and to succeed to her estate—see the case of Sreenarain Rai v. Bhyajka reported post. page 15.

2. In Rane Kishen Munee v. Rajah Oodwunt Singh and another, 24th June 1823, the Sadr Court of Bengal held, that a son adopted by a widow under permission of her husband, has the rights of a posthumous son; so that a sale made by her, to his prejudice, of her late husband's property, unless under circumstances of inevitable necessity, will not be valid, III Select Reports, 304 new edition.

3. The Bywastba of the Pundits in the case of Must. Solukhna, reported in the text, in answer to the 3rd question regarding the validity of an adoption in the lifetime of a son born, was based on the now exploded doctrine, that "many sons are to be desired, that some one of them may travel to Gaya," see on this subject the leading case of Rungama v. Aitcham and others, VI M. I. A., page 1, reported post.
According to the law and usage of Mithila, a person adopted by the husband does not thereby become the adopted son of the wife, unless she joined in the adoption, nor does he succeed to her peculiar property, and vice versa. If the husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both.

SREENARAIN RAI AND WIDOW OF LULLUTNARAIN RAJ.

Versus.

BHYA JHA.

The Plaintiff Bhya Jha claimed as the adopted son, and donee of the late Rani Indrawatti, setting forth that on the 1st Aughun 1211, (15th November 1803), the Rani, some hours before her death, had, in the presence of her relations and servants, adopted him as her son and made him Malik (proprietor) of all her property, moveable and immovable; and that he had accordingly performed the funeral ceremonies of the deceased as his mother. The Defendants, who were the sixth in the descent from the ancestor Rajah Inndernarain, the late husband of the deceased Rani, denied the fact of the Plaintiff's adoption by the Rani, as well as her authority, under the Shaster, to give away any of the property in contest. The Provincial Court did not go into the question of adoption, but decided the case in favor of Plaintiff on a deed of compromise executed between the parties before action brought, whereby the property under litigation had been agreed to be equally divided. In appeal to the Suddur Court, the presiding Judges (Harington and Stuart) considered it necessary to determine the question of adoption, and for the purpose of ascertaining the Hindu law applicable to the case, referred the proceedings, with the following questions to the Pundits of the Court; 1st—If as (alleged by the respondent) Rani Innderawutti, widow of Rajah Inndernarain some years after the death of her husband, and some hours before her own death, regularly adopted the respondent, will the respondent as adopted son, be entitled to take any lands or other property left by the Rajah Inndernarain; and the property, which after his death may, during the Rani's lifetime have accrued from that estate; or will he be entitled only to take the Stridhun, of the Rani? 2nd

27th July 1812,
II Select Reports, S. D. C., p. 29.
If the Rani, with or without authority from Rajah Indernarain made the respondent adopted son to herself and to her husband according to the Shastres current in Mithila, would the lands and other property which has since accrued from the Rajah's estate go to the respondent? The following answers were returned by the Pundits to the above reference. 1st.—If a man appoint another his adopted son, that person, so adopted, stands in the relation to him of a son, and offers up his funeral oblations and is heir to the estate but the person, so appointed, does not become the adopted son of the adopter's wife, nor does he offer funeral oblations to her, nor succeed to her property. If a woman appoint an adopted son, he stands in the relation to her of a son, offers to her funeral oblations and is heir to her estate; but he does not become the adopted son of her husband nor offer to him funeral oblations, nor succeed to his property. If a husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If the husband appoint one person, and the wife another, adopted son, they stand in the relation of sons to both of them respectively, and do not perform the ceremony of offering funeral oblation, nor succeed to the estate of husband and wife jointly: such is the usage of Mithila. If, therefore Rani Indrawutti, several years after the death of Rajah Indernarain, and some hours before her own death, adopted Bhya Jha, then the respondent stands in the relation of son to the Rani, and offers up her funeral oblations; but he is not adopted son or presenter of funeral oblations to the Rajah: therefore the respondent would be entitled to take the Rani's Stridhun; but not being presenter of oblations to the Rajah, he is not entitled to the estate left by him, nor to any property which may have accrued from that estate during the Rani's lifetime, for this property is distinct from the Stridhun, or peculiar property of a woman, specified in the Shaster, and is included in the estate of the Rajah. 2nd.—If Rani Indrawutti, with or without the permission of her husband, made Bhya Jha adopted son, on the part of herself and of her husband, still the respondent is not the adopted son of Rajah Indernarain. It is not stated in any law tract, nor
is it according to the usage of Mithila, that a person adopted by a wife, with or without the permission of her husband, becomes the adopted son of her husband. The respondent not being the presenter of oblations to the Rajah nor one of his heirs he cannot take the lands or other property left by him, nor property which may have accrued from the estate of the Rajah's; such property being distinct from the Stridhun of the Rance, and forming part of the Rajah's estate. On a further reference to the Pundits of the Court, with the view of ascertaining how far the respondent, being the son of the full brother of the Rance's mother, might be entitled (though not adopted) to claim the succession to her estate, in right of inheritance, the following Vyavasha was delivered:—"Supposing that the Rance did not appoint Bhya Jha her adopted son, he would not inherit her Stridhun, the son of the mother's brother not being one of the legal heirs to her peculiar property. If the Rance left a brother, sister, sister's son, husband's sister's son, husband's brother's son, brother's son or son in law, any such person is entitled to succeed to the Stridhun. If she left none of these, Sreenarain and Lullutnarain the nearest sapindas of her husband, are entitled to her peculiar property, as well as to the Rajah's estate." A further reference was made to the Pundits of the Court, for the purpose of ascertaining, whether (in this event of the adoption of Bhya Jha not being established), Manik Jha, the son of the half sister of Rance Inderwuttee, who had given evidence in favour of the respondent's adoption, would be entitled to succeed to the Stridhun of the Rance? to which interrogatory the following reply was delivered:—"As the text of Vrihaspati (ordaining the succession of the son of a woman's sister to her peculiar estate), does not generally imply to the son of a woman's half sister, Manik Jha is not entitled to succeed to the Rance's Stridhun, according to the literal construction of the term sister, but the authorities current in Mithila warrant the construction, that the term sister includes also the half sister, and if the usage of Mithila be in unison with that construction, it is fit that Manik Jha should inherit the Stridhun of the Rance." The Court having referred
to the Hindoo Law officers of the Patna Provincial, and Tirhoot Zillah Courts, the question above stated, respecting the effect of an adoption by the Rane of Bhyu Jha, the answer of the Pundits of both Courts coincided with the expositions of the law delivered by the Pundits of the Sudder Dewani Adalat.

I. and II.—An adopted son has all the rights and privileges of a son born, and succeeds to the Stridhun, i.e., property given at the time of nuptials of his adoptive mother, in the absence of daughters.

(An adopted son of one wife, would succeed to the Stridhun of a co-wife. A woman can dispose of her Stridhun at her pleasure, but she has only a life interest in property inherited from her husband and father.)

III.—But property which has descended to the adoptive mother from her father, reverts on her death, to her father's heirs.

1.—TINCOUREE CHATTERJEE (PLAINTIFF) APPELLANT.

Versus

DINO-NATH BANNERJEE AND OTHERS, RESPONDENTS.

Before the High Court of Bengal.

Present: Loch and Seton Karr J. J.

This appeal was decided in favor of the appellant on the 7th April 1864. An application for review was made by the Defendants; first, as regards the adoption of the Plaintiff by Nubo-moonjuri, his adoptive mother, and secondly, in regard to the property which formed the subject of litigation, whether Nubo-moonjuri had anything beyond an estate for life. On 15th March 1865, it was held that the property became the absolute property of Nubo-moonjuri given to her by her father during her marriage, and as such her Stridhun. Two other points then arose, on which the review was admitted:—1st whether an adopted son can succeed to the property of his adoptive mother. 2nd:—Whether the adoptive mother did make a will.
in favor of the Plaintiff, her adopted son, and whether she was competent to make such a will.

On the first point, we think there is no doubt that an adopted son has all the rights and privileges of a son born. He is the son of the father and of the mother, and succeeds to the paternal property, and also to the Stridhun of his adoptive mother in the absence of daughters as a son born would do. In support of his argument, the pleader for the Plaintiff, quoted the texts noted in the margin shewing the status of an adopted son, and urged that he had in all respects equal rights with the son born. Against this argument, the learned Counsel quoted the case reported at page 128, Select Reports, Volume III, Gunga Mya, appellant, in which it was ruled that a son adopted by a woman, on whom her father's estate had devolved, would not be entitled to such estate on his adopting mother's death, but such estate would go to her father's heirs. We are not now disposed to differ from, or call in question the correctness of that opinion, though in fact it was a mere obiter, for the question of the status of an adopted son was not then before the Court; but it arose from a supposed case put by the second Judge. We think it inapplicable to the present case. The question put to the Pundit related to property which had descended to a woman from her father, not as Stridhun, but in the ordinary course of inheritance, and it may well be, as explained to us by Baboo Kishen Kishore, that the reason why the adopted son is excluded from the succession in such cases, is that he is adopted into his adoptive father's family and not into his mother's family and cannot perform the Shrad of his maternal grand father though he can perform that of his adoptive mother? But with regard to Stridhun, which the Court have held the property in dispute in this case to be, the adopted son in the absence of a will, would succeed to it after the daughters as a son born, and such being the case, we think it immaterial whether a will was executed or not in favor of the Plaintiff by Nubo-moonjuvi.
It is scarcely necessary for us to go into the question whether a woman can or cannot execute a will, though it does arise in this case: we think that a woman cannot execute a will regarding any property she inherits in the usual course from her husband or her father, for in this case she has but a life interest, but it is otherwise with Stridhun which she is at liberty to dispose of at her pleasure, either by gift, or will, or sale, except in the case of immovable property given to her by her husband. It has also been asked by the learned Counsel for the Respondents, whether a son adopted by one wife, would be looked upon as the son of a co-wife and succeed to her property. Though this question does not arise we may point out that the Hindoo law of inheritance provides even for this case, and mentions the son of a contemporary wife among the heirs of a woman entitled to succeed to her Stridhun.

In the case before us, as the Court has found that the adoption is valid, and that the property in dispute belonged to Nubo-Moonjuri as Stridhun, we now hold that plaintiff, as her adopted son, is entitled to succeed to that property in the absence of daughters, whether there be or be not a will in his favor. It is, therefore, unnecessary for us to go into the genuineness of the will, and we affirm the former decision of this Court and charge the Respondent with all costs.

II.—MAHARAJAH JUGGURNATH SAHADE AND OTHERS, (PLAINTIFFS).

Versus

MUSST. MUKHUN KOONWUR AND OTHERS, (DEFENDANTS).

Before the High Court of Bengal.

Present: Loch and Seton-Karr J. J.

This was a suit on the part of Rajah Juggurnath Sahae, to resume a Jagheer held by Agni Deb Narain, the adopted son of Beharee Lall the former Jagheerdar. The suit was before this Court in 1863, and on the 10th of July of that year, it was remanded to enable the Lower Court to come to a distinct finding on the following points: 1st.—Whether the plaintiff can resume a Jagheer on the death of
Jahgeerdar without direct heirs, and bar the right of an adopted son to succeed. 2nd.—Was the defendant adopted by Beharee Lall, and then duly recognized as grantee by the Maha-raja; and was a confirmatory sunnud granted to him? The Lower Court found that from a decision of the Agent to the Governor General dated 12th Poos 1234, the plaintiff was at liberty to resume grants made by himself or his ancestors upon the failure of heirs direct of the original Jahgeerdar. The Judge found, therefore, that adoption was no bar to resumption; but he held that resumption was barred in this case by a confirmatory sunnud granted by the Rajah in favor of the Defendants on 16th Assu, 1263 Sumbat, and he dismissed the suit.

The plaintiff has appealed, repudiating the sunnud as a forgery. On the other hand we were asked to express an opinion whether an adopted son has not all the rights of a son born. We think that under the Hindoo Law the adopted son has the same right as the son born, and if this Jagheer were strictly speaking hereditary, the adopted son unless prevented by local or other custom, might succeed without any confirmation from the Rajah. But in the present case, the defendant has rested his right upon a confirmatory sunnud from the Rajah. This sunnud has not been proved. No witnesses have attested it, and it is evidently not executed in the usual formal and official manner that other deeds of a similar character are. We therefore reject the sunnud.

It is then urged that an adopted son is entitled to succeed, sunnud or no sunnud; and that the Plaintiff has given no proof that he had authority to resume. The defendant, however, in this case rested his claim on the confirmatory sunnud which he has failed to establish; and the fact, even if true, that the Rajah has received rent from the defendant, will not deprive the Rajah of the right to resume a right declared by the Governor General's Agent to exist in him. Under this view of the case we reverse the order of the lower court, and decree the appeal with costs.
17th December 1821, III, "Select Reports" 3 D. A. Page 170.

GUNGA MYA.
VERSUS.
KISHEN KISHORE CHODRI.

This was an appeal from Dacca Provincial Court of appeal dismissing the Plaintiff's claim to one and half anna share of the Zemindars of Sheerpore, Zillah Mymen Singh, the hereditary property of the Plaintiff's father; and the case coming first to a hearing before the Second Judge (C. Smith) he deemed it necessary to put the following question to the Hindu law officers:

A person named Sheonath, an inhabitant of Bengal, and proprietor of half an ancestral landed estate, died in the year 1204 B.S., leaving a pregnant widow by name Bhugwuttee, and an uterine brother named Govindpurshad; in the same year his widow brought forth a daughter which was named Gunga Mya. The widow died in 1207 B. S., Gunga Mya, in the year 1217 B. S. was married to a person called Ramkeshub Dutt. Govindpurshad, the original proprietor's brother died the year 1218 B. S., leaving Kishen Kishore a son and Daya Mya a daughter. In the year 1226 B. S., Ramkeshub Dutt, the husband of Gunga Mya died childless. Under these circumstances, it is required to be stated, whether, on the death of the original proprietor, his widow Bhugwuttee, or his brother Govindpurshad, was entitled to inherit his estate? If the widow was the proper heir, whether Govindpurshad or her daughter Gunga Mya was entitled to inherit the estate on her death? If the daughter was the proper heir, and if she by consent of her husband adopted a son, whether such adopted son was entitled to inherit the estate on her death; and if he was not, who was the proper heir on whom the estate should devolve after the death of Gunga Mya? To the above question, a reply was submitted to the following effect:—On the death of Sheonath his property belonged of right, to his widow Bhugwuttee and not to his brother Govindpurshad, for the estate of him who dies leaving no other heir, down to a great grand son, devolves by the law of inheritance on his widow. On the death of Bhugwuttee...
the estate which she had inherited from her husband, should devolve
on her daughter, who was unmarried at the time of her husband's
death, and not on the brother of Sheonath, for by the law of in-
heritance, of the three descriptions of daughters, that is the unmarried
daughter, the married daughter whose husband is living and of
whom there is a probability of a son being born, and the daughter who
has borne a son, the first mentioned has the best title to the succes-
sion in default of other preferable heirs; but the son adopted by
Gunga Mya, by the consent of her husband, has no title to the
estate to which she had succeeded, because, according to the Daya
Bhaga, an adopted son has no legal claim to the property of a Bandhu
or cognate, and according to the interpretation of the text of Menu,
which admits adopted sons to the right of succession collaterally, the
meaning is succession to the property of persons belonging to the
same family as the adopting father, as fully appears from the
Munwartha Mooktavalee compiled by Culluca Bhatta and other
authorities. On the death of Gunga Mya, therefore, the estate left
by her father, to which she had succeeded on the death of her
mother, and her right to which was limited by a life interest, should
devolve on Kishen Kishore, the brother's son of her husband, be-
cause when an estate devolves on a childless widow, who is held to be
half the body of her husband, it reverts at her death to the heirs
of her husband.

So an estate which had devolved on a daughter, who has a
weeker claim, should, a fortiori, revert to the heirs of her father—
Authority:—The text of Yajunyawaleya, cited in the Daya Bhaga
and other law tracts.

"A wife, daughters, both parents, brothers, their sons, kinsmen
spring from the same original stock; distant kindred, a pupil and a fellow
student in theology; on failure of the first of these the next in order
shares the estate of him who has gone to Heaven leaving no male issue."

On the 31st of October 1821, after perusing the above opinion
the Second Judge decided as follows:—"From the opinion of the
pundits, it is established that the appellant is the lawful heir on the death of her mother, and that Kishen Kishore, has no claim to the succession; but that opinion goes on to state that the appellant has only a life interest, and that on her death the estate should revert to the son of her father's brother. It is therefore proper that the decree of the Court below should be annulled, and that a one-and-half anna share of Pergunnah Sheerpore should be awarded to the appellant, to be held by her on the restricted tenure described in the Vyavastha. But if the appellant should hereafter, in conformity to the permission granted to her by her husband, adopt a son, such adopted son (if he think that the doctrine laid down in the opinion above cited is unjust) will be at liberty, on the death of the Appellant, to sue her husband's brother's son or his heirs for the recovery of the share to which he may consider himself entitled.* The cause came next to a hearing before the Third and Officiating Judges, (S. T. Goad and W. Dorin,) who, while recording their sentiments in unison with that of the Second Judge, as regards appellant's right to the one-and-half anna share of the estate left by her father, did not consider it proper in the present decree to make provision for more than the matter in dispute.*

* The point submitted to the Pundits in the latter of the above cases, as to whether property which had devolved on the adoptive mother from her father, would on her death go to her adopted son, or to her father's heirs, did not arise in the case then before the Court, and the answer of the Pundits cannot therefore have the weight which it would be entitled to, if the question had been directly at issue. It must in fact, be regarded as an obiter dictum, but notwithstanding this it is entitled to considerable weight as an exposition of the law by Hindu law officers, given under the sanction and at the express desire of one of the Judges of the Court of Sadr Dewani.—It is moreover quoted as a decisive authority by Machnaghten, (page 82, Principles of Hindu Law), Morley, (Digest, page 368, Vol. I), Shana Churn Sircar (Vyavastha Durpana, page 970, 2nd Edition), and Kishen Kishore Ghose, (Law of Adoption, page 214); and it may be, as is well pointed out by Baboo Kishen Kishore Ghose, in the case of Tincourie Chatterjee reported in the text, that the adopted son is adopted into his adoptive father's family, and not into his mother's family, and cannot perform the Shrad of his maternal grand father, though he can perform that of his adoptive mother. But, on the other hand, it has been held, that the relatives of an adoptive mother, inherit the property of her adopted son in default of any heirs of the adoptive father, Gowindpershad's case post, page ; and it does seem somewhat difficult to reconcile this ruling with the dictum of the Pundits in Gunga Mya's case, which would exclude an adopted son from the list of heirs of his adoptive mother's property. Moreover on the principle recognised in more than one case, that an adopted son has all the rights and privileges of a son born, it would certainly appear that he was also entitled
to the same interest as a legitimate son, in property acquired by inheritance
by the adopting father, but Gunga Mga's case has never been distinctly
over-ruled, and, as shown above, it is
supported by several eminent writers
on Hindu Law, and is recognised as the
prevailing doctrine in the
Morun Mee De-
beah and others Versus Bejoy Kishto
Gossame and others. Suth: F. B. Rul-
ings, page 121, see post, page 31.

2. It is true as remarked by the late
Mr. Justice Shomboonath Pundit, in the
last mentioned case, that in some respects
an adopted son is treated as inferior to
a son of the body, thus for instance
if after the adoption of a son, a son of the
body be born to the adopting father,
the adopted son obtains less than he
would have got if he also had been a son
of the body, see post; but there can
be no doubt that except where the Hindu
Law draws such special distinctions be-
tween an adopted son and a son of the
body, as just mentioned, both these
classes of sons have co-equal rights and
privileges.—See the case of Tincouree Chatterjee and Juggunnath Sahae, re-
ported in the text. Thus it has been
held, that even in the case of a Hindu,
dying in his father's lifetime without
issue, but leaving his widow authorised
to adopt a son; if such adoption be made
by the widow with the knowledge and
consent of her deceased husband's father
at any time before he shall have made
any other legal disposition of the pro-
PERTY, or a son shall have been born
to his daughter in wedlock, no such sub-
sequent disposition or birth shall inval-
idate the claim of the son so adopted to
the inheritance. Indeed the Pundits who
were consulted gave it as their opinion,
"that even if the grandfather, previously
to the adoption, had executed a deed
of gift assigning his property to his son in
law, yet the adopted son had acquired a
prior title to the property, the permis-
sion (which the deceased son had left
with his widow to adopt a son) being
considered in the light of her pregnancy,
in other words, the boy ultimately
adopted being entitled to all the rights of
a posthumous son," and they cited as
their authority for this opinion, the text
of Manu wherein it is declared that "even
they who are born, and yet unborn, and
they who exist in the womb, require
funds for subsistence; the deprivation
of the means of subsistence is reprehend-
ed," Ramkisien Surkhayi v. Must. Sri
Mates Dibia, 19th June 1824, III
Select Reports, page 489 new edition.

3. The same question, as to whether
an adopted son would succeed to his
paternal grand-father's estate, was much
discussed in the somewhat earlier case of
Gour Bullub Versus Juggunnath Pranad
Mitter, and others, 24th March 1824; and
out of 51 Vyasaasthaa which were sub-
mitted by the Pundits of the Civil Courts
of 45 Zillahs, and of the Provincial
Courts of Benares, Bareilly, Calcutta,
Moorshedabad, Patna, and Dacca, 46
declared that he was entitled to succeed,
on the authority principally of the text
of Manu, and the commentary of Kalluka
Bhatta; and the remaining 5, on the
authority of the text of Denala, as quoted
in the Dayabaga and other works, that
he was not. The Court decreed in the
affirmative, and this decision has since
been always accepted as based on a right
interpretation of the texts of Hindu
Law, and is believed to be also in accord-
ance with the custom of the country
generally.

4. As regards inability to disinherit
an adopted son on the ground of mis-
conduct, see Darer, v. Moles Nulhoo 6th
October 1813, 1. Borr. 75; and Ram Sum
Doss, v. Husst. Prankoer, 22nd May
1865 Agra Sadr Dewani, Select Reports,
page 293.

5. The case of Tincouree, Appellant,
is a direct and satisfactory authority,
with regard to an adopted son's right of
inheritance to that class of his mother's
Stridhum which was received by her at
the time of her nuptials; but the author
of theVyasaastha Darpana points out
that in the case of any other description
of Stridhum, the adopted son would suc-
cceed together with a daughter having a
son or capable of having a son, and not
in default of all daughters, as decided
in the case given in the text. Vyasaastha
Darpana, page 926, foot note.—2nd Ed :

The decision in Tincourie's case is also
important as ruling, that except in the
case of immovable property given to the
mother by her husband; she is at liberty
to dispose of her Stridhum, either by
gift, or sale, at her pleasure: on this sub-
ject see post, title Stridhum.
The relatives of the adoptive mother inherit the property of her adopted son, just as they would have succeeded to a natural born son.

GUNGA PROSAUD RAI.

Versus.

BRIJESSUREE CHOWDRAIN AND BUNWAREE LALL RAI.

Before the Suddur Dewani Adalat Bengal.


The Plaintiff, calling himself the next male heir to Goursoondree Rai, deceased, Zemindar of Paras, sought by this action to secure possession of the Zemindaree on the ground that Brijessuree the widow in possession, had adopted Bunwaree Lall without any permission, and was doing other acts prejudicial to his right as next heir to the property. The defence denies that Bunwaree's adoption is without permission, but even if it be so, Bunwaree Lall denies any right in the Plaintiff as heir of Goursoondree. The preferable heir (who also intervenes) was alleged to be Kistobeharee Rai, son of the deceased Goursoondree's maternal uncle. The Plaintiff replied that Kistobeharee could not be the heir of Goursoondree (who was himself an adopted son), first, because Kistobeharee's father and the adopting mother of Goursoondree, were not own brother and sister, but by different wives; second, because an adopted son could not be succeeded by the maternal relatives of the adopting family.

The Judge states, that "the section X proceeding embraced the several points at issue, but in order to avoid the calling of a great number of witnesses, whose evidence might not be required, it was understood that, in the first place the question arising out of Kistobeharee's claim should be settled by reference to the Hindoo Law Officer, to whom accordingly the question was put, whether the Plaintiff could represent the deceased Goursoondree in preference to Kistobeharee in his lifetime, and the question was worded so as to meet the fact of his being of the whole or half blood." The Pundit
declares that, "in either event, the Plaintiff could not represent Goursoondree in preference to Kistobharsee, who is undoubtedly the next heir."

As the ruling of the Pundit was disputed by the Plaintiff's Pleader on the precedent afforded in the case of Gunga Mya, Select Reports, Vol. III. page 128, the Judge heard arguments on both sides in conjunction with the principal Sudder Ameen, who he describes as a Brahmin well versed in the Hindoo religion, as well as a Judicial officer of great experience, and concurring in opinion with the principal Sudder Ameen, that no new Vyawustha was required, decided the suit by dismissing the plaintiff's claim, on the ground that he was not entitled to sue as the heir of Goursoondree. It was intimated to the court that Plaintiff's appeal involved no question of fact, and was preferred only on the point of Hindoo Law involved in the lower court's Judgment. The case was therefore called up and heard under Section XII, Act XV, of 1853.

It was argued for the appellant, that Kishensoondree adopted Goursoondree, and died leaving as heir this adopted son; that, Hemluta was the wife of Kishensoondree, and, consequently, the adopting mother of Goursoondree; now that Goursoondree is dead, his widow Brijessuree has without permission, adopted a son, Bunwaree Lall; and that it has been held by the Judge on the Pundit's Vyawustha that, even if Bunwaree should not be the legal heir in his own right, the Plaintiff, who represents the fourth generation from the common ancestor of the family, cannot succeed; as, failing the heirs of Goursoondree, the property left by him would, on the death of the widow, go to the relations of Goursoondree's adoptive mother, Hemluta, now represented by Kistobharsee, the son of Hemluta's brother. Appellant's Pleader admits that the line of successive heirs demarcated would be followed if Goursoondree had been the natural born son of Kishensoondree, but he denies the right of the maternal relations to succeed in the case of an adopted son. He argues that adoption is the act of the man, and
can be done without marriage, but can never be done by the woman without the express permission of her husband. The Pledger refers to the case of Gunga Mya, page, 128, Volume III of the Select Reports, and page 187, Volume II of Macnaghten's Hindoo Law. The Vyavustha delivered in that case was to the effect that, according to Hindoo Law, a son, adopted with the permission of her husband, by a woman on whom her father's estate had devolved, will not be entitled to such estate on his adoptive mother's death; but such estate will go to her father's brother's son in default of nearer heirs. The reason why the adopted son would have no title to the estate to which the adopting mother had succeeded, is represented to be, because according to the Dayabhaga, an adopted son has no legal claim to the property of a Bandhu, or cognate, and, according to the interpretation of the text of Menu, which admits adopted sons to the right of succession collaterally the meaning is, succession to the property of her sons belonging to the same family as the adopted father, as fully appears from Manvartha Muktavali, compiled by Kalluka Bhatta, and other authorities. The Pledger reasons from this by analogy that, as the adopted son is declared to be no heir of the adoptive mother, neither can she take the estate of the adopted son in failure of nearer heirs in her husband's family.

But we would remark that the Vyavustha in the above case is the only authority shown to us for this doctrine; and it would appear from the Judgment, ultimately passed, that a suppositional case only, regarding the rights of an adopted son, was recorded in the court's question to the law officer. One of the presiding judges remarks, that, "if the appellant should hereafter, in conformity to the permission granted to her by her husband, adopt a son, such adopted son, (if he think that the doctrine laid down in the opinion above cited is unjust,) will be at liberty on the death of the appellant, to sue her husband's brother's son, or his heirs, for the recovery of the shares to which he may consider himself entitled," and the other judge
with the same object in view observed that "he (the brother) has clearly a right to this portion during his life time, but it does not appear necessary or proper, in this present decree, to make provision for more than the matter in dispute."

It is obvious then that this doctrine was not conclusively adopted by the Court in the case referred to, and that it stands there merely as a dictum of the Pundit who gave it, but certainly cannot be said to have acquired all the authority of a recognized principle of Hindoo Law, to which the Sudder Court had intended to give effect.

Baboo Ramapershad Roy entered into a long and elaborate explanation of the Hindoo Law of inheritance, but as the only question before us was one of pure Hindoo Law, and the authorities referred to are writers on that subject, we did not consider ourselves competent to decide the point without calling for a Vywustha from the Pundit of the Court. As it appeared to us that the point must be decided on the general ground of, whether an adoptive mother's relations succeeded an adopted son under the same circumstances that would govern their succession to a natural born son, we put the question in that form, and the reply of the Pundit being in the affirmative, and the authorities quoted being derived from well recognized works on Hindoo Law, we have seen no reason to interfere with the Judgment passed by the Lower Courts, and uphold it, with costs against appellant.

The following is the Vywustha of our Pundit. "In the event of a Dattak, or an adopted son, dying, without leaving any heirs of the adoptive father, or of the said adopted son, the heirs of the father of the adoptive mother are, under the Hindoo Law, entitled to inherit the property of the said adopted son by right of succession. This Vywustha, or opinion, is in accordance with the Hindoo
Law Books, namely:—Dayabhaga, and commentaries of Dayabhaga, Vivadabhanganava, Dattaka Mimansa, and Dattaka Chandrika, &c., prevailing in the Bengal District.

First Authority.

A buchun, or dictum, of Yajnavalkya Mune to be found in Dayabhaga, &c., the meaning whereof is to the effect, if a person dies without leaving any son, grand son or great grand son, the inheritor of his property should be, in the first place, his widow, in default of her, his daughter; in that of the latter, his grand son (daughter's son), in that of all these, his father; in that of him, his mother; in that of her, his brothers; in that of them, brother's sons; in that of them, also, his agnate relations, &c., and in default of all these the Bandhu; that is to say, the descendants of his maternal grandfather.

Second Authority.

A buchun of Vishnu Munee contained in the aforementioned books, the meaning whereof is in coincidence with the meaning of the dictum of Yajnavalkya before explained.

Third Authority.

Vide the Law book Dattaka Mimansa. It is to the effect, as the adoptive father of an adopted son, and his father and grand father, became the father, grand father, and great grand father of the adopted son, in the same manner the father, grand father, and great grand father of the adoptive mother of the said adopted son, shall constitute his maternal grand father, great grand father, and the father of his maternal great grand father."
An adopted son cannot succeed to his adoptive maternal grand
father's estate when there are collateral male heirs.

(The adoption of a grand-nephew is not repugnant to Hindu Law.)

MORAN MORE DEBIAH AND OTHERS, (PLAINTIFFS)
APPELLANTS,
Versus
BEJOY KISHTO GOSSAMEE AND OTHERS, (DEFENDANTS)
RESPONDENTS.

Before the High Court of Bengal.
Present:—Shambhoonath Pundit, E. P. Levinge, and A. A.
Roberts, J. J.

The Appellants, two of whom are nephews (brothers sons,) of
one Shib Shunker deceased, sue as nearest heirs, to recover the pro-
PERTY of deceased, who died without having male issue.

Deceased had a daughter named Anud Poornee who was married
to the respondent Bejoy Kishen they had no children but adopted
the defendant Prosonnauth Goshami, who was the grand-nephew
(brother's grand son) of the respondents.

During her life Anud Poornee was in possession of her father's
property; and at her death the respondent Bejoy Kishen retained
possession of the property for their adopted son, whom he seeks to
constitute as legal heir of his father-in-law Shib Shunker, to the
prejudice, as appellants say of them, the legal male heirs of Shib
Shunker.

The issues tried in the Lower Courts were:—1st.—Whether the
adoption of Prosonnauth Goshami, who is grand son of respondent's
brother, is valid according to Hindoo Law:—2ndly.—Whether even
if legally adopted, Prosonnauth Goshami can inherit the property
of his adopted mother's father, there being collateral male heirs in the
person of plaintiffs:—3rdly.—Whether her father's brother's sons
being alive, Anud Poornee could adopt to their prejudice. The
Court of first instance, in conformity to the Vyvastha of the Pundit of
the Moorshedabad circle, which was concurred in by the Pundit of the Sudder Court, pronounced the adoption of Prosonnauth to be invalid as he was a grand-nephew, not a nephew; but found the other two points in favor of respondents' claim.

On appeal the judge of Rajshaye, with the help of the new Principal Sudder Ameen of the district, and the Head Master of the Government School at Beauleah, as assessors, set aside the ruling of the first Court on the first issue, and held that the adoption of a grand-nephew was lawful.

On the other two issues the appellate Court agreed with the Court of first instance, that the adopted son could inherit the estate of his adoptive mother's father, and that the existence of collateral male heirs was no bar to the adoption.

A special appeal is brought before this Court.

It is obvious that the decision of the case depends upon the two first issues.

As regards the first point, the legality of the adoption of a grand-nephew, we observe that the injunction in the Hindoo Law is that a son should be adopted from among "Sapindas," or kinsmen extending to the 7th degree. A brother's son is indicated as the first Sapinda, and should, as a general rule, be selected for adoption in preference to all other individuals (Sutherland's Synopsis page 214). But the brother's grandson being one degree more distant, is by no means excluded, as urged by appellant. It is contended that it would have been unlawful for respondent, the adopting father, to marry his nephew's wife, the mother of the adopted boy; and that, on the principle that it is not lawful to adopt one whom the adopter could not lawfully beget; respondent could not adopt his grand nephew. The commentators, however, in illustrating this principle point out that a man must not adopt his sister's son or daughter's son. In such cases the operation of the principle is obvious enough. But there is no reason whatever why the respondent should not
have lawfully married his nephew's wife,—the mother of the adopted boy—previous to her marriage with the boy's father.

This plea cannot avail the appellant, and we concur with the Judge and the Assessors that the adoption by respondent of his grand nephew Prosnononauth Goshami, was not repugnant to Hindoo Law.

Holding the adoption to be legal, it now remains for us to consider the second point, viz: the right of the adopted son to inherit property, through his adopting mother, from the father of the latter when there are collateral male heirs: two cases have been referred to as illustrating this point of law:—1st.—The case of Gunga Mya, (page 128, Vol. III, of the Sudder Dewani Reports,) which is quoted by appellant in support of his claim; and:—2dly.—The case of Gunopurusad Rai, page 1091, Vol. II, of Sudder Decisions for 1859, which is adduced by respondent. These are the only two cases which we have been able to find which at all bear upon the disputed point; but the question now before us did not directly arise in either of these cases, and has never, so far as we can learn, been authoritatively decided. In the case of Gunga Mya, which was decided in the year 1821, the Vyavastha was to the effect that a son adopted with the permission of her husband by a woman on whom her father's estate had devolved, will not be entitled to such estate on his adoptive mother’s death, but such estate will go to her father's brother's son in default of nearer heirs. The reason why the adopted son would have no title to the estate to which the adoptive mother had succeeded, is represented to be, because, according to the Daya bhaga, an adopted son has no legal claim to the property of a Bandhu or cognate, and according to the interpretation of the text of Menu, which admits adopted sons to the right of succession collaterally, the meaning is, succession to the property of persons belonging to the same family as the adoptive father, as fully appears from Manvartha Muktavala compiled by Kulluka Bhatta & other authorities. This dictum was accepted and a decree given in accordance thereto, by one of
the Judges of the Court, but the remaining two Judges observed that the
dictum referred to a contingency which had not happened in the case
before them, and that it was not necessary to provide for a state of
affairs which might never take place. Nevertheless the dictum of the
Pundit on this occasion has been accepted by Maenaghten and other
writers on Hindoo Law, as the principle which would govern the claim
of an adopted son to succeed to the estate of his adoptive mother's
father, which is the very case now before us. But the judges who
tried the case of Gunga Pershad Roy in the year 1859, considered
that the doctrine laid down in the case of Ganga Mya had not been
conclusively adopted by the Court; and it could not be said to have
acquired all the authority of a recognized principle of Hindoo Law
to which the Sudder Court had intended to give effect. They there-
fore determined to ascertain from the Pundit of the Sudder Court:—
"Whether an adoptive mother's relations succeeded an adopted son
under the same circumstances that would govern their succession to
a natural born son."

The following was the Vyavashtya received, and
upon which the Court in 1859 acted:—"In the event of a Dattuk, or
adopted son, dying without leaving any heirs of the adoptive father,
or of the said adopted son, the heirs of the father of the adoptive
mother are, under the Hindoo Law, entitled to inherit the property
of the said adopted son by right of succession."

In support of this opinion the Pundit quotes three authorities
among which is a dictum of Tajnyavalkya Munee from the Dayabhaga,
to the effect that the Bandhus, or descendants of the maternal grand
father, succeed an adopted son on failure of nearer or agnate rela-
tions. These are the only two cases in any way bearing upon the
question which have been brought to our notice, nor have we been
able to find any others, and although these two cases at first sight
appear to be conflicting, and it has been represented on the part of
respondent that the ruling in the latter case, that of Gungapershad
Roy, modifies the interpretation of the law which had been governed
for the previous 38 years by the case of Gunga Mya, we do not con-
sider that it is so. All that the case of Gungapershad Roy proves
is, that the ancestors in the ascending line of the adoptive mother of an adoptive son may, as distant relations, inherit the property of the said adopted son, when there are no nearer heirs; that is to say, that the adoptive mother's grand-father might succeed as the 29th in degree; the adoptive mother's father being, according to Hindoo Law, the 28th in degree. The question now before us, viz., the right of an adopted son to succeed to his adoptive mother's father's estate was not raised or alluded to. It is no doubt argued for respondent that there must be a recognised right, and that the adopted son should succeed to his adoptive mother's father; but this we cannot admit unless it be in the relation of a Bandhu, and in default of nearer heirs, the adopted son standing in the same relation as a natural son born to his adoptive mother or her father is altogether opposed to the theory of adoption in the Hindoo system. According to it a son of some sort is essential to the eternal happiness of a man, and in consideration of the performance of funeral obsequies, the adopted son succeeds to the estate of his adopting father, but a woman needs no such mediation. The law says:—"a virtuous wife ascends to heaven, though she have no child, if after the decease of her lord she devote herself to pious austerity." Menu. 5—160.

The adopted son, whether adopted, as in this case, by the husband with the wife's consent, or by the husband alone, or by the widow with the permission of her deceased husband, is adopted for the benefit of the husband. The reason given by Macnaghten in his chapter on Adoption, why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father is, that the party to be adopted "becomes the son of a person whose lineage is distinct from that of the maternal grand father."

Considering that this was the opinion which prevailed from the year 1821 to the year 1859, and that the Vyavastha given in the case of Gungapershad in the last mentioned year does not directly overrule the prevailing opinion, that not a text of law or a single precedent can be quoted to support the present claim; and lastly, believing it to be opposed to the theory of the Hindoo System of
adoption, we disallow the claim of Prosonnonauth Gosami to succeed to Shib Shunker's estate.

We decree the appeal, reverse the decision of the Lower Court, and decree appellant's claim with all costs.

Mr. Justice Shumboonauth Pundit.—I agree generally with my colleagues. I wish to add the following with reference to the point for the determination of which the case is now taken up by three Judges.

No direct text of Hindoo Law has been shown, distinctly ruling that an adopted son of a daughter can (after the death of his adoptive mother) succeed to the estate of the father of the latter, though by adoption, the deceased undoubtedly had legally become his maternal grandfather.

No case either of Bengal or Behar, within the jurisdiction of any of the two Courts of this Presidency, or of any other Presidency ruling the point has been shown. Really such a claim was not likely to be found to be so rare if there was any foundation for it. The very fact of no case being found, shows that the law on the point, as put down in all the English compilations of Hindoo Law (though not affirmed directly by any decision in a proper case), must have long been considered as settled, or else we would have found numerous cases in which the point now under decision would have fairly been raised. It is asked by those who contend for the rights of the adopted grandsons by daughters, why should they lose a particular line of inheritance altogether? The answer is simply this, that in other respects besides this, such an adopted son is admittedly in a worse position than a son of the body.

If for instance, after the adoption of a son, a son of the body be born to the adopting father, the adopted son obtains less than he would have got if he also had been a son of the body, and is not in many other respects treated as the eldest son of his adopting father.
The system of adoption is one full of injustice; and while the adopted himself becomes the cause of disappointment to others, he himself is not altogether exempt from the possibility of his rights of inheritance in one direction being curtailed entirely, just as well as in being adopted he might be a loser of his share of a valuable ancestral estate by his being given away by his natural father, perhaps a rich man, for adoption in a family comparatively indigent and poor.

If this right of an adopted son of a daughter had been ever recognized in Hindoo Law, then its rules regarding the rights of the daughters to succeed their father would have been worded quite differently from the manner in which in all books they are expressed. Some allusion to an adopted son would necessarily have been made just where barrenness and childless widow-hood are described as bars to their right of inheritance. Allusions would also have been made where such expressions as "capable of bearing children" are used.

It is quite obvious that the present wording of the law on this subject is clearly inconsistent with the right of an adopted son of a daughter to succeed to the estate of her father. Besides, if an adopted son lose a part of his rights by a son of the body being born to his adopting parents after his adoption, much more than an elder brother loses by the subsequent birth to his father of another son of the body, it is natural to suppose that the same difference which is observed between two such brothers with regard to the estate of their father, adoptive and natural respectively, would reasonably be maintained with regard to their rights of succession to the estate of the father of their mother. No such provision is made when the right of succession of daughter's sons is specified in all text books and English compilations of Hindoo Law.

Notwithstanding the amendment made by the late Sudder Court upon the doctrine of Dyabhaga to the extent of admitting the right of an adopted son to succeed collaterally, according to the doctrines of Menu (as explained by his best commentators), in the family of his adopting father, it may still be an open question, whether, when
two brothers, one an adopted son, and the other the son of the body of his father, have to inherit, as brother's sons or brother's grandsons, the property of a kindred of their father, they take this estate in equal or in the same shares in which they had taken their father's estate. It is clear that the last mentioned argument is not conclusive, if these brothers can, in the above case, succeed in equal shares; and in that case the omission of such distinction would be useless in such cases. We do not find that we can dispose of this question by stating as a general principle that one may adopt another as his own heir, and give him all his own property, but cannot be allowed by such an act to disinherit a third person from the estate of a fourth individual, because an adopting father may even do so, when his adopted son may have a right to claim as a nearer kinsmen the estate of a brother, or cousin, or uncle, of his adopting father, to the prejudice of another kindred, who is distant by one degree in descent and who might have succeeded to the same unopposed, if there had not been this adoption.

The principal grounds upon which we think that the opinion of the English compilers of Hindoo Law against the right of an adopted grand son to succeed to the estate of his maternal grand father is correct, are the facts of no direct texts acknowledging such a right being anywhere traced, and the absence among the reported cases of any suit in which the question directly arose. For aught we know, the case we are now deciding might have arisen from a wrong understanding of the effect of the decision of 1859 upon this point of Hindoo Law, which, however, it did not attempt to decide.

From that decision it may be argued that, if the maternal relatives of the adopting mother stand in the position of those relatives that they would be to the son of the body of the daughter of their family, and if they have a right to succeed to the estate of this adopted son just as to that of a son of the daughter, why should the adopted son himself be debarred from claiming a similar right of inheritance himself to the estate of these maternal relatives.
Such reciprocal rights are not, however, invariably any part of the Hindoo system of succession. A man never succeeds his own daughter; and a husband is not invariably, to all kinds of his wife's Stridhum property, her heir exclusively, or jointly with others; and though to some Stridhum of a step-mother a son may be heir, she can never claim any inheritance from such a son of her husband.

I.—Where a natural son is born after adoption, the adopted son takes one-fourth, and the real son three-fourths of the estate left by the father.

PREAG SINGH.

Versus

AJOODIA SINGH.

Before the Sadr Dewani Adalat of Bengal.

In this case an inhabitant of Zillah Shahabad, being childless at the time, took his mother's son, and made him his adopted son. Subsequently to the adoption, a son was born to the adopting father. The question submitted to the Pundit was, on the death of the adopting father, to what proportion of the property left by the deceased is each of the sons entitled? The reply was as follows:—

"Under the circumstances stated, the property should be divided into four shares, three of which will be taken by the son of the body, and the remaining one by the adopted son. This opinion is conformable to the Mitacshara, Dattaka Mimansa, and the other authorities, as current in the District of Shahabad."

The above decision, as remarked by Sir W. Macnaghten is in accordance with the doctrine of the Benares School, where the Mitacshara and the Dattaka Mimansa are paramount authorities; but in Bengal, where the Dattaka Chandrika and the Daya Krama Sangraha prevail, a Dattaka son only takes one-third in the division with a legitimately begotten son, subsequently born: see Vyavastha Durpans, page 909-910. But in a Madras case, Ayyayu Muppanar v. Nila-

dalchi Annual, 1, M. H. C. Reports, page 45, the learned Judges, Strange and Frere, ruled on the authority of the Sarasvatí Vilasa, that the fourth share mentioned in the Mitakshara as that of an adopted son where a natural son springs up, is a fourth of what the latter is to have: that is, the estate must be divided into five portions, of which the natural or begotten son is entitled to four, and the adopted son to one; in other words, the adopted son in such a case would receive only a fifth of the whole estate. A similar ruling was passed by the Sadr Adalat of Bombay, in 1858, vide West and Bühler's Digest of Hindu Law, page 43.

2. The Punjab Civil Code, always vague where it should be clear and decisive, lays down the very broad rule that if "lawfully begotten sons should be born after the adoption, then they will share with the adopted son" (Section VII para. 2, Part I), but in what proportion their shares are to be allotted, is left to the ingenuity of the Advocate to argue, and the discretion of each individual Judge to decide. Under the old Athenian Law heirs born after the adoption could not prejudice the right of the adopted person. Hermann's Pol., Antiq. of Greece, pages 233, 234.

3. It is stated in Almack Ramsey's Chart of Hindu Inheritance, on the authority of Houston's Manual of Hindu and Mahommedan Law, Dublin 1863, "that if, after adopting a son or sons, the adopter has had actual sons born, each adopted son takes only half as much as an actual son (page 6), and that according to the Benares School the adopted son takes only a third instead of a half" (page 19); see also Macnaghten's Hindu Law, Wilson's edition, page 73. In the case of Sudras the adopted and subsequently born legitimate son, share equally, I Strange's H. L. 99, and Duttaka Chandrika, Section V, para. 32.

(1.)—An adopted son (Duttaka) taking the Estate of his adoptive father is excluded from inheritance in his own family.

(2.)—And in like manner a member of the natural family cannot inherit the property of one taken out of that family by adoption.

**DUTTNABIN SINGH, (DEFENDANT). APPELLANT.**

**Versus**

**AJEET SINGH AND OTHERS, RESPONDENTS.**

**Before the Sadr Dewani Adalat.**

In this case the plaintiffs, Respondents, sued in the Zillah Court of Bhagulpore, for certain shares of Tuffa Seroonjah, in Pergunnah Pherkia, on the ground that this was the joint hereditary Talook of the family. The Defendant pleaded an exclusive title, but both the Zillah Judge and the Provincial Court of Patna decided against him. In further appeal to the Sadr Dewani Adalat (present W. Cowper) the Defendant’s plea was again rejected on the evidence, but previously to a final determination on the division of the estate, the Court caused a proclamation to be issued for the purpose of ascertaining the whole of the claimants to it; whereupon a claim was urged by one Bhoop Singh, one of the sons of Durgahai Singh, who alleged that he had been adopted by Bukhtaurur Singh, one of the grandsons of Umur Singh, the common ancestor of the parties. The opinion of the Pundits was accordingly taken as to how far the adoption of Bhoop Singh by his uncle, would affect his right of succession to his natural father’s estate; and they declared that this excluded him from any share of the paternal inheritance. Another question which arose incidentally was, as to what consequence would attach to an alleged circumstance, that Durgahy Singh performed the funeral obsequies of Gambhir Singh, one of the sons of Umur Singh, who died without issue; and the Pundits stated, that this singly could not give him any title to the inheritance of the deceased, unless the deceased had made him his heir by adoption.
These were special appeals from the decision of G. H. Fullerton, the Officiating Civil Judge of Chingleput, in appeal suits Nos. 104 and 105 of 1861.

Branson for the appellant, the fourth defendant, in special appeal No. 177.

Sadagoparcharlee for the Respondent, the Plaintiff in both appeals.

Tirumalachariyar for the Appellant, the fifth Defendant in special appeal No. 182.

Strange J.—The property in dispute was vested in one Janaki Ammal, who mortgaged it to Chechappa Noyakkam, the ancestor of the first, second and third defendants. Janaki Ammal adopted one Ranga Aiyann who died unmarried. The Plaintiff, as brother of Ranga Aiyann, the natural father of Ranga Aiyann, sues to redeem this property as heir of Ranga Aiyann in default of issue from him.

The mortgagees offer no objection to giving up the property to the rightful heir on discharge of their lien.

The fourth defendant claims to succeed as cousin of Janaki Ammal's husband, and the fifth defendant does so as foster son of Ranga Aiyann.

The District Munsif gave judgment in the plaintiff's favor, and his decision has been affirmed by the Acting Civil Judge.
The prominent question to be decided in this suit is whether a member of the natural family can succeed to one taken out of that family by adoption? The settlement of this question depends upon whether the severance of the person adopted from his natural family is so complete that no natural rights between them to property, in succession the one to the other, can arise, or whether the severance is not so thorough a one as to shut out such succession the one to the other.

In Special Appeal No. 15 of 1859, this question came before the late Sadr Court, when it was sought to establish the succession of a person adopted to his natural brother. The Pandits, relying on the reasoning of Cri Rana Pandita, asserted that the right of succession did exist. But the Court, after examining the basis of their opinion and other law authorities, were satisfied that the gift made of one for adoption created an entire and irrevocable severance of him from his natural family.

We are of opinion that the above decision is founded upon a just appreciation of the principle of an adoption, whereby the son of one man ceases to be such in the eye of the law and becomes the son of another man, inheriting thenceforth in his adoptive family and having no more rights in his own family. If it would be a violation of that principle to allow a person adopted to return to his natural family and take up their rights, it would be a still greater violation thereof to introduce to the rights in the adoptive family the natural kindred of the adopted person, who assuredly never had any part or title in the adoptive family or in their possession.

We observe furthermore, that in the Mitacshara, the great authority in this Presidency on the law of inheritance, no place has been given in the natural family for the re-introduction into the line of heirs of one taken out of that family by adoption, and none in the adoptive family for the admission of those in the natural family.
We conclude therefore, on all these grounds that the plaintiff has no title to represent the late Rayava Aiyan, and we consequently reverse the decree below and dismiss the suit with costs. Appeal allowed.

The exclusion of a son adopted according to the Dattaka form, from the family and estate of his natural family, is a point of Hindu law on which there is no room for doubt. The case of Duttnarin Sing, appellant, was followed by Rance Bhawani Dibeh v. Rance Soory Munee, 12th May 1806, I Select Reports, page 179, new edition, in which the point incidentally arose; and in a case cited by Macnaghten in his precedents, Vol. II Chapter VI, case 9, page 183, decided in May 1816, the Fundits gave the following reply:—"A given son has no right to succeed to his natural parents, as Masu says:—'A given son must never claim the family and estate of his natural father. The funeral cake follows the family and estate; but of him who has given away his son, the obsequies fail.'"

See Milachshara Section XII § 32, Vyasastra Durpana, 2nd edition, page 887-888. See further an elaborate Judgment by Holloway J, in Namsammai v. Salarama Charla, I. Stohe's lilan'ras Reports, page 420, in which the learned Judge said:—"The whole theory of an adoption is the complete change of paternity. For the purposes of this argument, the son is to be considered as one actually begotten by the adoptive father. He is so in all respects, save an incapacity to contract marriage in the family from which he was taken. It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman Law, Item amitam, licet adoptivam, ducere uxorem non licet." This case will be given in extenso post, under the head of adoption of a sister's or daughter's son.

In Gopeemnub Deb v. Rajah Rajkissen "(East's notes, Case 75)," which was affirmed in appeal by the Privy Council (III Knapp 55), an adopted son was considered in the nature of a purchaser for a valuable consideration, as he thereby lost his inheritance in his own natural family out of which he was adopted. But a Dnyanushyana, or son of two fathers, retains his filial relation to his natural father and inherits the estate and performs the obsequies of both fathers; but the relation of his issue, except in the case of the Kritima son, a form of affiliation which prevails in the Mithila country, obtains exclusively to the family of the adoptive father. Vide Dattaka Mimansa VI, §41 et seq. Dattaka Chandrika, Section 11, § 36, et seq. and Sutherland's Synopsis, head fifth. As to the effect of a Kritima adoption see post.—page 45.
One adopted by the Kritima form, takes the inheritance both in his own family and in that of his adoptive father.

MUSSUMMAT DEEFOO, PAUPER, APPELLANT,

Versus

GOWREE SHUNKER, RESPONDENT,

Before the Sadr Dewani Adalat.

The Respondent brought this action in forma pauperis, on the 4th December 1809, in the Patna Provincial Court, against the appellant and a person called Dussoo, to recover possession of half Mouza Muchrawan, a Mokurruree Istimraree tenure in the vicinity of Patna, and half Mouza Mouhur, a mortgaged Altumgha Mehal in Pergunnah Scwut, as well as buildings, gardens and moveables, appertaining to the estate of the late Gooloo Chowdree; suit laid at 9,001 rupees, annual produce of the lands, value of the buildings, &c.

The plaintiff set forth that Gooloo Chowdree, died in Assin 1213 F. S., leaving the plaintiff, his father's brother's grandson, and his father's son Juggoo (husband of the defendant, Mussummat Deepoo) heirs to the above ancestral property; that by the death of Juggoo, which happened on the 2nd of Maug 1216, F, S, the plaintiff was entitled to succeed to the share enjoyed by him, to the exclusion of his widow Mussummat Deepoo who, according to usage and the Hindoo law could claim maintenance only from his estate; but that as she had ejected the plaintiff, put her husband's nephew and Sister's son (the Defendant Dussoo) into possession, and enjoyed the proceeds of the above property, the plaintiff now sued and hoped for redress.

The Defendant, in reply, stated that the plaintiff was not Gooloo's heir, that nearly seventy-five years ago, Sumboonath and Bholanath, own brothers and grand fathers respectively, to the plaintiff and Juggoo Chowdree, amicably divided between themselves two dwelling houses left by their father, Anoop Singh, exchanged acquittances, and lived separately; that the plaintiff was in exclusive
possession, as heir, of his own grand father's property; that the wife
of Hurnath (Bholanath's father-in-law,) had adopted her own hus-
band's grandson, Busteeoram, who was Gooloo's brother and had
put him in possession of all her estates, property, business, &c., that
he accordingly retained possession during his lifetime, and on his
death Gooloo succeeded to one-half and the remaining moiety des-
cended to Juggoo, and Dussoo, the son and grandson of Busteeoram
whom Gooloo on his death had entrusted to the care of Lala Behadoor
Sing, declaring them his sole heirs, and Dussoo sold his jewels to
pay debts due from the estate to several bankers, but that there
was still a balance unpaid, that if the plaintiff had really been
Gooloo's heir he would have performed the usual ceremonies on his
death, and taken possession of his property, but this had been
done by Juggoo, that the plaintiff's statements as to the houses in
dispute having been derived from her father and grandfather was
altogether false, inasmuch as the two houses in Sannoookhn koochek
which were left by Bholanath's father-in-law, were inherited by
Gooloo, and were mortgaged by him, that the Defendant Deeppoo
was in possession of one house purchased and built by Gooloo, with
his own money, and that Mousa Mucraun was purchased by
Goopopurshad Singh, all as Pooosee Baboo, Gooloo's sons, in partnership
with Meer Burkut Bolah Khan, and was still in Mortgage, and not
in the Defendant's possession, that Mousa Moukur, which was rented
by Gooloo from the heirs of Gholam Reza Khan, was after his death
resumed by the proprietor, that there was no garden at Lohaneepoor,
that Gooloo and Pooosee had sold all their moveables to discharge the
incumbrances on the estate, and that the Plaintiff's claim was there-
fore altogether unfounded.

The Plaintiff, in reply, denied that the property left by Anoop
Singh, had been divided, or that acquittances had been exchanged by
Sumboo Nath and Bhola Nath, and stated, that, as the grand-son of
Gooloo's paternal uncle, he was the sole heir to his property after
the death of Juggoo. The defendants in rejoinder repeated their
former allegations.
The Judge of the Provincial Court, on the 27th of April 1813, observed that it appeared from the defendant’s answer that Busteeram, having been adopted by his maternal grand-mother, the wife of Hurnath, and the Pundits had declared their opinion, that, in consequence of Busteeram, having thus been adopted by a stranger, his son Juggoo could not succeed to Gooloo’s property, but that Goureeshanker, son of Beshennath Singh, was the proper heir. He therefore (disbelieving the defendant’s statement as to the disposition of the immovable property) passed a decree awarding to the plaintiff the lands, houses, garden, mentioned in the plaint, dismissing his claim to the moveables, and making the costs payable jointly by the parties. The appellant preferred an appeal to this Court, and the case came to a hearing on the 22nd of November 1820, before the third Judge (S. T. Good,) when it was referred back for further evidence as to whether the lands in dispute were actually left by Anoop Singh, the ancestor of the parties, and whether the property left by him was divided between his sons Bholanath and Sumboonath, or their descendants, namely, Bishennath, the Respondent’s father, Busteeram, father of Juggoo, the Appellant’s husband. The case came next to a hearing before the Officiating Chief Judge (T. H. Harington) on the 9th of February 1824, who observed inter alia, that although the division of Anoop Singh’s property between his two sons could not be positively proved, owing to the long lapse of time, still there was every reason to suppose that such a partition did take place, from the circumstances of the heirs of both brothers being in separate possession of their respective houses, and from their not having for a long time associated, lived, or traded together. A copy of this proceeding, with the genealogical table, admitted to be correct by the Vakeels of the parties, was then ordered to be laid before the Pundits of this Court, that they might state according to the Hindu Law as current in Behar:—First, on the death of Juggoo Baboo, who was heir to his and to Gooloo Baboo’s property, and if his widow, Mussummat Deepoo, was entitled to possession for life, to whom should it descend on her death? Secondly.—Whether
the adoption of Busteeram, the father of Juggoo Baboo, by his maternal grand-mother, the wife of Hurnath, barred the right of Juggoo as heir to succeed to the property of Gooloo Baboo? Their reply was to the following effect:—It is understood that there was formerly an individual by name Anoop Singh. He had two sons, by name Bholanath and Sumboonath. Of the three houses possessed by Anoop Singh, Bholanath took the two smaller ones, and Sumboonath the larger: and although they executed no formal deed of separation, yet they and their descendants from that time lived apart, and conducted their respective affairs separately. This is a proof that partition was made by Anoop Singh, which is further corroborated by the fact of Gowree Shunker, grand son of Sumboonath having exchanged the larger house possessed by that individual for the two smaller ones which had been sold to a stranger, and by the property being proved to be divided. Bholanath's grand-son, Juggoo, is heir to his portion of the property in default of his son Gooloo, and on the death of the said Juggoo, the property which he had so inherited, by reason of his having no issue, will devolve on his widow Mussummat Deepe0, at whose death it will go to her late husband's nearest Sopinda. This is the doctrine laid down in the Mitakshara and other law tracts current in Behar—Authorities.—“Should a doubt arise whether a legal partition having been made among heirs, it must be cleared by the testimony of their kinsmen in the first place, then by written evidence of a partition, if there be any, if not, by verbal proof of their separate acts. When co-heirs have made a partition, the acts of giving and receiving cattle, gram, houses, land, household establishments, dressing victuals, religious duties, income and expenses, are to be considered as separate, and as proofs of a partition.” Nareda, cited in the Vivada Chintamunee, Virametrodaya, Vyavahara Mayucha and other works:—“A wife, daughters both parents, brothers, their sons, kinsmen sprung from the same original stock, a pupil, and a fellow student in theology, in failure of the first, &c.” Yajnyawalaya, cited in the Mitakshara.—Secondly.—Although Busteeram, the father of Juggoo Baboo, was adopted.
by his maternal grand mother, the wife of Hurnath, still according to the Kritima form of adoption, which prevails in Behar, and conformably to which the said Busteeram was adopted, his son Juggoo will not lose the right of inheritance in his own family, because a Kritima, or as it vulgarly called, a Kurti son, retains the right of succession, and of presenting funeral cake, both in the family of his natural and of his own adopting father, consequently on the death of Gooloo, his brother's son Juggoo, will inherit his property. Authority. "Such son (alluding to the Kritima) offers the funeral cake to the person who adopts him, but the offices of presenting the funeral cake to his own father and other relations still continues nevertheless." Roodradharopa dhyaya, cited in the Soodh Viveka.

On a consideration of the above legal opinion it appearing to the Officiating Chief Judge, that Juggoo, and on his death his widow Deepoo, the Appellant, had clearly a right to the property left by Gooloo, and consequently that the decree of the Court below, in favour of the Respondent, Goureehunker, was wholly erroneous, that decree was reversed (the Officiating Judge J. Ahmuty, concurring), and an order was issued that the Respondent should restore possession of the property in dispute to the Appellant, with means profits while engaged by him, and pay also the costs of suit in both Courts.

The High Court of Bengal has also decided that an adoption according to the Kritima form does not destroy the adopted's position in his natural family, Collector of Tirkoot v. Harapershad Mohanty, 29th May 1867, VII. Suth. W. R. 600, and Muns. Shiboo, Kooree, and others, v. Joogun Singh and others, 8th July 1867, VIII. Suth. W. R. 156.

Sutherland also thus refers to this form of adoption:—"the Kritima son as usually affiliated in the Mithila country, would indeed take the estate of his adoptive father, but continues a member of the family of his natural father, and is not regarded as prolonging the line of his adopter." Note 18 attached to Synopsis, page 192, Kishen Kishore's Ed., vide also Strange's Hindoo Law Vol., II page 233.

2. According to this form of adoption the express consent of the person nominated for adoption must be obtained, and thus where a man on his death bed nominated an absent person as his kritima son, who afterwarra performed the funeral obsequies, it was held that the adoption was invalid for want of consent: Muns. Sutputte v. Indranunifyka 2nd April 1816, II Select Reports page 221, new edition.
The Natural rights of a person adopted remain unaffected when the 
adoption is invalid; and consequently the adopted son in such a 

case can make no claim through his adoptive father to be main-
tained by the alleged adopter.

BAWANI SANKARA, PANDIT, APPELLANT, 
Versus 
AMBABAY AMMAL, RESPONDENT.

Before the High Court of Madras.

Present:—Scotland, C. J. and Halloway, J.

Judgment:—The plaintiff in this suit as the adopted son of 
Kistnaji Koneri Pandit, who, it is alleged, was the adopted son of the 
defendant, a widow, seeks to recover a sum for the maintenance of 
himself and his adoptive mother. The defendant denies the right of 
the plaintiff to recover.

No doubt exists as to the validity of the plaintiff's adoption of 
Kistnaji Koneri Pandit. But at the original hearing it was proved 
by the record of the proceedings in the Original Suit No. 18, before 
the Subordinate Judge, (the same being a suit by Kistnaji Koneri 
Pandit, as adopted son to recover from the defendant, the property 
left by her husband, to which the present plaintiff was a party) 
that the alleged adoption by the defendant of Kistnaji Koneri Pandit, 
was, by the decree in the suit, pronounced to be of no validity, on the 
ground that though the forms and ceremonies of an adoption appeared 
to have taken place after the death of the defendant's husband, the 
defendant had no authority whatever from her husband to adopt. 
The record in Appeal Suit No. 41 of 1859, before the Civil Judge, in 
which the original decree was affirmed was also in evidence.

Upon this evidence both the Lower Courts have decreed against 
the plaintiff deciding that, as the adopted son of one whose alleged 
adoption had been held to be invalid in law, he could make no
claim to maintenance from the defendant through his adoptive father. We are of opinion that a right decision has been arrived at.

In reason and good sense it would seem hardly a matter for doubt that where no valid adoption, in other words, no adoption has taken place, no claim of right in respect of the legal relationship of adoption can properly be enforced at law. But in this case it was contended on the part of the plaintiff (the appellant) that although Kistnaii Koneri Pandit, was precluded from all right to inherit in the family of the defendant's husband, yet that by reason of the forms and ceremonies attending an adoption having been gone through, the law gave him the right to claim maintenance from the defendant, and that such right passed to the plaintiff as his son by a valid adoption, just as it would have passed to his natural son. In support of this, reference was made to Mr. Strange's Manual, Sections 120 and 197; Sir Thomas Strange's Hindoo Law I, page 82, and to the Dattaka Chandrika by Sutherland Section I, clauses 14, 15, and Section 6, clause 4. Now the passages in the two former works rest upon the authority of the Dattaka Ohandrika and the Mitackshara on inheritance, Chapter I, Section XI, clause 9, (a) and having considered what is to be found in these authorities, we are of opinion that no legal ground is afforded for the present claim to maintenance. Mr. Strange in Section 119, of the second edition of his Manual no doubt states broadly that a boy, after a gift made for adoption, cannot be readmitted to his family rights should his adoption "not stand good in law," and that devoid of inheritance, he has a claim to maintenance. And an observation to the same general effect occurs in a late judgment delivered by Mr. Strange, then a Judge of this Court, in the

(a.) "He who is given by his mother with her husband's consent, while her husband is absent (or incapable though present) or without his consent after her husband's decease, or who is given by his father, or by both being of the same class with the person to whom he is given, becomes a given son (Dattaka).

Manu declares. ' He is called a son given (Dattirima) whom his father and mother affectionately gives as a son being alike by class and in time of distress; confirming the gift with water.'
case of Ayyayu Mappanar v. Niladatchi Ammal (b) But Sir Thomas Strange's observations are confined to the adoption of one of a different class from the adopter, and he puts the claim to maintenance on the ground that such an adoption, while it divests the child of his natural claims does not entitle him to all the incidents of an unexceptionable adoption and enable him effectually to perform those rights which are essential to the right to inherit, and this in effect is supported by the Dattaka Chandrika, Section 1, clauses 14, 15. Where however both the author and commentators to whom he refers, make the claim of adopted sons of a different class, more expressly and distinctly to rest upon the ground, that although not qualified to present the oblations and perform the rites essential to inheritance they acquire a filial relationship, (as is there said) "by reason of their being beneficial in perpetuating the name and the like, but as they are beneficial in a small degree, they only receive maintenance." See also the Dattaka Mimansa, Section 3.

The doctrine so laid down treats the adoption as one that may be made and existing, and of validity for one of the purposes of adoption according to Manu, quoted in clause 3 of the same section, though not for the other purpose of "the funeral Cake, water and solemn rites." How far this doctrine now holds good as law we are not called upon to consider, as it has, we think, no application to the present case. But we may observe that there appears to be nothing in the Mitakshara to the same effect, and Sir Thomas Strange in a note to the passage before referred to, questions the claim to maintenance and says: "Mr. Sutherland, translator of the treatise on adoption, being of opinion that the adoption being void, the natural rights remain, and applied to the present case, this opinion of a very high authority upon the subject is entitled to the more weight, that it is clearly logical. If there was no adoption nothing can have been acquired and nothing lost.

(b) Vol: I. p. 45.
In the present case the question does not turn upon any personal disqualification on the part of Kistnaji Koneri Pandit and we think the natural rights of the plaintiff remain in law quite unaffected. In this case the authority of the defendant's husband was indispensable to the validity of the adoption relied upon by the plaintiff, without it the absolute essentials of adoption for civil purposes, the giving and receiving, could not with any legal effect take place, and it would be strangely inconsistent and unreasonable if the mere formal performance of certain customary rites and ceremonies connected with adoption which as regards the civil rights of the person adopted would probably not be treated as necessary to its legal efficacy, (I. Sir Thomas Strange's Hindu Law, p. 96; Viraps, rumal Pillay v. Narain Pillay (a), were held to confer a right to enforce maintenance by a civil suit. We think there is nothing in Hindu Law which requires, or would warrant such a decision, and that as in this case there was no valid adoption by the Defendant the suit must fail.

This decision renders it unnecessary to give any opinion upon the other questions argued at the bar whether, if the right to maintenance existed in Kistnaji Koneri Pandit that right would, as an estate, have descended to his sons, natural or adopted.

Our judgment therefore is in affirmation of the decree of the Civil Court. The costs of this appeal will be borne by the appellant. Appeal dismissed with costs.

(a) I Strange's Notes of Cases, 100.
RIGHT OF ADOPTION AS REGARDS GIVER & RECEIVER.

1.—According to Hindoo law as current in Bengal and Benares, an adoption made by a widow without authority of her husband, is illegal, though she may have obtained the consent of her husband's heirs.

(a. A childless widow is not entitled to succeed to the estate of her husband, which devolved entire on him from his ancestors, to the exclusion of his brothers.—b. The adoption of an only son is invalid under the same Shasters, unless the natural father deliver the son to the adoptive father on condition that he shall belong to both as a son, and the latter accept and adopt him as such: in this case the adoption is good and the adopted son is denominated Dwayamushayana, or son of two fathers.)

II.—According to the Hindoo law current in the Dravida country in the South of India, a widow if duly authorised by her husband's kindred, although having no permission from the husband, may adopt a son; but there must be such evidence of the assent of the kinmen as suffices to show, that the act is done by the widow in the bona fide performance of a religious duty, and not capriciously, or from a corrupt motive. The widow, however, cannot adopt, where there is a prohibition by the husband, direct or implied.

I.—RAJA SHUMSHERE MULL.

Versus.

RANEE DILRAJ KOUR.

Before the Sudder Dewani Adalat of Bengal.

This was an action brought by Shum Shere Mull, in the Zillah Court of Goruckpoor, on the 10th of August 1805, against the late Ajeet Mull, for the recovery of the raj and zemindaree of Mujhoolu of which the annual produce was estimated at 13,843 rupees. The subjoined sketch of the family of the parties will tend to elucidate the case.

*But see on this point post.
The Plaintiff claimed the Raj and Zemindaree, setting forth in his plaint, that by the custom of the family it was not divisible, but on the death of the Raja for the time being, he was always succeeded by his eldest son, to the exclusion of the other branches of the family; that from Raja Nerayon Mull the estate had devolved regularly to his descendants until it fell to Raja Bheem Mull; that on his demise in 1153, F. S., his widow Renee Bukht Konwur adopted his (Plaintiff's) father as her son, and made him proprietor of the Raj and Zemindaree; that his father in 1201, F. S., in the presence of a large assemblage of people, conferred on him the tilok, or badge worn by the Rajas, and appointed him to the Raj and Zemindaree; that he remained in possession thereof until 1204, F. S., when in consequence of a robbery being committed within the limits of his estate he was summoned to appear before the Nwab at Lucknow, and was there unjustly detained in confinement for seven years, and that the defendant during this interval took possession of the estate, and at the formation of the decennial settlement for the provinces ceded by the Nwab in 1801, stood forth as proprietor, and entering into engagements with Government had wrongfully held possession ever since.
The defendant, in answer, after denying the claim of the plaintiff in general terms, stated, that as Raja Bheem Mull died childless the estate in dispute had devolved on his father Raja Sher Mull, son of Baboo Lutchmee Mull, the second son of Raja Bode Mull; that on his father's demise he succeeded to it, and had enjoyed uninterrupted possession of it during a period of 53 years; and that neither the plaintiff nor his father possessed any claims to the estate. Raja Ajeet Mull demised at this stage of the proceedings, and the suit was defended by his widow Ranee Dilraj Konwur who filed a petition shewing that her husband Raja Ajeet Mull had adopted as his son Tej Mull, the only son of Baboo Surobject Mull.

It being admitted by both parties, that from Raja Bode Mull the estate had devolved entire to Raja Bhuwany Mull, and on his demise to Raja Bheem Mull his son, to the exclusion of Baboo Lutchmee Mull, and Anund Mull, who were merely allowed a maintenance from the estate, and it appearing from the evidence adduced by the plaintiff as to the adoption of his father Pertaub Mull by Ranee Bukht Konwur, that the adoption had been made by the said Ranee without any permission to adopt obtained from her husband, and merely with the sanction of her husband’s relations, the Zillah Judge made a reference to the Pundits of his own Court, and to that of the Provincial Court of Benares, to ascertain whether such an adoption was legal and valid or otherwise, under the Shasters current in Goruckpoo; and further to ascertain, in the event of the adoption being invalid, in which of the heirs of Raja Bode Mull the succession to the estate held by Raja Bheem Mull, legally vested on the demise of Bheem Mull—Baboo’s Lutchmee Mull, and Anund Mull, and their sons Kishen Pershad Mull and Govind Mull having deceased previously to that event. In answer to this reference it was stated by the Pundits that the adoption having been made by Ranee Bakht Konwur, without the assent of her husband, was invalid, and that the Plaintiff as heir of his father, had therefore no claims to the estate, the succession to which, Bheem Mull having died childless, legally vested in Raja Sheo Mull, son of Lutchmee Mull, and nearest surviving heir of Bode
Mull, and on his decease in his son Raja Ajeet Mull. The claim of the Plaintiff was accordingly dismissed with costs.

On appeal by the Plaintiff from the above decision to the Provincial Court of Benares, that Court concurred in it, and dismissed the appeal with costs.

On a further appeal by the claimant from the above decision to the Sudder Dewanny Adawlut, that Court after consideration of the proceedings held in the Lower Courts directed that the Vyvasthas delivered by the Pundits of those Courts and a genealogical table of the family of the parties, should be laid before their Pundits for an exposition of the Hindoo Law on the points which appeared material to the case, as contained in the following questions.

1st.—If a widow without the authority from her husband adopts a son, is such an adoption legal and valid under the Shasters current in Goruckpoor, or otherwise, and can or cannot appellant, as heir of his father Pertaub Mull, adopted by Rance Bukht Konwur, without authority from her husband, maintain any right to the estate?

2nd.—If the adoption of Pertaub Mull is invalid, on the demise of Raja Bheem Mull, who was the legal heir to the estate?

3rd.—On the death of Raja Ajeet Mull, does his widow, the respondent, succeed to the Raj and Zemindaree which descended entire to him from his ancestors, and if as alleged by her, Ajeet Mull her husband adopted as his son Tej Mull, the only son of Surobject Mull, will Tej Mull, succeed to the estate during the life time of the widow, or not until after her demise?

4th.—If the adoption of Tej Mull, be illegal, in which of the descendants of Raja Bode Mull, will the succession to the Raj and Zemindaree vest on the demise of the respondent?

The answers returned by the Pundits to these questions were as follows:
Answer 1st.—It is written in the Veera Mitrodaya and Sunakar Kusol toobha, that it is lawful for a widow to adopt a son without authority from her husband, provided she obtain the consent of her husband’s heirs, but as this doctrine is over-ruled in the Dattaka Mimansa, a treatise of greater authority, the adoption of Pertab Mull by Ranee Bukht Konwur without authority from her husband, Raja Bheem Mull, is illegal, and invalid under the Shastries current in Goruckpore, and such adoption being illegal, the appellant, as heir of his father Pertab Mull, cannot maintain any claim to the estate in dispute.

2nd.—The adoption of Pertab Mull having been declared illegal, the succession to the estate in dispute which from Raja Bode Mull devolved in succession to Raja Bheem Mull, on the demise of Raja Bheem Mull vested in Raja Sheo Mull, son of Baboo Lutchman Mull, and nearest surviving heir of Raja Bodes Mull, and on his death in his son Raja Ajeez Mull.

3rd.—The Raj and Zemindaree having descended entire and without partition to Raja Ajeez Mull from his ancestors, his widow can maintain no right to possession of it during her lifetime, because according to the Shastries current in Goruckpore, a widow is only entitled to the portion of the ancestral estate, which on a partition may have fallen to her husband, and the adoption or gift of an only son is illegal under the Shastries current in Goruckpore. If, therefore, Surobject Mull made a gift of his only son Tej Mull to Raja Ajeez Mull and the latter adopted Tej Mull as his son, such an adoption is illegal, and under this adoption Tej Mull has no right to possession of the estate either during the lifetime or after the demise of the respondent; If, however, Surobject Mull delivered Tej Mull to Ajeez Mull on the condition that he should belong as a son to them both, and Ajeez Mull accepted him on this condition, and adopted him in the manner ordained in the Shastries such adoption was good and valid, the son so adopted being denominated Deya Mushayana, or son of two fathers, and under such
an adoption Tej Mull is legally entitled to receive immediate possession of the estate, and during the life time of the respondent.

4th.—If this adoption of Tej Mull by Ajeet Mull be invalid under the Shastera, the succession to the Raj and Zemindaree in dispute will, on the demise of the respondent, devolve on the nearest surviving heir of Bode Singh.

The principal authorities cited by the Pundits in their Vywasathas were the following texts:

In support of answer 1st. Dattaka Minansa: Vasishtha having said "Let not a woman give or accept a son unless with the assent of her lord," it is evident that a widow cannot, unless with the assent of her husband, adopt a son. It has been argued that this text is applicable solely to women whose husbands are alive, and not to widows, the wife alone being under control of the husband; to this it is answered, the word "woman" is to be taken in a general sense, and applied equally to a widow or to a wife, both being under control, the widow under that of the husband's kindred, to this it is urged in reply, that a widow consequently may adopt a son with the assent of her husband's relations, but such a doctrine would be manifestly absurd, for if she could, with the consent of her husband's kindred, adopt a son, the word "husband," must necessarily bear the sense of kindred, which it does not, and a son so adopted could not confer any benefit on the deceased husband, being adopted without his consent, whereas, a son adopted by a widow with the consent of her husband, is in truth the son of her lord.

In support of answers 2nd and 4th, Mitakshara. "To the nearest Sapinda the inheritance next belongs. If there be not even brother's son, the estate devolves on the paternal kindred, who are Sapindas, which relation includes the descendants of a paternal ancestor to the sixth degree, and ceases with the seventh person; in default of Sapindas, or the Samanodacas, or those connected by a common libation of water, and those are, the more distant paternal kindred extending.
to the fourteenth degree, and on failure of Samanodaces to those termed bandhu, or cognates.

In support of answer 3rd, Mitakahara. "It is a settled rule that a wedded wife being chaste, takes the whole estate of a man; who being separated from co-heirs, and not subsequently re-united with them, dies leaving no male issue."

Vasishtha has said. "Let no man give or accept an only son, he must remain to raise up progeny for the obsequies of ancestors." Dattaca Mimansa, "Let no man make a gift of an only son."

To miti. "An only son belongs to the natural father, the sale or gift of such a son is invalid."

Dattaca Mimansa. "The son of two fathers, Dwyamushyakanasa, is of two sorts, Nityo Dwyamushyakanasa, and Onityo Dwyamushyakanasa. The first is an only son given by his natural father to his adoptive father under an agreement to this effect. "He shall belong to us both."

When a son may be initiated under the family name of his natural father into the ceremony of tonsure, and when the other rites of initiation, as the investiture, with the poita or thread, &c., are performed by the adoptive father under his family name, as the rites of initiation have been performed by both fathers, he is termed Onityo Dwyamushyakanasa. Yajnyawaleya. "The legitimate son is one procreated on the lawful wedded wife. Equal to him is the son of an appointed daughter, the son of the wife is one begotten on a wife by a kinsman of her husband, or by some other relation. One secretly produced in the house, is a son of hidden origin. A damsel's child is one born of an unmarried woman; he is considered as son of his maternal grandsire. A child begotten on a woman whose (first) marriage had not been consummated, or on one who had been deflowered (before marriage) is called the son of a twice married woman. He whom his father or his mother give for adoption shall be considered as a son given. A son bought is one who was sold by his father and mother. A son made is one adopted by the man him-
self; one who gives himself is self given. A child accepted, while yet in the womb, is one received with a bribe. He who is taken for adoption, having been forsaken by his parents, is a deserted son."

"Among these, the next in order is heir, and presents funeral oblations on failure of the preceding."

It appearing, from the above exposition of the Hindoo Law, and on reference to the Vyasavasahas delivered by the Pundits in the case of Raja Hemunchul Singh, versus, Rance Bhudarun, (vide page 74) which involved the same point of law, that the adoption on which the appellant rested his claim was illegal and invalid, the Court of Sudder Dewanny Adawlut (present T. H. Harington and T. Bombelle) affirmed the decree passed against the appellant, and dismissed his appeal with eventual costs, if he should be found to possess assets for the payment of them.

II.—THE COLLECTOR OF MADURA,

Versus

MUTU RAMALINGA SATHUPATHY AND ANUNDAL, ALIAS RANI KUNJARA NACEHAR AND ANOTHER,

Versus.

RANI PURVATA VURDANY NACHEAR AND ANOTHER.

Before the Lords of the Privy Council.


This was an appeal from a decision of the High Court at Madras. (1)

The following is the pedigree of the principal parties in this case:

(1) 2 Madras High Court Reports, 206.
Rani Mangaleswari (grantee from Government), d. 1807.
m. Ramaswami Tavur, (d. 1797-1804.)

Annaswami (adopted 1804, d. February 1820.)
m. (1) Mutu Verayi. (2) Kunjara (appellant)

Ramaswami (adopted 26th January 1820, d. 1850.)
m. Purvata (respondent)

Ramalinga (Respt.) (adopted 1847.)

Mangaleswari (d. 1840.)

Doraraja (d. 1845.)

Their Lordships' judgment was as follows:

The principal questions raised by these appeals is the validity of an adoption made by the widow of the last male zemindar of Ramnad.

His title to that Zemindary, which is of great extent, and, like many of the large Zemindaries in the South of India, in the nature of a Raj or Principality, descendible to a single heir, was thus derived. In 1795, the then Zemindar, Mutu Ramalinga Sathupathy, having rebelled against the East India Company, was deprived of his Zemindary, which in the month of July in that year was granted to his sister Rani Mangaleswari. Her title was confirmed by a formal Sunnud, executed on the 22nd of April 1803, by Lord Clive, the then Governor of Madras, which granted the Zemindary to her, her heirs, successors, and assigns. She was married to Ramaswami Tavur, who died some time between 1797 and 1804; and in the latter year, Mangaleswari, then a widow, and professing to act under a written agreement, between her and her late husband, adopted one Annaswami, his nephew, whose title she afterwards confirmed by a will executed on the 11th of April 1807. She died in that year, and was succeeded by Annaswami. He had seven wives, of whom only his chief wife, Mutu Verayi, and the Appellant Kunjara, need be mentioned, but had no male issue by any of them. And on the 26th of January 1820, he adopted a son, Ramaswami, who was the natural brother of Mutu Verayi, and by a testamentary instrument of that date confirmed that adoption stating it to have been made "by himself and his chief wife Mutu
He died in February 1820, and was succeeded by Ramaswami, who died in 1830, without male issue, but leaving a widow, the respondent Purvata, and two infant daughters, Mangaleswari and Doraraja, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of Annaswami and Ramaswami were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of Ramaswami to the Zemindary, as stated above, is the common ground of all the parties to this litigation, and on the consideration of these appeals, must be taken to be incontestable. On the death of Ramaswami, without male issue, his successor in the Zemindary, according to the course of succession ab intestato, was his widow. He had however two days before his death addressed to the Collector, as the representative of Government, the Arzi of the 19th April 1830, which is set forth at page 84 of the record. In that document, after stating that he was suffering from small pox, and that the issue of his illness was uncertain, he expressed himself as follows:—“I have made an arrangement that my mother, Rani Mutu Varayi, who is my guardian in every respect, and who holds chief right to this Zemindary, should enjoy this Zemindary and all other things; pay Peishkist to the Sirkar; maintain my royal wife, my daughter, Mangaleswari, of five years old, and her younger sister a small child, and when these children shall attain their proper age, to make an arrangement with regard to their right to the zemindary, and continue the same; that my natural brother Mutuchella Tcovar should manage the affairs of the Zemindary until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement.”

The affairs of the Zemindary seem to have been managed under this arrangement between 1830 and 1840. The respondent Purvata, is said to have been herself very young at the date of her husband's death; her children were infants; and the mother-in-law was probably the only member of the family with any capacity for business.
In 1840, Mangaleswari the elder daughter of Ramaswari who had previously been married, died after giving birth to a male child, who did not survive her. About that time, differences arose between Purvata and her mother-in-law, who appears to have set up some claim to the Zemindary in her own right. The Board of Revenue acting as Court of Wards intervened; appointed, in April 1840, Purvata guardian of Doraraja, her infant daughter, in the place of Mutu Verai, and assumed the management of the estate, treating apparently Doraraja as de facto Zemindar, either by virtue of the Arzi executed by Qamaswami, or by reason of Purvata's waiver of her rights in favour of her infant daughter.

Doraraja died on the 24th September 1845, she had been previously married, and having no children attempted on the day before her death to adopt as a son a child named Anundai.

By the document called her will, she declared, however, that this person would only be entitled to the Zemindary in succession to her mother, Purvata, whom she calls "the chief heiress to the Zemindary." This adoption was communicated to the Collector by a letter of the 23rd of September 1845, but was treated by him as invalid under the 25th Section of Regulation V of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of Purvata to the Zemindary, as heiress either to her husband or to her daughter, was therefore recognized by the Revenue Authorities, who in April 1846, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime and ever since 1840, Mutu Verai had been engaged in active litigation with Purvata and others for her enforcement of her alleged rights to the Zemindary. The proceeding, in her last suit are set forth in the record. For the most part they have no bearing upon any of the questions which their Lordships have now to determine; and it is unnecessary to notice any of them except the supplemental rejoinder which was filed by Purvata on the
6th of March 1846; and the Razinama or agreement of compromise by which this litigation was terminated on the 26th of February 1847: in the former Purvata asserted apparently for the first time a right to adopt a son to her husband either under an alleged authority from him in the event, which had happened, of both his daughters dying without issue, or under the more general power of adoption which is disputed in these appeals. By the latter Muthu Verayi in consideration of the provision made for her and her foster son, Sinasvami, declared that Purvata might thenceforward enjoy the Zemindary for ever; and besides might adopt a son at her pleasure as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the Zemindary and its management, between the death of Ramaswami in 1830 and the month of May 1847, Purvata was at the last mentioned date in undisputed possession as Zemindar of Ramnad.

In that state of things she made the adoption, which is the subject of the present dispute. On the 19th of May 1847, she gave notice to the Collector of her intention to adopt her sister's younger son, and invited him to be present at the ceremony. On the 24th of the same month, she formally adopted the respondent, Ramalinga.

It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached, except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an order dated the 10th March 1849, declared that the adoption was invalid, and that on the death of Purvata the Zemindary would escheat to Government. On the 23rd of July 1855, the Madras Government set aside this order, and confirmed the order of the Board of Revenue of the 10th of June 1849; and caused this its final determination to be intimated to Purvata through the Collector by a letter dated the 15th November 1855.

The first of the suits out of which these appeals arise was instituted in that year by Kunjara, claiming as the last surviving
wife of Annaswami, and her daughter Mangaleswari, against Purvata alone. They impeached the validity of the adoption, insisted that on Purvata's death, Kunjara as the next in succession, would be entitled to the Zemindary, and claimed maintenance in the meantime.—Purvata by her answer alleged that Kunjara was not the wife but the concubine of Annaswami and could have no title to the Zemindary. Various persons afterwards intervened under different titles, and were all by supplemental plaint made parties, defendants to this suit; but none of them, except the respondent, Ramalinga, and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits was brought in February of that year by the respondent Ramalinga, who had then attained his majority against Purvata and the Collector. Against the latter it sought to have the before mentioned order of intimation of the 15th of November 1855, set aside as illegal; and against the former it prayed that immediate possession of the Zemindary might be adjudged to the respondent Ramalinga. The second suit was the first heard, and by his decree, dated the 18th March 1861, the Civil Judge ordered that the order of the Collector of the 15th November 1855, and his orders to certain subordinate officers therein referred to, should be cancelled; and that as he had failed to establish any right to the estate, as to invalidate the acts of Purvata in respect to it, he should abstain from all further interference, and that Purvata, subject to the provisions of Hindu Law, and Section 8 of Regulation XXV of 1802, might without the previous consent of the Collector, or of any other authority, assign and transfer to the plaintiff (the respondent Ramalinga), or whomsoever she might think proper, by sale, gift, or otherwise, her proprietary right in the Ramad Zemindary. The decree further declared, that it was to be without prejudice to the Collector's right to bring a regular action for the estate if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat, whilst there were heirs.
The decree made by the same Judge in the first suit bore date the 12th of April 1861. It found that Kunjara was one of the wives of Annaswami, but that as such she had no right to succeed to the estate after Purvata, being only her stepmother, and therefore excluded from inheriting it; it further decreed that the Zemindar of Ramnad for the time being should pay to the plaintiffs (the Appellants, Kunjara and her daughter), maintenance at the rate of 400 rupees per mensem, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, against the second, Kunjara and her daughter, appealed to the High Court of Madras; and on the 26th of March 1863, the Court made an order on both appeals, whereby it directed the Civil Judge to try the following issue: "Was the adoption made with the authority of Mutu Verayi, widow of Annaswami, or with that of any others of the kindred of the late Zemindar, Ramaswami, in whose behalf the said adoption was made." It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st of September 1863; and the findings of the Civil Judge are at page 93 of the 1st Record. They are in effect that the consent of Mutu Verayi, and of all the then surviving kindred of Ramaswami, had been obtained to the adoption.

Against this finding, the Collector, as well as Kunjara and her daughter again appealed to the High Court, which on the 17th of November 1864, after two hearings pronounced an elaborate judgment in favor of Purvata's right to adopt, and her exercise of it in the particular case, and in doing so the Court came to the following conclusions:

I. That the widow of the late Zemindar had made a valid adoption; that there was no doubt it was made with the assent of the majority of her husband's sapindas; and that though it might be
doubtful whether the Civil Judge was right, there were not sufficient grounds for saying that he was wrong in thinking that all the sapindas then living had been proved to have assented.

2. That considering the extent of the property, and the fact that she was the last surviving widow of the Zemindar, Annaswami Kunjara was entitled to a more liberal maintenance than that accorded by the Civil Judge; and that such maintenance should be at the rate of 10,000 rupees per annum. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with the judgment, the following appeals have been presented viz:—

1stly.—An appeal by the Collector impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th March 1861 as declared or implied that "Purvata" had power to alienate or affect the Zemindary beyond her life in trust.

2ndly.—An appeal by Kunjara, and her daughter, also impeaching the objection; and further objecting to the decree of the 12th April 1861, and in so far as it declared that Kunjara had no right of succession to the Zemindary.

3rdly.—A cross appeal by Purvata and Ramalinga, objecting to the maintenance awarded by the High Court as exorbitant; and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question, whether by the Hindu Law, as current in what is known as the Dravida country (wherein Ramnad is situate), a widow can adopt a son to her husband without his express authority; and if so, by whose assent that defect of authority must be supplied. Their Lordships think it will be convenient to consider, in the first place
how this question really stands upon the authority of Mr. Colebrooke and Sir Thomas Strange.

Mr. Colebrooke's Note on the "Mitakshara" (Chapter I, Section II, Art. 9), which has been much discussed, clearly involves three propositions:—1. That the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the Schools of Hindu Law, except that of "Mithila". 2. That the Bengal (or Goura) School insists that the widow must have the formal permission of her husband in his lifetime.—3. That some at least of the other Schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The two first propositions are admitted; but it has been argued for the appellants, that on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise called the Mayukha is the predominant authority. Balambhata, however, whom he cites as an authority for a power of adoption in the widow wider even than that expressed in the third proposition, was a commentator of the Benares School. And the several notes of Mr. Colebrooke, at pages 92, 96 and 115 of the 2nd Volume of Strange's Hindu Law, seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common "to the followers of the Mitakshara in the Benares as well as in the Mahratta School," and as such to be receivable as the law current in the Zilla Vizagapatam, which lies between the Northern or Andra division of the Dravida country.

Again, Sir Thomas Strange's Statement of the law in his work, Vol. I, page 79, is clear and unambiguous:—"He says equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given to take effect, like a will after his death; and according to the doctrine of the Benares and Mahratta Schools prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal Provinces."
Their Lordships entertain no doubt that the term "the Peninsula," as used here, and other passages by the same author denotes that part of India which is South of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of the Dravida district. The learned Counsel for the appellants, however, appeals from Sir Thomas Strange as a text writer, to Sir Thomas Strange as a Judge, and cites his dictum in Pillai v. Pillai as opposed to this passage. In that case, Sir Thomas Strange after citing the text of Vasista, says: "Hence it may be inferred what appears confirmed by opinions of living Hindu lawyers, and by every case of the kind we are acquainted with, that the consent of the husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir Thomas Strange. The precise question which is now under consideration was not in issue in that case, where there was a written authority from the husband, and where the real issue was whether the widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindu law were far less accessible to an European Judge than they have since become.

And Sir Thomas Strange, in his work composed twenty years later, says of this very case of Pillai v. Pillai that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. Colebrooke's, translation on the law of inheritance, and the treatise on adoption since translated by Mr. Sutherland, to say nothing of the M. S. S. materials that came subsequently into his own hands, and which had contributed largely to every chapter of his work. There can therefore, be no doubt but that the passage in his book contains the matured opinion of Sir Thomas Strange, and that it must be treated as an authoritative declaration of that opinion controlling his dictum in Pillai v. Pillai (1.)

(1) 2 Strange's Notes of Cases, 108.
Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo Law current, in the South of India, their Lordships have next to consider whether any sufficient reason has been assigned for trusting that opinion as unfounded.

The remoter sources of the Hindu Law are common to all the different Schools. The process by which those Schools have been developed seems to be of this kind. Works universally or very generally received become the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Thus the Mitaksahra, which is universally accepted by all the Schools, except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority yielding only to the Dayabhaga in those points where they differ, was a commentary on the Institutes of Zajnavalkya; and the Dayabhaga, which wherever it differs from the Mitaksahra, prevails in Bengal, and is the foundation of the principal divergencies between that and the other Schools, equally admits and relies on the authority of Zajnavalkya. In like manner they are glosses and commentaries upon the Mitaksahara, which are received by some of the Schools that acknowledge the supreme authority of that treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of Vashista, which says, "Nor let a woman give or accept a son unless with the assent of her lord." But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime but capable of taking effect after his death; whilst the Mayukha and Kanstubha treatises which govern the Mahratta School, explain the text.
away by saying that it applies to an adoption made in the husband's life time, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute in cases of necessity evidence of authority from the husband, than to the authority to adopt being independent of the husband.

The duty therefore, of an European Judge, who is under the obligation to administer Hindu Law, is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law. The respondent Ramalinga, insists that, tried by either test, the proposition for which he contends will be found to be correct. The industry and research of the Counsel in the Courts below have brought together a Catena of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest European Authorities Mr. Colebrooke, Sir Thomas Strange, and Sir William Mac-Naghten, all concur in treating as works of unquestionable authority in the South of India, the Mitakshara, the Srutis Chandrika and the Madhavyam, the two latter being, as it were the peculiar treatises of the Southern or Dravida School. Again, of the Dattaka Mimansa of Nanda Pandita, and the Dattaka Chandrika, two treatises on the particular subject of adoption, Sir William Mac-Naghten says, that they are respected all over India; but that when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the provinces of Mithila and Benares. The Dattaka Mimansa, by the author of the Madhavyam, is also recognized as of high authority in
the South of India, by Mr. Ellis in his note at page 168 of the 2nd volume of *Strange*. On these treatises the *Mitakshara* is silent on the point in question. The *Dattaka Mimansa*, of Nanda Pandita, (Section I, Articles 15 to 18, and Articles 27 and 28), is opposed to the respondent's view of it; but it seems equally opposed to an adoption by a widow under any circumstances. The *Dattaka Ckandrika*, (Section I, Articles 31 and 32,) allows a widow to give a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The *Smriti Chandrika*, also permits a mother to give her son if she be authorized to do so by an independent male. And it is argued that what these two last authorities lay down concerning a widow's right to give, must by parity of reasoning, be taken to be laid down concerning her right to receive a son in adoption. The *Madhavyam*, if that term is confined to the *Parasara Madhaviya*, and does not embrace all the works of *Vidyā Narayanswamy*, seems also to contain no direct determination of the point in question, but the *Dattaka Mimansa*, of that author clearly and explicitly declares the right of the widow to adopt with the authority of her father-in-law, and whatever other kinsman of her husband may be comprehended under the *et caetera*. It cannot therefore, be said that the proposition laid down by Mr. Colebrooke, and adopted by Sir Thomas Strange, is not supported by at least one of the original treatises of undoubted authority in *Dravida*.

The *Dattaka Mimansa* of *Sri Rama Pandita*, who is stated by the Judges of the High Court to be an authority very generally cited in the South of India, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of *Dravida* the peculiarly *Mahratta* treatises. (The *Mayukha* and *Kanstubha*); and also the *Vira Mitrodaya*, which is a treatise of especial authority at Benares. It must however, be admitted that the fact of the reception of the doctrine in question by Schools so closely allied to that of *Dravida* is in favour of the
hypothesis, that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the South of India, consists partly of the opinions of Pandits, partly of decided cases.

Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindu Law in various parts of British India. Upon such materials the earlier works of European writers on the Hindu Law, and the earlier decisions of our Courts, were mainly founded. The opinion of a Pandit which is found to be in conflict with the translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence, that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country. A considerable body of these futwahs is collected in the third part of what has been called throughout the argument in this case, the "green book." It is not necessary to consider whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion to the effect that where the authority of her husband is wanting, a widow may adopt a son with the assent of his kindred in the Dravida Country. The decided cases, exclusive of those in the Bombay Presidency, which may be taken to be governed by the Mayukha are certainly not many. But there is at least the case G., decided by the late Sudder Court of Madras, and there are the French Cases, which ought not their Lordships think, to be wholly disregarded as recognition of the law prevailing in the South of India. They are to be relied on in this case as affording evidence of a long continued series of opinions officially given, and judicially received, which were adopted
as the grounds of decision, showing a continued and recognized existence of a doctrine, which suffices to remove from the opinions of the Pandits, in this case, every suspicion of being opinions given to support the interests or judgments of others. Against these authorities, the appellants have invoked, that of the case in 2 Knapp, p. 208. But what was in fact, decided by the very guarded judgment delivered by the late Lord Wensleydale in that case? It was that according to the native Text Writers, including probably Vastusla, certainly including the Dattaka Minansa of Nanda Pandita, the authority of the husband was requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the Mahratta States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction, that relaxation had extended to the particular district of Etawah, in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that district did not require the direction of the husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the court below. It is clear that that decision was not intended to govern, and cannot be taken to govern a case arising in the South of India.

Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dadvida country, and, particularly in that part of it wherein this Kamnad Zemindary is situate, a Hindu widow not having her husband's permission may, if duly authorized by his kindred, adopt a son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu Law, or upon analogies real or supposed, between adoptions according to the Dattaka form, and the obsolete practice, with which that form of adoption co-existed, of raising up issue to the deceased husband, by carnal intercourse with the widow.
It may be admitted that the arguments founded on this supposed analogy are, in some measure, confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaka Mīmāṃsā of Vidyā Narayanaswamy, the author of the Madhavyam; but as a ground for judicial decision, these speculations are unadmissible, though as explanatory arguments to account for an actual practice they may be deserving of attention.

It must however be admitted that the doctrine is stated in the old treatises, and now by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—i.e., undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate except a right to maintenance. And though the father of the husband, if alive, might as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt where not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindus. Their Lordships do not think there is any ground for saying that the consent of every kinsmen, however remote, is essential. The assent of kinsmen seems to be required by reason of the
incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased, and not bona fide attained. The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption was needed, they do not in themselves go to the root of the legality of an adoption.

Again it appears to their Lordships, that inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen, proceed, in a great measure, upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supercession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rights. Their Lordships having thus stated the conclusions to which they have come upon the general question of Law involved in these appeals, will now consider whether the High Court of Madras has correctly applied that Law to the facts of the present case.
They are of opinion that both the Courts below were right in holding that the collateral kinsmen of Ramaswami were to be found in the Taver family, of which the printed pedigree forms part of the record. According to Hindu Law, Ramaswami was the son, though by adoption, of Annaswami; and he again was the son, though by adoption, of the first Ramaswami, who was a Taver; and the heirs of Ramaswami in the absence of descendants, were traceable upwards through these two persons as if they had been his natural father and grand father. There is no ground for saying that this, the legal consequence of the successive adoptions, was afforded by the assumption of the name of Sathupathy, the family name of the ancient Zemindars of Ramnad and of Mangalerwari, the grantee of the Zemindary. It is to be observed, however, that this line affords now but very remote kinsmen, if their relationship to Ramaswami be calculated on the principle just stated. The nearest of them, Mutuswamy, would on that principle, stand in a degree of relationship to Ramaswami which according to the rule of the Mitakshara, (Cap. 2, Section 5, Art 6), would exclude him from the category of Sapindas, and place him in that of Samanodakas, or those connected only by a libation of water, and a common family name,—He was, however, the natural brother of Annaswami, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of Ramaswami's widow.

Again, the person who really filled the office of protector, and that by the express appointment of Ramaswami, was, up to the time of her quarrel with her daughter-in-law Mutu Verayi. Nor is it by any means unusual in a Hindu family to find the mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Purvata, after the failure of Ramaswami's descendants. It therefore appears to their Lordships that in this state of the family the assent of Mutu Verayi, of Mutuswamy, and of the other persons who are proved beyond all question, to have assented, was
sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsmen, Ramraja Taver.

It has been argued, however, that even if this adoption would have been regular had Ramaswami died childless and intestate, his Arzi relating to the management and descent of the Zemindary contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow. Their Lordships cannot accede to this argument. Ramaswami, no doubt, intended to be represented by his daughter's line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission, are powerful to exclude a presumptive prohibition to adopt when on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt, except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the appellants was founded on the attempted adoption of a son, Annaswami, by Doraraja. That person is not a party to either of these suits; he has not impeached the adoption of the respondent, Ramalinga; he has, on the contrary, supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue Authorities, at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining whether that adoption was, in fact, valid or invalid; or whether, if valid, it would have any, and what, effect on the title of the respondent, Ramalinga. In that state of things, neither of the present appellants can be allowed to insist on this supposed Jus tertii as an objection to the decrees which they impeach.
Their Lordships have, therefore, come to the conclusion that these decrees and the judgment on which they proceed are substantially right, in so far as they affirm, as between the parties to this litigation, the validity of the adoption by Purvata of the respondent, Ramalinga.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of March 1861, on the ground that it asserts a power in Purvata to alienate or affect the Zemindary beyond her life interest. Her power of alienation is expressly stated to be "subject to the provision of Hindu Law," and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindu Law, free from the control of the Government or its Revenue Officers.

Their Lordships are further of opinion, that there are no grounds for impeaching the decree of the 12th April 1861, in so far as it found that the Appellant, Kunjam, stood in the relation only of step-mother to Ramaswami; and, therefore, could have no right to inherit his estate. They think that this conclusion is supported by the document which expressly states that, Ramaswami was adopted by Annaswami and Muttu Verayi unanimously.

Upon the cross appeal their Lordships have only to observe, that the quantum of maintenance is a question with which the Courts of India, having local knowledge, and being conversant with the habits of native families, are peculiarly competent to deal; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of Madras in the present case.

Being, therefore, of opinion that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recom-
mend to Her Majesty that the two appeals and the cross appeal be each dismissed, with costs.

1. Colebrooke in his remarks on a case quoted at page 92, Vol. 11, Strange's Hindu Law, says that "the followers of the Mitraschara in the Benares and Maharastika Schools, admit the widow's power of adoption without authority from her husband, if she have the sanction of his kindred." With all deference for the opinion of so high an authority on Hindu Law, it is submitted that this exposition of the Benares Law, is incorrect; in the first place, it is directly at variance with the decision of the Sudder Court of Bengal in the case of Raja Shamshere Mull, in which the authorities were all well considered; in the next place, it is opposed to the equally high authority of Macnaghten, (See Principles of Hindu Law, page 84, Wilson's Edition); and lastly, the Lords of the Privy Council in Re Haimun Chull Sing v. Koomer Gunsheem Sing, stated distinctly referred to the case of Raja Shamshere Mull, and decided in accordance with the doctrine therein laid down. Now as the case before the Privy Council was governed by the Benares Law, the alleged adoption having taken place in the district of Etawah, the decision of their Lordships must be held to place the question beyond all controversy, especially as the same Court has again very recently, in an appeal from the Agra Sadr Court, affirmed the same doctrine, and ruled that the husband's authority must be strictly proved. Their Lordships also observed that as the adoption is for the husband's benefit, so the child must be adopted to him and not to the widow alone; nor would an adoption by the widow alone, for any purpose required by the Hindu Law, give to the adopted child, even after her death, any right to the property inherited by her from her husband. Chowdri Padam Singh v. Koer Udaya Singh, 12th March 1869, II, B. L. R. 101, P. C.

2. The Bengal School follows the Benares, in requiring the husband's authority to give validity to an adoption by his widow. Thus in Janki Dibek v. Suda Shoo Rai, the Sudder Dewani Adalat of Calcutta decided that, as the widow had failed to prove the genuineness of the deed of permission which she had produced, the adoption made by her was consequently invalid. I Select Reports, 262, new edition. Vide also Sutherland's remarks to a case decided in Zillah Salem in 1803, 11 Strange H. L. p. 84; the answer of the Fundit in another case, ibid, p. 92; and Macnaghten's Principles of H. L. page 84, Wilson's Edition; and Colebrooke's Digest, Book, V. Chapter, IV. Section VIII. CCLXXII. So also it was held in Jai Ram Dhani, and others, v. Musan Dhani, 14th January 1830, 6. Cal. S. D. A., Reports, page 8, that according to the law applicable to Behar, permission of the husband was absolutely necessary to legalize adoption by his widow in the Danaka form, and that leave from her husband's kindred was not sufficient.

3. In Southern India, on the contrary, it has been repeatedly held that the consent of the husband's kindred is sufficient to give validity to an adoption by a widow, Rames Secagamy Nachiar v. Streemathoo Hermaniah Gurbah, Case 18 of 1814. I Morley's Digest, 13, title, Adoption; Arundodi Ammal, III, Madras High Court Reports, page 253; and the case reported in the text, recently decided by the Privy Council, finally disposes of the question. In Bombay it was held, that a widow could adopt if she obtained permission of the caste, and the sanction of the ruling power, provided she adopted the nearest of kin to her late husband, Sree Brij Bockusjes Maharaj v. Sree Gokooloosajee Maharaj, 5th November 1817, I Borr. 181; but in Halwel Rao Mankur v. Govind Rao Bulmunt Rao Mankur, 1st September 1823, 2 Borr.: 75, it was held that although a widow could adopt without the injunction of her husband, the son of her husband's brother, she could not do so in any other case.

4. Under the Hindu Law current in Mithila, however, a widow has power to adopt a son in the Kritrima form with or without her husband's consent; but such son would not by virtue of such adoption lose his position in his own family; nor would he succeed to the property left by the husband of his adoptive mother, but would be considered his son and entitled to succeed to her only. Collector of Tirhoot v. Haropershad Mohunt, 29th May 1867, VII, Suth: W. R. 500, Civil Rulings, and Must. Shibokoree v. Joopus Sing and others VIII Suth: W. R. 155.

5. It is not necessary that there should be a written power from the husband:
6. In Gobind Soondar Debi v. Joggo Dumba Debia, 29th May 1865, it was held by the Calcutta High Court, that a Hindoo woman, taking no steps to adopt until the death of the last male member of her husband's family, forfeits her right to adopt, III W. R. 66; but, in an earlier case (24th March 1814), it was held that a power of adoption granted by a Hindu to his wife, may be exercised by her at any time after her husband's death, and accordingly, an adoption fifteen years after the husband's death, was held to be valid. East's Notes, Case 10.

7. As regards the widow's power to give a son in adoption, it has been held by the Sadr Dewani Adalat of Madras, that she can give her younger son on obtaining the consent of father, brothers, &c., Arnachellum Pillay v. Jyasam Pillay, Case 5 of 1817, 1 Mad. Dec. 154; but she is incompetent to give her only son in adoption as a Dwyamushayana without authority previously given by her deceased husband. Debee Dial and another v. Hur Har Singh, 29th December 1828, 4. Cal. S. D. A. Rep. 320. "On the subject of the legal ability to give a son in adoption," says Mr. Butherland in his Synopsis of the Law of Adoption, Head second, "some difficulty exists in extracting a consistent doctrine. The more correct opinion appears to be:—1st.—That, the father may give away his minor son without the assent of the mother, though it is more laudable that he should consult her wishes;—2nd.—That, the mother generally is incapable of such gift while the father lives;—3rd.—That she, however, on her husband's death may give in adoption her minor son, and even during the life of that person, in case of urgent distress and necessity. A man who had permanently emigrated, entered a religious order, or become an out-cast, being civilly dead, would be regarded as virtually deceased." The text of Mena is, "He whom his father or mother, with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water." Chapter 9, Section IV, § 12. See also MacNughten's Principles of H. L. page 68 Wilson's edition, 1, Strange H. L. 82, Strange's Manual of H. L. § 78.

8. The Mitacchara, however, seems to recognise the right of a widow to give a son in adoption without any previous authority from her husband Vida Chap: II, Section XI, para. 9, and the commentator Balam-Bhatta, who belongs to the Benares School, distinctly asserts this to be the law.
A Hindu widow cannot, on the death of one adopted son, adopt another unless she has received special permission from her husband to do so.

GOURNATH CHOWDRI AND OTHERS.

Versus.

ARNOPPOOBNA CHOWDRAIN.

Before the Sadr Dewani Adalat of Bengal.

Sir R. Barlow, W. B. Jackson, and R. H. Mytton, J. J.

Suit laid at rupees 6,251, for possession with mesne profits.

Baboo Hurakali Ghose, for Appellants,

Baboo Sumbhoonath Pandit, for Respondent.

In this case the Unoomuttee puttur only gave permission to the widow to adopt a son, and the question was whether, after the death of such son, the widow could legally adopt a second son.

Judgment. On reference to MacNaghten, Volume 1, page 86, we find it is a disputed point whether a widow having, with the sanction of her husband, adopted one son and such son dying, she is at liberty to adopt another without having received conditional permission to that effect from her husband. According to the doctrine of the Dattaka Mimansa, the act would clearly be illegal, and this work is authoritative on the subject of adoption.

As it appears from the decision of this Court, at page 135, Vol. I, Sudder Dewani Decisions, that on special permission granted, one son may be adopted on the death of another, and no case has been brought forward to show that without such permission such adoption would be valid, and further, as it is a principle of Hindoo law, that without permission no son can be adopted, it is a fair legal inference that a second adoption on the death of the first child, when the husband is no longer alive to grant permission to adopt, cannot be valid. We therefore set aside the alleged adoption of Gooroo Dutt. This decision renders any argument on the fifth issue 27th April 1852, S. D. A. R. p. 322.
(i.e. whether it was lawful for Brahmins to adopt a son at the seventh year of his age,) raised by the appellants, unnecessary.

The Respondent has defended the action on the ground of a hibbanama from her husband; upon this point the Principal Sudder Ameen gave no decision, and respondent gives up her issue. She is nowhere denied to be the widow of Nobokishore Surma, and has pleaded that during her lifetime she is entitled to the property left by her husband. She is no doubt by Hindoo Law entitled to keep possession of the property which she now holds during her life.

We dismiss the original plaint and reject this appeal; the Principal Sudder Ameen's decision is amended, thus the defendant Arnopoorna will continue in possession during her life by right of succession to her deceased husband.

Under the circumstances of the case costs are charged equally to the parties.

1. Jagannath who affirmed the validity of two successive adoptions by a widow who had only a single injunction from her husband, did so on the ground that the object of the injunction would otherwise be unattained; but the above decision has set the point at rest, and, as pointed out by the learned judges, it is undoubtedly, a fair and logical inference from the principle that a husband's authority is essential to an adoption, that a second adoption, where the permission is limited to a single act, is invalid.

2. In the case alluded to by the judge Sumbhoochunder and another v. Narain Debia, reported ante p. 1, there was a successive adoption which was held to be valid, but in that case the husband had given a special authority for that purpose; and the high authority of the Dattaka Mimansa is also against the validity of a successive adoption when the permission is a limited one.

3. As to the other plea which was raised in the above case, but not decided, viz., regarding the age of the adopted son, see post.
A widow being a minor, may adopt a son under instructions from her late husband, though her husband's brothers are living.

HARADHUN RAI, AGENT OF SURBAMUNGULA, Versus.

BISWANATH RAI AND OTHERS.

Q. A person previously to his death left directions with his wife who was then under age, to adopt a son for him, while his other brothers were alive. In this case, was he at liberty to desire his wife to adopt a son, though his brothers were living?

R. If the deceased previously to his death, and during the lifetime of his brothers, left directions with his wife to accept a son in adoption, and subsequently died, on his death, the directions so given should be considered legal for the purpose of affiliation. The non-age of his widow and the existence of his brothers are, according to law, no obstacle to the adoption. This opinion is conformable to the doctrine of Menu, the Vyavaharatata, the Dattaka Mimansa, and other Law Books.

1. The above case is a sufficient authority for the validity of an adoption by a minor widow who has been duly authorised by her husband, but whether a minor husband is competent to adopt, is a point on which eminent Hindu Lawyers have differed. Pundit Bharat-Chander Shri-romany, the author of commentaries on the Dattaka Mimansa and Dattaka Chandrika, says in his Synopsis to the former treatise, that "both male and female infants may adopt sons, infancy not being a bar to the performance of religious rites."

Baboo Prosuna-Coomar Tagore, on the contrary, on the ground that under the Mitashtra minority extends to the sixteenth year, and that "before attaining majority, every act whether worldly or religious is prohibited, except the performance of obsequies, or of the like nature, which is especially enjoined by the Shastras and not optional," has declared his opinion that "adoption by a minor, is invalid, since he cannot possess discretion, and any authority of the kind given by a minor, like any testamentary writing or verbal request made by him is invalid, according to Hindu Law."

2. It is however abundantly clear that according to the best works on the Hindu Law of Adoption, such as the Dattaka Mimansa and Dattaka Chandrika, adoption is regarded not as an optional, but as a positive act of religion; and so long as the minor has attained sufficient reason to understand the benefit and religious merit to be gained by the adoption of a son, it seems to be more consistent with the religious obligations, which the law places upon every Hindu to secure the perpetual performance of the shrad of his ancestors, to permit him not only to authorise his widow to adopt, but to make an adoption himself. The author of the Vyavastha Durpana concedes this power, but couples it with the restriction that should the adopter die before attaining majority, the adopted would only be entitled to maintenance. It is true that under Section 33, Bengal Regulation X of 1793, no adoption by disqualified land holders is to be deemed valid without the consent of the Court of Wards, and it has been held by the Sadr Court of Bengal that it necessarily follows from the provisions of the above Regulation, that no power to adopt can...
be granted by such a person without the consent of the Court of Wards. Must. Amand Moyes, v. Shib Chandar Roy.

3. But I must confess, that to uphold the validity of an adoption made by a minor on the one hand, and to declare on the other hand, that in the event of the minor's death, before attaining majority, his adopted son would only be entitled to maintenance, does not commend itself to my mind; for supposing, and in this country it may and has often happened, that a minor should have a natural son, and die a few days before the completion of his fifteenth year; could it be contended in such a case that the natural son would not be entitled to succeed his father? Certainly not, and why then should an adopted son, who possesses all the rights and privileges of a son born, be deprived of his inheritance. Both principle and reason seem to require, that where the adoption is itself legal, the adopted is entitled to all the rights which result from such an affiliation, the effect of which, it must be remembered, is to deprive him of all rights which he would otherwise have possessed in his own family.

4. Macnaghten in his Precedents (Vol. II page 175), gives a case from Zillah Jungle Mohals, 11th May 1826, in which it was held that an unmarried person was competent to adopt a son, "for the purpose of securing his own and his ancestor's funeral oblations of food and water"; but whether the adopter was a minor or one who had attained his majority, is not mentioned.
There are no restrictions in the Hindu law of adoption confining
the selection to the family of the deceased husband. On the con-
trary, a stranger may be adopted.

MUSSUMMAT LUDEEA AND MUSSUMMAT BHOOREEA.
Versus
KOOLLA AND TUNSUKH.
Before the Judicial Commissioner of the Punjab.
Claim:—Rs. 140, offerings of a temple.

This case was previously before this Court in appeal, when
it was returned for further enquiry on two specified points, viz., (1)
whether Jus Ram, deceased had been legally adopted by Mussammat
Chainoo; and (2) whether Mussammat Chainoo had a right to dispose
by will of her share of the temple offerings.

The Assistant Commissioner, Lieutenant Harcourt, decides both
points in favor of defendants.

The Commissioner considers that Mussammat Chainoo, had cer-
tainly the right to adopt an heir to her deceased husband, but she
had no power to do this without restriction. She had first to make her
selection from her husband’s family, and failing to find a suitable
heir then she might look to her own family. She had also to obtain
the sanction of her husband’s family. He therefore considered it
clearly proved that Mussammat Chainoo did not legally adopt
Jus Ram, and she held only a life interest in her husband’s share, and
that on her death this share reverted to her husband’s heirs the
plaintiffs. He therefore decreed in plaintiff’s favor.

The Defendants now appeal, urging that the two points laid
down for re-investigation by this Court ought to be decided in
their favor on the evidence which they produced.

Judgment.—The grounds upon which the Commissioner has
pronounced the adoption of Jus Ram to be illegal are not tenable.
There are no restrictions in the Hindoo law of adoption confining
the selection to the family of the deceased husband. On the contrary, a stranger may be adopted (see Principles, Hindoo and Mahomedan Law by H. H. Wilson, chapter VI, page 70, 71); neither is the sanction of the kindred of the deceased husband imperative.

Therefore, as the Lower Courts have found that Mussammat Chainoo had certainly the right to adopt an heir to her deceased husband, she was at liberty to adopt her nephew Jus Ram, and did undoubtedly adopt him, although he does not appear to have succeeded to the sole possession of the property, having died when he was only 22 years of age. It is also clear that the appellant, Mussammat Ludeea has since the death of her husband, Jus Ram, lived with her adopted mother Chainoo; Ludeea, therefore, as the widow of Jus Ram, is entitled to a life interest in the property, but it is not proved that Ludeea received the permission of her husband, Jus Ram, to adopt a son, or that she has formally and legally adopted Bhoorco.

I therefore affirm the appeal, and reversing the order of the Commissioner, dismiss the suit of Respondent, as against Ludeea who has a life interest in the property.

In Ooman Dut v. Kunkia Singh
15th April 1822, III Select Reports
192, new edition, which was an action brought in the Zillah Court of Tirhoot, where the Kritrima form of adoption prevails, the Pundits of the Court were asked, "whether an individual who had a brother's son living could in Tirhoot legally adopt as Kritrima son, his daughter's son, or any other person, and the answer was that such adoption would not be lawful, the adoption of a Kritrima or any other sort of son, when a brother's son existed, being forbidden by the authors of Kalpataru and Parjata, and other old writers of that country, and likewise by the modern writers, Chanderscara, Vooakapati Misra, Bansadhara, Rukhazara, Harimatha, and others; that it was therefore not valid by approved usage, as no such usage could exist in opposition to every law tract of the country, ancient and modern, nor be of any weight if it did exist." The Officiating Judge of the Sadr Court in accordance with this exposition of the law, dismissed the plaintiff's claim, remarking that "the conclusion against the validity of the adoption was confirmed by the Dut-taka Chandrika, and Dattaka Mimansa, in which it is stated, that in default of a son the nephew has a right to be adopted to the exclusion of all others." But although the above decision is undoubtedly in accordance with the Dattaka Mimansa, a work which it must be admitted is of great authority on questions of adoption, its correctness has long been questioned; and so far from the Dattaka Chandrika, a work of almost equal authority with the Dattaka Mimansa, confirming the doctrine, it entirely controverts it. See Section I, para. 22, page 135, Kishen Kirhore's In. In Bengal where the latter authority prevails, a brother's son may be superseded in favor of a stranger, and although such a son is generally regarded as the most fit person to be adopted, the doctrine now generally accepted even in Schools governed by the Benares law, is, that he does not possess an imperative or indefeasible right to be adopted. To quote the language of Macnaghten, "it may be held, then, that the injunction to adopt one's own Sapinda (a brother's son is the first), and failing them, to adopt one of one's own gotra, is not essential, so as to
invalidate the adoption in the event of departure from the rule.” Principles H. and M. law, p. 71. Wilson’s edition:—In Prayaga Venkata v. Lachsheng, 27th July 1809, II Strange’s Hindu Law 102, the Pundit of the Marsalipatam Provincial Court, on the authority of a passage from Sureswaty Vataram, gave his opinion that while there was a possibility of adopting a brother’s son, another should not be preferred, but both Colebrooke and Ellis in their remarks on this case, differ from this opinion; and the latter distinctly says “it is not incumbent on a person to adopt the son of a brother, or other Sapinda. The law merely states this as preferable, but without prescribing it.” See also similar remarks, Ibid. p. 98-99.

2. To the same effect is the language used by Sir Thomas Strange, for he says, “the result of all the authorities upon this point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one, not being precisely him who, upon spiritual considerations, ought to have been preferred.” Volume I, H. L. page 85. See also note, Morley’s Digest, Volume I, page 18, and the case of Horadhan Rai—v.—Biswanath Rai reported ante p. 85.

3. The principle, therefore, laid down in the decision given in the text, although at variance with the case of Oomun Dat v. Kunkia Singh above mentioned, appears to be better supported by authorities, and in accordance with the usage of more modern times. I am myself aware of several instances of a brother’s son having been superseded in favor of a stranger, or a remote kinsman, in the city of Delhi, where the Banares law prevails; and I am informed that the ancient rule ordained by Moses has been similarly relaxed in most parts of India.
(1.)—The second adoption of a son, the first adopted son being alive and retaining the character of a son, is an illegal and void act.

(2) Twin adoption is also wholly void, and a husband cannot confer on his wife a larger power of adoption than he himself would possess.

1.—BUNGAMA (WIDOW) FOR HERSELF AND ANOTHER.

Versus.

ATCHAMA (WIDOW) AND OTHERS.

AND

ATCHAMA (WIDOW).

Versus.

RAMANADHA BABOO.

Before the Lords of the Judicial Committee of the Privy Council,

On appeal from the Sadr Dewani Adalat at Madras.

Right Hon'ble T. Pemberton Leigh.—The question in these appeals relates to a very large property in the Northern Circars, which in the year 1798, belonged to a Zemindar, named Vencatadry.

Vencatadry being childless, on the 2nd of April 1798, adopted as his son, a boy named Jaganadha. On this occasion he signed a paper, bearing date the 7th of April 1798. In this paper, after reciting the adoption, he proceeds to say, "Therefore, be it believed that I have executed this, my tutelar deity bearing witness, that Jaganadha Naidoo, is Huckdar, or heir to my Zemindari, Mirasay, to my wealth and debts; and that I have it not in my power, on any account whatever, to make over (the same) to any other person besides him (Jyanadha Naidoo)." On the fact, or the validity of this adoption, no question is made. He afterwards became desirous of adopting another boy, named Ramanadha, and of dividing his property between them. It is said by the Appellants, and many witnesses have sworn, that he consulted certain Pundits, as to the validity of a second adoption, and was advised by them that a second adoption could not be legally made.
It was contended by the Appellants, that upon the whole evidence it was to be inferred that, in consequence of this opinion, although he brought up Ramanadha as his son, he never adopted him with those religious ceremonies which were necessary in order to constitute a valid adoption, according to the Hindoo law. We have no doubt, however, that he did whatever was necessary to constitute a valid adoption, if such second adoption could by the Hindoo law, be valid.

This last adoption took place in 1807, various steps seem to have been taken by Vencatadry during the minority of both these boys, with a view to divide his property between them.

In 1815, Janganadha attained the age of eighteen, when by the Hindoo Law, he came of age. After this, in 1816, Vencatadry made a new division, between his two sons, Ramanadha being still under age, and, as it seems, about nine years old. Janganadha took possession of the property so allotted to him; and Vencatadry seems to have remained in possession of what was allotted to Ramanadha. In the course of the year 1816, Vencatadry died; Janganadha claimed the whole of the property of Vencatadry, alleging that the adoption of Ramanadha was invalid, and at all events did not constitute him a coheir. Much dispute took place on this subject, and various proceedings were laid before the Board of Revenue, which had seized a large portion of the property, for payment of arrears of revenue. Suits were instituted for the purpose of determining the right of the parties, into the particulars of which it is not necessary to enter. The first of the suits, now in controversy, began in 1820, being a suit instituted by Ramanadha, against Janganadha, to establish his right to that portion of the property which had been allotted to him in his character of adopted son, by Vencatadry. This suit was still pending when Janganadha died. In 1824, a decision was pronounced against Ramanadha, from which, however, he appealed; and before the appeal had been heard on the 28th of February 1825, Janganadha died. He left no natural,
born issue, but two wives, Rungama and Atchama, and a boy who had been brought up in his house, and who is said to be his adopted son named Lutchmeputty.

The question then arose, who was entitled to succeed to the estate of Jayanadha; the question of what the estate of Jayanadha, consisted, that is whether he was entitled to the whole, or only the half of the estate of Vencatadry, still remaining unsettled. With respect to the right of succession to Jayanadha, it is not disputed that if he left a son, whether natural born, or legally adopted, such son would be entitled to succeed. That if he left no son, but an undivided brother, such brother would be entitled to succeed. That if he left no son, nor undivided brother, the widow, or one of the widows, would be entitled to succeed.

On the death of Jayanadha, Ramanadha set up a title to the whole estate of Vencatadry, alleging (not very consistently with his former claim), that he and Jayanadha were undivided brothers, and that Jayanadha had left no issue, natural born son, or adopted.

Rungama at first acquiesced in the claim of Ramanadha, it being alleged by her that she was deceived by Ramanadha who got authority to act for her, while it is alleged by other of the parties that she colluded with him.

Lutchmeputty was a child of about six years old and no claim was brought forward on his behalf. Atchama, however, instituted a suit, claiming the whole of the estate of Jayanadha, and insisted that she was entitled to inherit. Afterwards Ramanadha and Rungama having quarrelled, the claim of Lutchmeputty was advanced. After long litigation, with various fortune, in the Indian Courts, the Sudder Adawlut decided that Jayanadha and Ramanadha were undivided brothers, and that Lutchmeputty was not the adopted son of Jayanadha; that consequently Ramanadha, was entitled to the whole inheritance which had come from Vencatadry: and against this decree the present appeals are brought.
The questions for our decision relate, first, to the estate of Vencatadry, and secondly, to the succession of Jaganadha.

The conflicting parties are:—First, Lutchmeputty, who claims the whole inheritance which came from Vencatadry, on the ground that Jaganadha was the only adopted son of Vencatadry, and that he Lutchmeputty is the adopted son of Jaganadha. Secondly, Atchama, who insists that Lutchmeputty was not well adopted, and that she, as eldest widow, is entitled to succeed to the inheritance of Jaganadha. Thirdly, Rungama, who maintains the case of Lutchmeputty, but insists, that if he is not the adopted son, she is entitled to share with Atchama, in the succession of Jaganadha. Lastly, Ramanadha, who maintains the decree as it stands.

A further question is made, in which all the other parties concur in contending against Bamanadha, that if he was well adopted, and, therefore, a brother of Jaganadha; they were divided and not undivided brothers, and therefore, though Bamanadha might be entitled to his share of Vencatadry's property, he can have no right of succession to Jaganadha's.

As far as concerns Ramanadha, his whole title depends on the validity of his adoption. If he was not well adopted, he was neither a co-heir with Jaganadha, nor heir to Jaganadha.

The first question, therefore, is, as to the validity of a second adoption, the first adopted son still existing, and remaining in possession of his character of a son. This appears to have been long a point of great doubt in Hindoo Law, and is stated by the Judges in this case, to be unsettled.

Three classes of authority have been referred to:—First,—The opinions of the Pundits, appearing in the course of the proceedings;—Secondly,—The Native Authorities, as found in the Hindoo treatises; and.—Thirdly,—The European Authorities.

First, as to the Pundits; there is considerable difference of opinion amongst them. If the Appellant's evidence is to be believed,
a number of Pundits and learned men gave their opinion against
the validity of the adoption, to Vencatadry, in his life time, and this
at a period when their bias would probably be, to favour the
wishes of the powerful Raja who consulted them. On the death of
Vencatadry, there is a certificate signed by 140 Brahmins, that the
adoption of Ramanadha was invalid. But as this was an opinion
produced by Jaganadha, then in possession of the estate, but little
weight is due to it.

On the other hand, in 1818, before the institution of the suit
by Ramanadha, the Northern Provincial Court, took the opinion
of their own Pundit, and of the Pundits of the Centre and Southern
Divisions of the Courts, on these questions:—

1. "Is a person having, conjointly with a wife, adopted a son,
and thereafter being displeased with her, and marrying a second
wife, authorized by Hindoo Law, conjointly with her, the second
wife, to adopt a son ?

2. "A person adopting a son, having for any reason adopted a
second son, is the former or the latter heir to the estate of the adopt-
ing, or are both sons entitled to share the same ?"

These Pundits, being at a distance from each other, giving
separate opinions at the same intervals of time, without, as it
appears, any communications between them, all agree in holding,
that the second adoption is good, and that both sons are
equally entitled to inherit. The opinions seem to be as free,
as any opinion can be, from suspicion of undue influence.
When the case came before the Sudder Court, two of the Pundits
consulted were in favor of the adoption, and one against it. The
reasoning of the two Pundits in favor of the adoption is certainly
very unsatisfactory, but still, so far as the law is to be collected
from the opinion of the Pundits, to be found in this case, the prepon-
derence is in favour of the adoption.
These opinions, however, are by no means conclusive, and the Appellants contend, that the native authorities, upon which they are founded, are strongly against the validity of a second adoption.

These authorities, like the opinions of the Pundits, are not reconcilable with each other. In the Digest of Hindu Law, on Contracts and Successions, with a commentary by Jagannatha, translated by Mr. Colebrooke, the question is discussed and treated as one on which a difference of opinion prevailed. The most material passages of the treatise are found in pages 386, 389, 395, 397. The author holds the better opinion to be, that an adoption is valid, although a previously adopted son, or even a natural born son, be already in existence. The main foundation of that opinion being an ancient text, "that many sons are to be desired, in order that one may travel to Gaya."

It was attempted, in a most ingenious argument, on behalf of the Appellants, to reconcile this authority with others, apparently of a different tendency, by showing that the author intended, not that many sons of the same description might be adopted, but that he referred to sons of different descriptions, of which there were twelve, recognised in the remote ages of Hindoo antiquity though only two are now allowed; the son given and the legitimate son. Another suggestion was that the author intended only that the second adopted son may have the rights of a son, in the event of the failure of the existing issue, natural or adopted. We find great difficulty in adopting either of these suggestions. At the same time it must be owned, that the doctrine is not very clearly stated, nor very easily to be reconciled with some of the authorities to which it refers; and with respect to the right of inheritance of the second son, we rather collect the author's opinion to be, that the second son would succeed, as in the case of a son adopted by one having no issue, to whom a son is afterwards born, viz., to one-third only of his father's estates.
Whatever, however, may be the effect of this practice, its authority is far outweighed by two other Hindoo works, expressly on the subject of adoption, the *Dattaka Mimamsa* and the *Dattaka Chandrika*.

The first passage, Section I, plac. 3, in the former of these works is the citation of a text of an ancient sage, *Atri*, in these words:—

"By a man destitute of a son, only, must a substitute for the same always be adopted." This, perhaps, standing alone, may be held to mean that upon such a one only was it incumbent to adopt a son. The Commentary, however, excludes this construction, for it says, Section I, plac 6, "By a man destitute of a son only, the incompetency of one having male issue is signified by the term 'only' in this passage." The author then, after quoting a text from *Menu*, much to the same effect with that cited from *Atri*, observes, that the instances of adoption, by certain illustrious persons of sons, although they already had male issue, must be considered as exceptional cases, and not as generally authorising the act. In the next paragraph (12) the author seems to concede, that a second son may be adopted, with the sanction of the existing issue.

The *Dattaka Chandrika* (Section I., plac 3.), cites the same text from *Atri* and *Menu*, and puts the same construction on them, as the *Dattaka Mimamsa*. We think that these treatises are more distinct than the work of *Jagannatha*, they are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India; and their weight is strong against a second adoption. In the ordinances of *Menu* translated by Sir William Jones, we find this passage, in page 113. "He, whom his father, or mother with her husband's assent, gives to another as his son, provided that the donee have no issue, is considered as a son given."

In the *Viva Darnava Setu*, translated by Mr. Halhed, Chapter XXI, Section IX, the proposition is distinctly stated, "He who has no son, or grandson, or grandson's son, or brother's son, shall adopt a son, and while he has one adopted son, he shall not adopt a second."
If we are to form our opinion of the law, from the effect of these authorities, we can have no hesitation in coming to a conclusion adverse to the validity of a second adoption.

At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded upon authorities to which we have access only through translations and when the doctrines themselves, and the reasons by which they are supported or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindoos, with which we cannot be familiar. It is satisfactory, therefore, to find that, under the third head to which we have adverted, the European authorities, there is much assistance to be derived from the labours of those who have investigated this subject with all those advantages of familiarity with the laws and languages of Hindoostan, in which we are necessarily deficient.

Here unfortunately, as everywhere else, there is some discrepancy in the authorities.

Sir Thomas Strange in his elements of Hindoo Law, Vol. 1 p. 78, (2nd Edit.), expresses himself as follows:—"In general, it is in default of male issue that the right is exercised, issue here including a grand-son or great grand-son. But as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death duly authorised; so even where the first subsists, a second may take place, such having been the pleasure and will of the husband, upon the principle of many sons being desirable that some one of them may travel to Gaya, a pilgrimage considered to be particularly efficacious in forwarding departed spirits beyond their destined place of torture." In support of these propositions he refers to two cases in Mr. Macnaghten's Reports. Sham Chunder v. Narayni Dibe (1 Ben. Sud. Dew. Rep., 209,) which was decided in 1807; and Gooreepershad Bai v. Mussammant Jymala (2 Ben. Sud. Dew. Rep., 136,) which was decided in 1814.
Now, the first of these cases decided only that a second adoption is valid, when the first adopted son has died without issue, a point of law which is not disputed. In the second case a man, having two wives gives authority to each of them, to adopt a son. One of them made the adoption. He himself, together with the other wife, afterwards made an adoption, and it was finally held, that the two sons were entitled equally to inherit to the husband. This was a very peculiar case—it certainly seems to assume the validity of a double adoption, but the doubts in the case seem to have been, rather as to the effect of the second adoption by the husband himself, in revoking the authority given to the wife, than on the validity of a second adoption, while a first adopted son is living. This decision is also stated by the Court, to be in conformity with the preceding case of Shamchunder v. Narayni Dibeh which, in truth, for the reason already mentioned, it in no degree supports.

These, we believe, are the only European authorities referred to, on behalf of Ramanadha. With reference to these cases, it may be observed that they have never been considered as settling the law upon this subject. In a note to the case of Narayni Dibeh v. Hirkishor Rai (1 Ben. Sud. Dew. Rep., 42), which it seems, was supplied to the Reporter by Mr. Colebrooke, the translator of Jagannatha's Digest, he states the point as one of doubt, and in which, although the authority of Jagannatha was in favour of the adoption, the weighty authority of the Dattaka Chandrika was the other way.

Every European, without any exception, as far as we have any information, who has since examined the subject, has come to the conclusion adverse to the second adoption. In a note to Strange's Elements of Hindoo Law, Vol. 11. page 85, (2nd Edition). the law is thus stated by Mr. Sutherland, a very high authority, "A Hindoo cannot have legally adopted children; a son legitimate or adopted existing, any subsequent adoption would be invalid; at least the son so adopted would not inherit."
In Mr. Sutherland's Synopsis of the Hindoo Law of Adoption, p. 212, he thus expresseshimself:—"The primary reason for the affiliation of a son, being the obligatory necessity of providing for the performance of the exequial rites, celebrated by a son for his deceased father, on which the salvation of a Hindoo is supposed to depend, it is necessary that the person proceeding to adopt, should be destitute of male issue capable of performing those rites. By the term 'issue,' the son's son, and grand-son are included. It may be inferred that if such male issue, although existing, were disqualified by any legal impediment (such as loss of caste), from performing the rites in question, the affiliation of a son might legally take place." In Mr. Steele's Synopsis of the Law of Hindoo Castes, he states, page 48:—"An adoption can take place only where no begotten son or grand-son exists, or where the begotten son has lost caste." Again, at page 52: "In the case of the death of an adopted son (and total lost of caste is considered equivalent to death), another may be selected and given in the same manner; but a man, after adopting one boy, cannot adopt another, at the desire of a second wife, &c. Only one adopted son can subsist at one time." It is true that the Treatise purports to relate to the customs of the Provinces of Bombay; but we are not aware of a difference between the different Provinces, on this point, though there appears to be some minor differences, on other points of the law of adoption, and for this the last Section of the Mitacehara is referred to. The last paragraph in this page, seems to be the statement of different opinions collected from different quarters, and, as might be expected, not very well agreeing with each other.

But by far the most important authority is Mr. William Macnaghten, whose Principles and Precedents of Hindoo Law, were composed, as appears from the preface, after collecting all the information that could be procured, from all quarters, and a careful examination of all the original authorities, and of all the opinions of the Pundits, recorded in the Supreme Court, for a series of years.
This work was published after his report of the two cases already referred to, and of course he could not but be acquainted with them; indeed, he refers to one of them. Now, Mr. Macnaghten states the law, as he considers it to be, without the slightest doubt or hesitation. He says, Vol. I p. 80. "It is clear that a man having adopted a boy, and that boy, being alive, he cannot adopt another." And he examines the text, that "many sons are to be desired, in order that one may travel to Gaya," and says that it applies only to natural born sons.

We are informed by our very learned Assessor, Sir Edward Ryan, that this work of Mr. MacNaghten's is constantly referred to in the Supreme Court, as all but decisive of any point of Hindoo Law contained in it, and that much more respect would be paid to it, by the Judges there, than to the opinions of the Pundits. Upon the particular point in question, Sir Edward adds all the weight of his own high authority, concurring as he does entirely in the law, as stated in MacNaghten.

The Judges in the Sudder Court state, that they are aware that this has been long considered a doubtful point, and they seem to proceed entirely on the opinion of the Pundits, who favour the second adoption.

On examining the reasons assigned by these Pundits, they rest upon two main points:

First.—The text that "many sons are to be desired, in order that one may travel to Gaya."

Second.—Upon the doctrine, "that he who has only one son is to be considered as childless."

Now, the first of these texts is evidently out of the case, if Mr. Macnaghten's explanation be correct; and as to the second, in referring to the passages on which the Pundits rest, they manifestly relate, not to a person who receives a child, but to one who gives a child, in adoption.
Upon the whole, therefore, for these reasons, (which, as the point is of great general importance, we have thought it advisable to explain very fully,) we have come to the conclusion, that the adoption of Ramanadha was not valid, and that the judgment of the Suddur Court upon that point must be reversed. If we had come to a different conclusion on this subject, it would have been necessary for us to examine into the effect of the deed, alleged to have been executed by Vencatadry, on the adoption of Jaganadha, and upon which one of the Courts below held that the subsequent adoption was invalid, as far as regarded the right of inheritance; but our view of the first point makes this unnecessary, and also removes all question as to the alleged division between the supposed brothers. Feeling the hardship of this case on Ramanadha, we have looked with some anxiety to see whether his title could be maintained, on the ground, that it was subsequently recognised by Jaganadha, and that such subsequent recognition might be considered equivalent to previous assent.

We think it, however, impossible to maintain his right upon this ground. Supposing Jaganadha to have acquiesced, after he came of age, in the division of property made by Vencatadry, it was an acquiescence on the footing of right already asserted by the father, to exist in Ramanadha, and it does not appear that Jaganadha, possessed all the knowledge, or was placed in the circumstances which must exist, in order to make his ratification binding, even if we assume, what is not by any means clear, that such subsequent ratification would be equivalent for that purpose, in Hindoo law, to previous consent. It appears, however, that there was some property, both real and personal, of which Vencatadry had the power of disposing by an Act, inter vivos, without the consent of Jaganadha: and we think that he made a gift, as far as he could, of his property between his two sons. Applying then to this case, a principle not peculiar to English Law, but common to all law, which is based on the rules of Justice, namely, the principle that a party shall not at the same time, affirm and disaffirm the same transaction—affirm
it as far as it is for his benefit, and disaffirm it as far as it is to his prejudice. We think that effect must be given against the estate of Jaganadha, to the intentions of Venkatadry, as far as he had the power of effecting them. If Jaganadha takes, as we think he is entitled to do, the whole ancestral property, which the father could not dispose of, without his consent, we think he must give up, for the benefit of Ramanadha, the whole property included in the division, to the disposition of which, his consent was not necessary.

Ramanadha, being removed from the contest, as to the succession of Jaganadha, the question as to the succession is in dispute between Lutchmepotty and Atchama; for Bungama, though she may have the same interest with Atchama, in opposing Lutchmepotty, supports his title.

This is a mere question of fact, upon which, as in almost all cases from India, the evidence is contradictory, and the decision must turn very much upon the probabilities of the case, to be collected from those facts, which are sufficiently established. In the year 1819, the situation of Jaganadha was as follows:—He had married two wives, but had never had any issue by either of them. He is estated by some of the witnesses to have been, from bodily infirmity, very unlikely to have issue. This is so far confirmed by undisputed facts, that he lived for six years afterwards with Bungama, and never had any issue. He might, therefore, reasonably presume, or perhaps, know, that he should have no natural born son, or at all events, no such son, by Bungama.

With Atchama he had quarrelled in April 1819, and previously to the alleged adoption, she had quitted his house, to which she never seems to have returned, till after his death. Under these circumstances it cannot but be held probable, that he should choose to adopt a son. But this probability is much confirmed, when we consider the relation in which he stood towards them, who, if he left no issue, natural or adopted, would succeed to his joint possessions. Either
Alabama with whom he had quarrelled, would take alone, or jointly with Bungama or Ramanadha, with whom he was at law, and whose character of a brother he denied, would succeed. Nothing is more natural than that he should desire to disappoint these parties. Now, it is proved, beyond all question, by the evidence of Mr. Roberts, the Collector at Masulipatam, that in the course of the years 1824, and 1825, a boy of an age corresponding with that of Lutchmeputty and who, by other evidence, is shown to have been Lutchmeputty, was brought by Jaganadha, upon several occasions in which he paid a visit at the Collector’s Office, and that the boy was treated by Jaganadha, and considered by him, the Collector, as his adopted son: he says that the boy accompanied Jaganadha upon every visit except the first, that he had frequent communication with Jaganadha on the subject, that he considered the boy was brought in order that he might be recognised as an adopted son, and that so satisfied was he, Mr. Roberts, of the facts, that on Jaganadha’s death, in the absence of evidence to the contrary, he should have considered him as heir.

The question then is, was this boy well adopted or not, the account given by the appellant is this, that in March 1819, Chava Naidamah, a relative of Jaganadha, had a son born to him, that Bungama, by the desire of Jaganadha applied to the grandfather of the child, to know if the family would give this child in adoption to Jaganadha, that difficulties were suggested as to the right of Jaganadha to adopt any of the Soodra class, that he consulted the Pundits, who gave an opinion in favour of such adoption, on 23rd of April, that this opinion was communicated to Chava Naidamah, who, on the 26th of April, signed an instrument giving his son to Jaganadha, who signed an instrument accepting the boy in adoption, and that on the 18th of August 1819, all the necessary ceremonies of adoption were performed, and a certificate of the performance endorsed on the instrument, containing the opinion of the Pundits, and signed by twelve persons present at the adoption.
These instruments are produced, and the facts tending to this conclusion are sworn to, by a vast number of witnesses. There appears to us to be no objection to this testimony, beyond the observation, which may be made on all Hindoo testimony, that perjury and forgery are so extensively prevalent in India, that little reliance can be placed on it.

But the important fact, that this boy was brought up and treated as an adopted son, does not depend merely on Hindoo testimony. That there was such a boy, and that he was considered as likely to succeed, is proved, not only by Mr. Roberts and his Clerk, who though, from his name, (Custoory Setaputty,) we presume is a Hindoo, appears to give evidence without the slightest bias, but, also by a letter written, or rather forged, by, or on behalf of Atchama, in the name of Jaganadha, dated just before his death. In this letter, Jaganadha is made to state, that Rungama was teasing him to leave his estate to Lutchmeputty. The words are:—

"Rungama troubles me much to leave, by writing, the talook, &c., to Chava Lutchmeputty, to another gotrum, whom she, Rungama, has been taking care of; but I have not consented to it." This document, together with the forged will in favour of Atchama, were produced in Court, on the 12th of May 1825, immediately after Jaganadha's death. Now, the case made by Atchama is, that Lutchmeputty was a boy first brought forward some time after the death of Jaganadha, and that he never was at Amaravati, the residence of Jaganadha, in his life time. This is clearly contrary to the fact, and contrary to the fact, as known to Atchama, and yet many of her witnesses, who say that they were in Jaganadha's house at the time when the alleged ceremonies of adoption took place, and that no such ceremonies in fact took place, swear also that Lutchmeputty was never at Amaravati, till after the death of Jaganadha. Such evidence can go for nothing.

There are two circumstances, and only two, which, no doubt, are much against the adoption.
First.—The conduct of Rungama, who now brings forward this claim of Lutchmeputy, but who suppressed all mention of it, as it is said, till the quarrel between Rungama and Ramanadha, in 1826. Secondly the absence of proof of any formal notification to the Government, and of that degree of notoriety which might be expected of a fact of so much importance in such a family.

As to the first point, there is no doubt, that for several months after the death of Jagannadha, Rungama not only was silent as to the title of Lutchmeputy, but she acquiesced in that of Ramanadha and signed several instruments, quite inconsistent with the case which she now sets up.

It is attempted to remove the effect of these acts by saying that she was under the influence of Ramanadha, and signed whatever papers were laid before her in ignorance of their contents, or even blank papers to be afterwards filled up.

There is some evidence that she did sign blank papers; and the fact, that if Lutchmeputy was not entitled, she had herself a strong claim to participate with Atchama, in the succession of Jagannadha, affords a strong inference that, in supporting the claim of Ramanadha she was deceived by him, unless she was acting in collusion with him, under some secret arrangement.

We cannot say, that we are satisfied as to the imposition alleged to have been practised upon her, and if we were dealing with her rights, we should attribute much weight to this part of the case, but we cannot attribute much weight to it: perhaps, in strictness, we ought not to attribute any, when we are dealing with the rights of Lutchmeputy, and when the effect of the acts relied on, is removed alike by supposing collusion with Ramanadha or imposition by him.

Secondly,—With respect to the absence of any formal notification to the Government, it is admitted, on all hands, not to be necessary. At the same time, it affords so easy a mode of preserving unquestionable evidence, of a most important fact, that, in the case of a great family like this, some written communication would, most probably
be made either on the occasion of the adoption itself, or on some subsequent occasion, and we find, accordingly that communications were made to the Government by Vencatadry, with respect to the adoption, both of Jaganadha and Ramanadha, and that he endeavoured to have their title recognised. The absence of any such communication in the case of Lutchmeputty is, therefore, important.

There are, however, circumstances in evidence, by which the weight of the objection is very considerably diminished. The adoption was resolved upon in April 1819, Amaranwati was in the Collectorship of Guntoor; and, at this time Jaganadha was at law with the Collector of Guntoor, who refused to deliver up possession of some portions of the property Vencatadry, claimed by Jaganadha.

It is not, perhaps, very unnatural to suppose that, under such circumstances, Jaganadha would not willingly have any communication with the Collector, not absolutely necessary. But there were other disputes at this time, between Jaganadha and the Government authorities. Atchama, or her brothers, on her behalf, had complained to the Civil Magistrate of the conduct of Jaganadha towards her and he had been fined. From some of the documents, there seem to have been other differences subsisting between them. That at a subsequent time, there was some written communication to the Collector of Masulipatam, in which district a portion of this large estate was situated: there is much reason to believe a most important letter upon this subject, purports to be a letter from Jaganadha to his wife, and has much internal evidence of authenticity. It is dated 13th July 1819, and is in these words:—"As Puntooloo has sent me a letter, enclosing a foul Arzee to the authority, on the subject of our adoption of a boy, I caused it to be copied fair, and despatched it this day through the Vakeel, because I thought it proper: and the said Arzee was received by the junior gentleman who is vested with the authority of Magistrate. There was enmity before between us and certain persons, in this place..."
owing to one's malevolence against us; and it has now occasioned enmity between us and another man, as well as between us and the authorities of this place, in consequence of the authorities of the Circuit Court having been pleased to expose the calumny used by the persons in this place against us; consequently there will happen obstacles to our affair, but I am not uneasy, as there does not appear any thing that can be supported by the said persons regarding the circumstances, which is now intimated to us. I herewith send the copy of the said arzee, and will inform you the remaining circumstances on my arrival at that place." If this letter be genuine, it is almost conclusive. I observe that one of the judges below states that the handwriting of this letter is not proved; but that, at all events, is of no consequence, because in fact it is before the adoption, and could not prove that the adoption had taken place. In the enormous mass of documentary and parol evidence to be found in this case, far exceeding anything which, in our experience, has been brought before this Committee, it may be difficult to say, whether it is or not regularly proved, but it seems to have been produced in evidence, without any objection being made to its authority.

The objection which is made to it by the judge, certainly is not well founded. The transaction of the adoption might not have been completed, at the date of the letter, because the usual ceremonies had not been performed, which are represented to have taken place in the following August, but the transaction was inchoate: the child had been given in adoption and received in adoption, in the preceding April, and the terms of the letter are, therefore, perfectly applicable to the state of circumstances which existed at the date.

Upon this state of the evidence, the probability of the adoption, certainly of a child being brought up in the family, and introduced to the European Authorities, with the same state and pomp as if he were an adopted son, with documents and witnesses in great numbers, confirming this account, which documents and
witnesses are open to no other suspicion than attaches to all Hindu evidence, we should have had no hesitation in affirming the fact of adoption, if the case had come before us as an original cause. We have been pressed, however, and very properly pressed, with the argument that this is a mere question of fact, to be proved by evidence; that all the judges before whom the case has come, have disbelieved the evidence, that they had some advantages in coming to a conclusion which we have not, and that their judgments are to be considered as verdicts of a jury, which ought not to be disturbed, except, upon very strong grounds.

It is impossible not to feel that there is great weight in these observations, and that they have occasioned one of the principal difficulties which we have felt, in this most difficult case; we have however, the same evidence which was in the Court below:—We have had the advantage of a most full and able discussion, at the Bar; and this Court is more accustomed to the examination of evidence, than the Civil Servants of the East India Company, who preside in the Native Courts, can be supposed to be. We have further the great advantage of having the grounds on which these judgments proceeded. We cannot say that they are at all satisfactory to our minds. By far the most important evidence in the case, the evidence of Mr. Roberts, is disposed of, by assuming that this gentleman, in his deposition, and in a communication which he made to the Board of Revenue, entirely in the same sense, immediately on the death of Jagannadha, lay under a misconception of what had passed in conversation, in a language which was not vernacular to either party.

This appears to us a purely gratuitous assumption; it would have been a strong assumption if Mr. Robert's opinion had been formed from a single conversation; but he states, that he had frequent communications with Jagannadha, upon the subject, that the boy was brought to him by Jagannadha four or five times; was treated by the Raja as his son; and was brought, as he considered, in order
that his title as such might be known and recognised. His opinion is founded not merely on what he heard, but what he saw, not on one, but on several occasions.

Supposing the fact of adoption to be proved, some objections were made to its validity, in point of law; but they do not appear to us to be of any value.

Upon the whole, after a very long and anxious consideration of the subject, we feel ourselves called upon to differ upon this point also, with respect to the adoption, from the judgment of the Court below, and to hold that Lutchmeputty was well adopted, and is entitled to succeed to the whole estate of Jaganadha, subject to such maintenance, as his widows may by law be entitled to. Our report to Her Majesty will be, that as to Putoory Caly Dass, (who seems to have been very improperly made a party to the proceedings), the appeal ought to be dismissed, with costs. That the decree of the Court below ought, in other respects, to be reversed. That it should be declared, that the adoption of Ramanadha was invalid, and that he was not entitled to be considered as a co-heir with Jaganadha to Vencatadry, but that under the circumstances appearing in evidence, he was entitled to such property included in the gift made by Vencatadry after Jaganadha came of age, as Vencatadry had the power to dispose of. That Bamanadha was entitled to retain those portions of such property which came into his possession, and to have restored to him such portions thereof as came into the possession of Jaganadha, or to have compensation made for them, out of the estate of Jaganadha. That the adoption of Lutchmeputty by Jaganadha was well proved, and that Lutchmeputty was entitled to succeed to the whole estate of Jaganadha. That with these declarations, the cause should be remitted to the Court below, with directions, to do what may be necessary for giving them effect. That no costs ought to be given in these appeals, or in the suits below, except to Putoory Caly Dass.
Phear, J.—The plaint in this case sets out that one Promothonath Day, a Hindoo inhabitant of Calcutta, being without male issue, duly adopted two sons at one and the same time. These were respectively the plaintiff in this suit, and one Sooruthnath Day. Promothonath at the time of the adoption, having two wives, gave the plaintiff to his elder wife, who is the second named defendant, Sreemutty Nemomoney Dassee, and Soornauth, to his other wife, Sreemutty Santoomoney Dassee. After this adoption Promothonath died without having begotten male issue of his body, leaving his two wives and the adopted sons surviving. He also left a will duly executed appointing his two wives and one Aushotosh Day, his executrixes and executor; by which among other things, he in terms gave a power and direction to each wife, in the event of the foster son whom he had given her dying without issue, to take another son in adoption in his place. Sreemutty Nemomoney Dassee, with the other executors, proved the will shortly after Promothonath’s death. Soornauth died an infant, without issue and unmarried, and thereupon Sreemutty Santoomoney Dassee, his mother in adoption, assuming to exercise the power which the will purported to give her under the circumstances which had happened, adopted Onauthnauth Day, the first named defendant, as son of Promothonath Day, in the place of Sooruthnauth deceased. The plaint further alleges that the plaintiff and the defendant, Onauthnauth Day, in 1854, while both were infants, filed a bill by their next friend for the administration of Promothonath’s estate; that this suit is not yet ended, and that under it some considerable sums of money for maintenance and otherwise have been paid to Onauthnauth; also, that Sreemutty Santoomoney died in 1860, and that
the Plaintiff attained his full age in 1862. The plaint then charges that the adoption of Onauthnauth Day, by Sreemutty Santomoney Dassee, was invalid by Hindu Law, that consequently Onauthnauth cannot inherit any of Promothonaath's property, also that he is not entitled to take any thing under the will; and finally, prays that the Plaintiff may be declared the only son and heir of Promothonaath, and may be decreed an account and other necessary relief. The first Defendant's written statement does not deny the facts thus alleged in the plaint, but adds some details with regard to the administration suit, and goes at some length into matter concerning the conduct of the Plaintiff and of the second named Defendant, towards Onauthnauth. It also alleges that the plaintiff was purchased for adoption, and not obtained by gift, and consequently his adoption was void, and it maintains that the plaintiff is barred by the various decrees in the administration suit, and estopped by the proceedings which he has himself instituted in relation to it, from now setting up that Onauthnauth is not co-sharer with him in Promothonaath's property. The statement of the other defendant, Sreemutty Nemomoney Dassee, adds no new material facts, but sets out a finding made by the Master in the administration suit to the effect that, none of the assets of the testator had come into Nemomoney's hands.

On the state of things thus disclosed, four questions call for decision from the Court. In order of time they are:

First.—Was the plaintiff himself duly adopted?

And this may turn upon (a) whether by Hindoo law, a simultaneous adoption of two children can be good, (b) whether Monemothaath was not given, but purchased.

Secondly.—Was the defendant Onauthnauth the lawfully adopted son of Promothonaath? A question which may also involve two points, namely, could Promothonaath, in the state of circumstances under which his will was made, delegate to his widow the
power of future adoption which was pretended to be given by the will, and if he could do so, could this power be validly exercised when one of the sons alleged to have been adopted by the testator was yet living?

Thirdly.—Does either Promothonaut or Onuthonaut, or do both of them, take as devisee under the will?

Fourthly.—Is this suit barred by the decrees in the administration suit, or is the plaintiff estopped from bringing it by reason of the part he has taken in regard of that suit?

It is a task of no ordinary difficulty to ascertain what ought to be taken to be Hindu Law upon any disputed point. Admittedly Hindu Law is the offspring of a divine revelation, which found expression in the writings called Sruti and Smriti respectively. The first, as being the very words delivered by God himself, possesses the highest authority. The three first Vedas probably constitute the whole of this class; but as they are, I believe, occupied almost exclusively with religious matters, practically no recourse is had to them as bearing on ordinary social duties, rights and obligations. They have not been directly cited before me, and excepting so far as they are quoted and referred to in the Smriti, may be entirely left out of sight as a part of Hindu Jurisprudence. The Smriti was the Code of Laws taught fully to Manu, (as he himself says), in the beginning by the Self-existent, and afterwards taught by Manu to the ten sages, and by them delivered to the world. Since that time there has been no revelation, and consequently (as divine law overrides all other law), no original law given. The institutes of Manu and these ten sages are therefore, theoretically, the body of laws to which the Hindu is subject, and by which alone, with the exception of customs and usages, to which I shall presently have occasion to allude, the Hindu, in his social relations to his fellow Hindus, is governed, and which the Indian Courts of Law must seek out and administer. The institutes of Manu exist in considerable com-
pleteness, but those of the other sages are nowhere to be found in any integrity. This gap is bridged over by very early digests of the body of law delivered by Manu, Marichi, Atri, and the other sages; and these digests, with their glosses and commentaries, have come to be accepted as the sources from which Hindoo Law at the present time is to be drawn. At this point there is some resemblance between Hindoo law and the unwritten Common Law of England. But in England, although no doubt the basis of the Common Law is even now to be sought in old text or digest writers and traditional authorities, still by the living action of the Courts of law the unwritten principles have, de anno in annum, and from century to century, been applied to the varying conditions of human society, and the result of the application has been authoritatively enunciated as the law of the time being. In this way portions of the old system which are not adapted to an altered state of society are dropped out as obsolete, or become lost, and others are developed or enlarged into new directions, and virtually become additions to, or alterations of the Code, demanded by the necessities of society, and thus it happens that the common law of England, as judicially recognized, is the embodiment, in practice, of those unenacted rules and maxims which men of the time tacitly acknowledged themselves to be justly subject to, and governed by, in their actual intercourse and dealings with their fellow men.

In India, however, although there, as in England, the operative law must in some degree change with the circumstances of the time, there is now scarcely any means of ascertaining what that change is. Very little has been recorded in the shape of systematic decisions of the Indian Courts. By the necessity of the case what there is of this nature is of very modern date, and is moreover characterised by the evident and natural desire on the part of the Courts to carry out the letter of the law rather than to enlarge it. For foreign judges to attempt the task of development would be very dangerous, to say the least of it. Probably the task itself would be impossible; for it must be remembered that the development is not
from the state of things of yesterday to that of today, but from the
Regulations of *Manu*, twelve centuries before Christ, to an
analogue of to-day, which the educated Baboo of Bengal shall recog-
nize as reasonable and just. There seems, therefore, to be no al-
ternative to administering the law as it is found in the old digests.
However, I am told that there does exist in this country a machinery
by which I can be guided to the active and living law of today, as
distinguished from the Code of *Manu*, out of which it has been deve-
loped and elaborated, namely the pundits; and that from them I
shall obtain, 'the immemorial customs of good men' and 'approved
usage' which *Manu* himself has declared to be a portion of the
Judicial system in addition to the written Codes of law. (a).

A long series of cases was also quoted to me with the view of
showing that, until of late years, it was the invariable practice of the
Indian Courts to consult these pundits. If the pundits were a body
of men whose profession obliged them to be conversant with the 'im-
memorial customs,' and 'approved usage' of society, and to answer
questions relative to these points with judicial impartiality and sense
of responsibility, their *responsa* might no doubt in some degree
supply the want that is felt, and their opinions might, to a certain
extent, take the place of the decisions of the superior Courts of Law in
England, with, it must even then be remembered, this vast difference,
namely, that the English precedents are always perfectly independent
of the case which they are cited to govern, while the pundits' opinions
are sought *pendente lite*, with direct reference to the facts of the
case itself. But I do not forget that, so far from the pundits' state-
ments of the law bearing even a remote resemblance to the utter-
ance of a tribunal given after full discussion and investigation with
a judicial impartiality, Sir *William Jones*, in his time, speaking from
experience, said of them, "that he could not with an easy conscience
concur in a decision merely upon the written opinion of native
lawyers in any case in which they would have the remotest interest
in misleading the Court," and since that period the position of
the pure Pundit has certainly not become more exalted. At the best

(a.) *Manu, Ch. ii. Slo: 6 and 12.
he comes into Court as a skilled witness to speak to opinions rather than to facts; and of witnesses in this capacity, Mr. Pitt Taylor remarks:— "It is quite surprising to see with what facility and to what extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not indeed wilfully misrepresent what they think, but their judgment becomes so wrapped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion." Acting under these impressions, when Mr. Montriou proposed, as he did at the commencement of his case, to put certain learned Pundits into the witness box for the purpose of giving their opinions as to the actual law now prevalent in Bengal with regard to adoption, I refused to take their evidence; Mr. Montriou then tendered evidence of a certain number of specific acts of adoption throughout the Presidency of Bengal, exactly similar in character and circumstances to that which is in question before me, with the view to establishing a legal practice to justify this latter. The greater portion of this evidence was not direct, but was merely traditional, such as that which was given by the witness, who said he had been told by his father of occurrences in the family before he was born. I rejected the whole of this, at the same time I intimated my readiness to receive evidence of reputation of either general or local customs in regard to adoption, and then of any overt acts in conformity therewith, but Mr. Montriou declined to offer any evidence of reputation.

Under these circumstances, I am obliged to decide this case by reference to the ancient written authorities alone, with such aid in regard to the construction of them as I can derive from the later commentaries and text books, whether Native or English. And although I would not accept the evidence of the Pundits as so much original material, I was most willing to have the benefit of their assistance, as scholars, towards enabling me to ascertain the meaning of the disputed texts in the Sanscrit writings. Accordingly, with this view, while I did not treat them strictly as witnesses in the cause, but rather as interpreters in aid of the Court, I asked the Counsel of
the respective parties to elicit the required information for me by way of examination and cross examination, and I have borne their testimony in mind when consulting the translations to which I have been obliged to have recourse.

With this preface I now come to the issues in the case. Possibly I might without difficulty select one of these, such that my determination upon it would decide the whole case without reference to the others; but still under the circumstances which surround the parties, and in view of the further stages of litigation which will necessarily succeed to the present, I think it may eventually be the saving of expense if, on this trial, I come to a finding upon all the questions, and indeed both parties have expressed the wish that I should do so. Accordingly, I will proceed to consider each of them in succession.

The first question, "Can the simultaneous adoption of two children be valid"?

Let us try to ascertain what constitutes the foundation of the right to adopt in any case.

Manu lays down, Chapter II, Clause 28, that "by studying the Veda, by religious observances, by oblations to fire, by the ceremony of Traividya, by offering to the Gods and manes, by the procreation of children, by the five great sacraments and solemn sacrifices, this human body is rendered fit for a divine state;" and again Chapter IX, Sl. 137, "by a son a man obtains victory over all people, by a son's son he enjoys immortality, and afterwards by the son of that grandson he reaches the solar abode." These and many like texts put forward the doctrine that man's welfare in a future state of life hinges entirely upon the fact of his having a son in this world, and so all important is this view of the son's fulfilling the character of his father's survivor, that Manu goes on to say, Sl. 138, "since the son delivers his father from the hell named Put, he was therefore called 'Puttra' by Brahma himself." There can now be but little doubt that this etymology is altogether mistaken; the words
put and puttra have no original connection with each other; but it may not be without use, when construing the ancient writings, to remember that the authors considered the word ‘puttra’ to bear the sense of ‘hell deliverer.’

As revelation made it so essential that a man should have a son, it also provided means whereby the want of a son could be supplied. Now the special office of the son was to perform the sraddha at the death of his father, and the sacrifices to the manes afterwards, and accordingly Manu, Chapter IX, Sl. 127, directs as follows:

"He who has no son may appoint his daughter in this manner to raise up a son for him, saying, the male child who shall be born from her in wedlock shall be mine for the purpose of performing my obsequies;" and again in Sl. 136, he says; "By that male child whom a daughter thus appointed either by an implied intention or a plain declaration shall produce from a husband of equal class, the maternal grand father becomes in law the father of a son, let that son give the funeral cake and possess the inheritance." It is fairly clear from this, I think, that as far as the appointment of the son through the daughter is concerned, Manu only intended the power to arise, when, without its exercise, there could be no one who could perform the appointer’s funeral obsequies, and then that the power could be completely fulfilled and satisfied on the birth of the daughter's first son. In the case of the birth of twins, possibly some doubt might arise as to whether both became sons of the grandfather or not; but at any rate the latter could not choose to take to himself any of the daughter's children of later birth as well as the first. The power seems to be strictly limited to procuring a single substitute for that one son, who, if he had existed, would have prevented the power from arising.

Now, in addition to the substitute son worked out in this manner, Manu enumerated ten other sorts, who, in the absence of
a son of the body, should stand in his place for the sake of preventing a failure of obsequies, Chapter IX, Sl. 180. The list is made out in a certain order, and of course all the sorts do not necessarily exist in any given case; but the first on the list who does actually exist is the one selected by Manu to be substituted son.

Most of these possible substitute sons exist, or do not exist, quite independently of the grandfather; but amongst them, besides the son of the appointed daughter, there is the adopted son given by his parents, who is brought into being by the choice of the father, and it is this one who forms the subject matter of dispute in this suit. Prima facie, it seems to me that the power of adoption cannot be larger than the power of procuring a son through an appointed daughter, inasmuch as the same end is sought in both cases. When a law, whether written or unwritten, says that a certain necessity shall give rise to a power, it is, I think, to be presumed, unless the contrary explicitly appear, that the power is limited to, and defined by, that necessity. It is in this case admitted by all parties that the power to adopt does not arise except on the contingency of there being no son of the body. Manu does not expressly say that the act of adoption shall not be made before the occurrence of the contingency, but he distinctly lays down that the adoptive son only comes in as a substitute for the son of the body, Ch. IX, Sl. 180, and this amounts to pretty much the same thing; while the Dattaka Mimansa, a treatise on the law of adoption of the highest authority throughout India, gives as the text of Atri:—"By a man destitute of a son only must a substitute for the same always be adopted," Chapter I, Section I, para. 3. In para. 6, the same author commenting upon this passage says, "the incompetency to adopt of one having male issue is signified by the term only in this passage." The Dattaka Chandrika, Section I, paras 3, 4, 5, and 6, is to the same effect, although not quite so emphatic, and therefore I think it is beyond doubt that according to the Smriti, the power to adopt does not attach to a man except when he is "destitute of a son" (Aputra), and that it always does attach to him when he
is in that condition. In addition to the texts on this latter point, which are to be found in the Institutes of Manu, the Dattaka Mimansa Section I, para 9, quotes the following from some other of his writings:—"a son of any description must be anxiously adopted by one who has none, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name." The only serious contest then is whether aputra, sonless, means the condition of having literally no sons of the body in existence, or whether it refers as well to any of the substitute sons of Manu's list as to the actual sons of the body. The Dattaka Chandrika, Section I, para 6, makes "putra" extend to grandson and great grandson on the ground that these equally with the son of the body, present oblations of food and preserve the line. If carried to the full extent, this reasoning would also embrace the other substitute sons. On the whole, recollecting that Manu himself uses the word putra with the supposition, whether rightly or wrongly is no matter, that its meaning is Hell deliverer, and that the essential, if not the sole, intention of the act of adoption is to provide for deliverance from Hell, I am obliged to come to the conclusion that the condition pointed out by the use of the word aputra, in connection with the rest of the phraseology of the sacred texts, as for instance in the case of appointment of the daughter; is the state of want of a Hell deliverer, and therefore the existence of a son already adopted as much prevents the rising of the power as that of a son of the body. Possibly, this construction might have led to practical difficulties, were it ever necessary to have regard to the last six classes of substitute sons in Manu's list, but, fortunately, according to the authorities given in the general note to Manu's Institutes, and also in the Vyavahara Mayukha, Chapter IV., Section IV, para. 46, and many other writers, with the exception of the given adopted son, most if not all the other secondary sons are set aside in the Kali or present age. I may add that the bare fact of being aputra, does not of itself suffice to give the power; for Sankha says that:—"before proceeding to adopt, the father must have fasted for a son," (cited in Vyavahara Mayukha Chapter IV, Section V.
para. 8, and in Dattaka Chundrika, Section I, para. 4). All reasonable probability of his having a son must have been gone, though the contingency of his afterwards having a son is provided for by Manu.

I believe I may safely say that none of the older Sanscrit authorities are in any way opposed to the view above given as to the power to adopt. Neither the Daya Bhaga nor Mitakshara come directly in contact with the question. But the latter, (Chapter I, Section XI, para. 2) referring to Manu, Chapter IX, Sl. 163, says:—

"The legitimate son is the sole heir of his father's estate, but for the sake of innocence he should give a maintenance to the rest." This text of Manu must be considered as applicable to a case where the adopted sons, namely, the son given and the rest, are disobedient to the legitimate son and devoid of good qualities. The legitimate son here spoken of is, by comparison with the text of Manu clearly one born after the creation of the substitutes; and by adopted sons the commentator means the whole list of Manu's substitutes; while the "son given," who alone corresponds with the adopted son, was under consideration, and that son, it may be observed, is spoken of in the singular; consequently, so far as it goes, the inference is favourable to the view I have taken, although, had it been otherwise, I could not have considered the Mitakshara of any weight in this case when opposed to the books of the Bengal or Gauria School.

When, however, we come to the modern digest of Jaganatha, we find that the author broadly asserts that a subsidiary son may be adopted even when a principal son is living (ccci). But this writer, however valuable his books may be as a Cyclopaedia of law sages, is so confused in his manner of treating his subject, and so inconsistent with himself, as to possess no intrinsic authority. In this case, he omits the argument in his favour, deducible from some instances in the Puranas, of the contemplated co-existence of the son of the wife begotten by the appointed kinsman, the son of the appointed daughter, and a son made
by adoption, and he passes by the words of Manu, referring to a possible plurality of individuals in each class of substitute sons, Chapter IX § 184. He rests his doctrine solely on the authority of the text, "many sons are to be desired that some one of them may travel to Gaya," which he quotes second hand out of the Sridhara Sāmilī, without ascribing to it any authority. He seems even to admit that, as regards deliverance from put, (the only object attributed to adoption in the Smritī), one adopted or substitute son living, another could not be adopted, but says that one who desires numerous issue for other purposes besides deliverance from the hell called put, may adopt a son given, and the rest, although he have one legally begotten; so that in fact Joganatha only differs from the conclusions I have arrived at, when he goes beyond them and rests upon the anonymous text relative to Gaya, which probably refers only to sons of the body. I feel no difficulty in saying that this is a foundation of no legal validity.

The English writers on Hindu Law are necessarily not original authorities. Their works stand in the position of text books, but some of them are no doubt of very great weight. Sir T. Strange in his Hindu Law, Vol. I, Chapter 4, treats this point very summarily. He says, "as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself or by his widow or widows after his death, duly authorized, so even where the first subsists, a second may take place upon the principle of many sons being desirable that some one of them may travel to Gaya." This is all that he says in the matter, and he makes this statement, without any reasoning of his own, solely, as it seems, on the authority of Joganatha and of a very doubtful decision in the Bengal Sudder Dewanny Adawlut. He does, however, remark in a note that the doctrine enunciated in the text, is questioned by an authority in the law of adoption, namely, Mr. Sutherland, to whom he refers the reader without any further mention of his own opinion on the issue thus raised. Under these circumstances, I do not think that I ought to consider the pas-
sage in Strange's book as affording any confirmation or additional strength to Jaganatha's position. On the other hand Mr. Sutherland, who is second to no English writer as an authority on the Hindu Law of adoption, in the passage referred to by Sir T. Strange, remarks:—"A son, legitimate or adopted, existing, any subsequent adoption would be invalid, and Sir William MacNaughten, who although he may not be quite so nearly infallible on the subject of Hindu Law as it has until lately been the fashion to consider him, certainly outweighs Sir T. Strange, at least in Bengal, says,—"It is clear that a man having adopted a boy, and that the boy being alive he cannot adopt another," and he makes this assertion after a short discussion of the leading texts both of the Dattaka Mimansa, and Jaganatha bearing on the point.

Having thus reviewed at some length the documentary evidence of what the Hindu Code lays down on this point, I must just touch upon some of the leading judicial decisions which bear upon it. First, in order of time, is that of the Privy Council in Rangama v. Atchama (a). This case was an appeal from the Sudder Dewanny Adawlut at Madras, and I am told that it is not binding upon me here, because the law of the Bengal schools differs from that of Southern India. To a certain extent this objection may be just, but even if the judgment of this Court is not bound, strictly speaking, to follow that decision, it would in any event be most powerfully influenced by it, because it proceeds mainly upon a consideration of precisely the same written authority as those which I have felt myself obliged to discuss on this occasion, and because admittedly the law of adoption varies less from uniformity throughout all India, from the Himalayas to Cape Comorin, than any other portion of Hindu jurisprudence. I may add that the Court of Sudder Dewanny Adawlat of this Presidency, in the case of Jay Chunder Rai v. Bhrub Chunder Rai, (b), a case from Dinagepore, considered that the above decision of the Privy Council settled the point of law on adoption. In the case of Rangama Atchama and others v. Vencatadry, (a), one

(a).—4, M. E. I. App. 1, see ante, page 90. (b).—2, Ser. Cases. 575.
Venkatadry being childless, on the 2nd of April 1798, adopted as his son a boy named Jaganadha. He afterwards becomes desirous of adopting another boy named Ramanadha, and of dividing his property between two, and accordingly, in 1807, he performed all the acts and necessary ceremonies for effecting this second adoption, if it could be legally done. The first question which the Privy Council put to themselves was as to the validity of a second adoption, the first adopted son still existing and remaining in possession of his character of a son, and they answered it by saying that the adoption of Ramanadha was not valid.

In Ramkishore Acharj Chowdree v. Bhoobunmoye Dabia Chowdrani and others (14, S. A. D. Rep. 122, and on application for review Ib. 1361), a childless man had given power to his wife to adopt a son; afterwards a legitimate son was born to him, but he then confined to his wife the power to adopt in the event of this son's death. In this state of things, he died. This son lived, married, and finally died, having delegated to his widow the power to adopt a son, which she duly executed. After the adoption by the son's widow, the father's widow, who was still alive, exercised the power of adoption originally given her, and the question before the Court was which of the two adopted sons should take the father's property, and it was decided that the adopted son of the father's widow had no claim against the adopted son of the son's widow. This case is chiefly important because, with some difference of opinion among the judges who decided it, namely, Messrs. Colvin, Sconce, and Torrens, it is clear they all united in thinking that the law laid down by the Privy Council in the Madras case was the law of Bengal. They seemed, however, to have discussed the validity of the father's delegation of power to adopt, rather with a view to its bearing on the proprietary interests of a son already existing, than with any reference to the general principles which govern the origin of the power itself and eventually their decision turned entirely upon the father's intention. The result was that nothing fell from the judges which could serve to elucidate the matter of law now in issue before me.
On final review this decision was reversed by a majority of the Court, as then constituted, on the ground that the son's widow had never, in fact, received authority from her husband to adopt, but, as before, the Court abstained from any investigation of the principles which lie at the root of all adoption.

In Sadanund Mahaputter v. Bonomally and others (a), the facts were almost exactly parallel to those of Rangama v. Atchama (b), and the High Court expressly said there could be no doubt, but that the judgment of the Privy Council in that case must be taken to have authoritatively settled the Hindu Law of Bengal in reference to second adoption.

I have not alluded to the case of Mussummat Solukhna v., Ramdollal Pande and others (c'), where Pundits were consulted, and in answer to questions from the Court, said that a man having a son might, with the consent of that son, or with the wish to have more sons for religious acts, give power to his widow to adopt. It is evident from the report of the case that the opinions of the Pundits were founded solely on Jaganatha, and add no confirmation to him, and, besides, they were not in any way accepted by the Court, who decided the case on the simple ground that there was no proof of any delegation of power to the widow at all.

With these authorities before me, can I entertain any substantial doubt as to the legitimateness of the conclusion to which an independent consideration of the Shasters and Digest had led me? I feel myself bound to hold that, in Bengal, while one adopted son is living a second cannot be adopted. I am also further of opinion that the power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them; it does not extend to enabling him to do more than is at the time of exercising it reasonably sufficient to satisfy the purpose for which the law gave it. Consequently, supposing the occasion for exercising the power to have arisen, one son, and one alone, can be adopted; an attempt to adopt more than one son at that time must be an abortive act, and void for

(a).—1, Marshall, 317. (b).—4, M. E. I. A. 1. (c').—1, S. D. A. Rep. 324.
all purposes, unless, perhaps, so far as it may entitle the unlucky boys to maintenance, a question with which I need not now burden myself. It is suggested that at least one son may be adopted for each wife, which the adopting father may have, but this argument is founded on a false analogy. The existence or non-existence of a wife does not form an element in the question, and it seems to be indisputable that one who has no wife, whether because he has never married or because his wife has died, is as much entitled to adopt as one who has a wife. See the Dattaka Mimansa, Section 2, para. 45, and Jagannatha. It was stated by the Defendant's Counsel that the usage and custom of Bengal gives a childless man the right to adopt one son in respect of each of his wives, either simultaneously or not; but, as I have said already, no such evidence as the Court considered admissible to establish a custom or usage was tendered during the trial. However, a decision of the late Sudder Dewanny Adaclut, given on the 25th of June 1845, in the case of Rance Hurry Priah v. Rajah Luckhinarain Roy (a) was referred to for the purpose of showing that that Court judicially recognised the existence of the custom contended for. The facts of that case were not unlike those of the present one. Rajah Sudar Narain Roy, being childless, and having two wives, namely Rance Hurry Priah, and Rance Bishun Priah, adopted a son named Sreenarain for Hurry Priah, and the Defendant Luckhinarain for Bishun Priah. Whether these adoptions occurred simultaneously or not, does not appear, though it certainly seems that they were effected in one and the same day. Sudanarain Roy died a fortnight after this event, and Sreenarain, Hurry Priah's adopted son also died in the same year. Upon his death, Hurry Priah set up a claim to be entitled by virtue of an Anumottee puttro given to her by her husband to adopt a second son in the place of the first who had died. The sole question in the suit was whether or not this alleged deed was forged and fraudulent, and it is said that the absence of any issue relative to the legality of the first adoption, conclusively shows that

(a)—1 S. D. A. Report, p. 324.
the Court considered that they were unimpeachable. I am, however, unhesitatingly of opinion that I cannot treat the silence of the Court on this point, however important it may appear to have been, either as a judicial enunciation of the law, or as an obiter dictum, entitled to consideration, and for no other purpose can I look at a judgment given in suit between parties, to whom those of the present suit are in every sense strangers; consequently, I do not allow any inference to be drawn from it to influence my decision. As regards the next question (a) I will confine myself to saying that the evidence before me entirely fails to establish the alleged purchase of Monomothonath, whatever might have been the effect now a days of such a fact, had it been proved; and there is certainly prima facie evidence of his having been freely given, consequently I find that Monomothonath was duly given.

Proceeding to the next issue (b), I may without detailed reference to authorities take it to be undisputed Hindu Law, that a man having no son, either natural born or adopted, may, after natural procreation is impossible, and when there is no reasonable opportunity whether from the state of his health or otherwise, for himself adopting, either verbally or by writing, including a will, delegate to his widow the power of adopting a son for him after his death, and that even if he have a son, natural or adopted, he still may lawfully give his widow a prospective power of adopting, contingent in the failure of the then existing son; see the judgments, Sham Chunder v. Narain Dibeh (c) and in Ramkishore, Acharj Chowdree, v. Bhoobunmoye Debra Choudrani and others (d). But I conceive no one will contend for a moment that the husband could confer on his wife a larger power than he himself, acting under the same circumstances, would possess. Therefore, if I am correct in my conclusion on the first issue, the widow cannot, in exercise of the delegated power, notwithstanding

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the decision in Gooree Pershad Bai, v. Mussamat Jymala (a) upon which I have already commented, adopt a son when either a natural born son or an adopted son is still living. By the aid of these principles, let us see what has been the legal effect of the acts of the parties.

Promothaunath having, as he supposed, simultaneously adopted two sons, and appropriated one to each wife, made his will, in which among other things, he said "having adopted two sons, I have given my elder son to my elder wife to bring him up, and my younger son to my younger wife to bring him up; and they both are respectively nourishing the said two sons as sons born of their womb. If either of these my two sons depart this life without issue (which God forbid) I direct either of my wives, whose foster son shall have died, to take another son in adoption pursuant to this my direction; and having done so, should a similar misfortune happen, she shall have the option of adopting other sons in succession." In substance this it seems to me, amounts, to giving each wife a conditional power of adoption, namely, a power to adopt on the occurrence of the death without issue of a specified individual: and I think it was competent to him to confer such a power, only that the law, as I understand it, attached to it the further condition that the power should remain in abeyance, and incapable of being exercised as long as a duly adopted son should be in existence. I can find no precedent of the husband intentionally making the widow's power contingent upon any other event than the death of an existing son or adopted son, except in the case of Mussamat Solukhan v. Ramlolol Pande, and others (b) where it was sought to be made out that the second widow had power given her to adopt in the event of her disagreement with the first widow. The question as to the validity of such a condition was not then settled, because the Court came to the conclusion that the pretence of any Anumotee Puttro at all having been given was altogether false and

fraudulent. But I see no reason, in principle, why the husband should not, if he chose, give his wife a less authority than the fullest which he had in his power to confer upon her. I think, therefore, that I am justified in construing the will as speaking thus to the widows:—

"I authorize either of you to adopt a son for me as the law allows, only that you A shall not do so until after B's death; and you A 2, shall not do so until after B 2's death;" and having so construed it, I think I am bound to give that construction full effect.

I have already said that I hold the testator's act of adoption of the two sons to have been null and void; consequently, when Santoomoney Dassee set herself to exercise the power of adoption given her according to my construction of the will, there was neither son nor adopted son of Promotzhauth, nor any lineal issue of him existing; and the death of Suruthnauth, her so called adopted son, without issue had taken place, consequently everything had happened that was necessary to confer upon her the full power to adopt; and I am of opinion that Onauthnauth, the son then adopted by her, became and is the lawfully adopted son of Promotzhauth. I now come to the question whether either Plaintiff or Onauthnauth take by devise under the will or otherwise.

Neither disputes the validity of the will either as an Anumotee Pattro, or as an instrument of proprietary disposition. All that devolves upon me, therefore, is to arrive at that which the testator has expressed in his will as his intention, whether explicitly or by implication, and in so doing, as this is a Hindoo will, there are not, I believe, any rules of construction by which I must consider myself bound. Fortunately, I find no difficulty in the language of the instrument. The most important part of the will bearing on this point, is in the following words:—"Besides one half share of the moveable and immoveable properties of which I am possessed jointly with my elder uterine brother, whatever Company's papers, and so forth, personal and real properties, there are belonging to me in my separate, that is to say, private khata, or account, my said
"executor and executrixtess shall become possessed of the whole "after my decease and shall receive my dues and pay the under-"mentioned legacies; that is to say donations, &c., and the residue "shall remain as my estate, which shall be received by my two adopt-"ed sons in equal shares."

The testator had previously stated that he had adopted two sons, and had directed that, in the event of either dying without issue, another son should be adopted in his place, and that son shall inherit "the share of my deceased son." I do not at all think that the testator supposed these clauses to be merely descriptive of the course of distribution which the law would effect among his adopted children. On the contrary, I am of opinion from the words I have quoted, and other parts of the will, that he directly intended to give the residue which he mentions to the two boys, whom he had previously in his will said that he had adopted, and called his adopted sons, as specific individuals, in equal shares, and on the death of either without issue to give over his share to the son who should be adopted in his place. No difficulty arises, under the circumstances, as to the meaning of dying without issue, and I hold without any serious doubt that the before mentioned residue went in equal shares to the plaintiff and Surnuthnauth, and that on the death of the latter his half share went, by the gift, over to Onauthnauth, who satisfies the condition of being the son adopted by Santoomoney in the place of Surnuthnauth. The complete power of a Hindu, according to the law of Bengal at this day, to dispose either by deed inter vivos, or by will, of all his property, as well as ancestral as acquired, was not questioned before me by either side; and I conceive that power extends to distribution in regard to time, as well as to distribution in regard to persons. It follows, that the original gifts of shares to the plaintiff and Surnuthnauth, strangers to the family though I hold them to be, were good, notwithstanding the subsequent adoption of Onauthnauth, and also that the gift made over to Onauthnauth is valid.
Finally, I must see whether the plaintiff is prevented from setting up the claim which he makes in this suit by reason of the administration suit and the part he took in it. That suit was brought in 1854 by Monomothanath Day and Onathnath Day, both then infants and appearing by their next friend Lalbehary Day, against the three executors of Promothanath's will. The bill of complaint set out the main facts of the case very nearly as they are stated by the plaint in this suit, and prayed that the trust of the will of the said Promothanath Day might be carried into execution under the direction of the court, and the rights and interests of the plaintiffs under the same declared, and that accounts should be taken, and that certain monies should be charged against the defendants; that directions might be given for partition and division of the testator's joint estate for the benefit of the plaintiffs, and for the appointment of a receiver, and so on. It does not appear that a final decree has yet been made in this suit, but a receiver has been appointed; accounts were taken before the late Master, and various interlocutory orders made with regard to maintenance and other matters: however, I am of opinion that no decree in a suit thus framed would be judicially binding as to the rights of the plaintiffs, inter se. A decree of court can only effect a res judicata between parties who appear before it adversely, or in opposition to each other. Possibly, if such opposition in fact exists, and was dealt with in the decree, the circumstance that the persons to be affected do not appear on the face of the proceedings as distinct antagonistic parties might be unimportant, but in this case Monomothanath and Onathnath not only are co-plaintiffs, but appear by one and the same next friend. They ask for joint relief; they do not even seek to have their separate interests declared; and while they ask that the testator's property may be divided from that of his co-sharer, they do not go on to desire that the resulting share may be divided among themselves. It is therefore clear that Monomothanath and Onathnath were never, in the administration suit, in any sense at arms length from each other. The criterion of a
res judicata inter partes, as deduced from a long line of ancient and modern authority, is thus expressed by Mr. Justice Willes in Nelson v. Couch (a)—"Where the plaintiff has had an opportunity in a former suit of obtaining that which he seeks to recover in a second, the former suit is a bar to the second." And in Hunter v. Stewart (b)—Lord Westbury held that the res judicata in Chancery suits was determined by the equity set up between the parties and not by the nature of the relief asked for. In the administration suit as it was brought, Monomothanauth never had the opportunity of seeking any relief at all against Onathnauth. To have done so, he must have altered the frame of the suit, and this consideration seems to me to show conclusively that the administration suit in itself constitutes no bar to this suit; then has the present plaintiff's conduct towards Onathnauth in relation to that suit and the matters arising out of it, been such as to render it inequitable that he should obtain the relief against him which he now seeks? I think not. To enable me to say the contrary I must, I apprehend, be satisfied either that the plaintiff has knowingly and deliberately waived the claim which he now urges, or that he acquiesced in the supposed rights of Onathnauth on the basis of the bill of 1854, so long and under such circumstances that he cannot now be allowed to disturb them. Had he expressly given up the exclusive rights which he now imagines himself to possess, whether for the sake of family, place, or otherwise, or had he with substantial knowledge of his present case stood silently by, and had so, in either way, presumably allowed Onathnauth to act, with regard to future arrangements, on the faith of the state of things set up in the bill in the administration suit, I should be bound to hold him disentitled to bring the present suit. But the defendants have not furnished me with a particle of evidence to support either of these alternatives. Estoppel of this kind, as distinguished from the estoppel of a judgment, must arise out of the actual behaviour of the person to be es-

topped. See Swan v. N. B. Australian, Co., (a). In 1854, at the time of the institution of the administration suit, Monomothonauth and Onathnauth were children, and respectively of the ages of seven and four years, and I cannot look upon the fact that, under the circumstances, Monomothonauth, by his next friend, claimed administration of the property in conjunction with Onathnauth as a deliberate waiver of his rights adverse to Onathnauth.

It does not appear that Monomothonauth has since that time exhibited any want of consistence, good faith, or reasonable diligence. He has brought this suit as promptly after his attainment of his majority of sixteen years as can reasonably be required of him, and I see no reason why it should not be entered upon and determined on its merits.

Having thus, at the request of the parties in this cause, considered and discussed at some length the various issues which have arisen in it, the result of the conclusion to which I have arrived, under the several heads respectively, is that I must dismiss the plaint with costs. No. 3.

(a).—10, Ju. N. S. 132.

The Judgment of Mr. Justice Phear, in the latter of the above important cases was appealed and heard before Peacock C. J. and Trevor and Samboonauth Pandit J. J. on the 1st and 2nd May 1866. The learned Judges in appeal preferred to decide the case on the will, and agreeing with Mr. Justice Phear on that point affirmed his Judgment, without expressing any opinion as to the invalidity of a double adoption, side, II Ind. Jur. 24-49. It is impossible, however, not to agree with the main conclusion which Mr. Phear drew from his review of the Hindu authorities, and on the Madras side the decision of the Privy Council has of course finally settled the law.

The case of Day, v. Day, reported in the text was followed by the same Judge in Siddessory Dassee v. Doorga Churn Sett. and others, 14th July 1865, II Ind. Jur. 22; and in fact, the principles therein laid down had been virtually affirmed for years past in the various Schools of Hindu Law; thus in Basoo v. Camanah Basoo Chianna Venccathan, 13th February 1856, the Sadr Adalat of Madras, decided that not only was a second adoption invalid by cause of the existence of the son first adopted, but that no change of circumstance, such as the demise of the son first adopted, could render the said invalid adoption a valid one; and the same Court held in another and later case, that even an adoption made during the pregnancy of the wife of the adopter is void, it being of the essence of the power to adopt, that the party adopting should be hopeless of having issue. Narayana Reddi and another v. Vedachala, 8th August 1860, M. S. A. Dec. 1860, page 97. In like manner the Sadr Court of Bombay held, that
although a man before the full performance of the ceremony of adoption, could, if he wished, set aside the person he had originally chosen and adopt another in his stead, he had no such power after he had once properly adopted a son; and that he could not disinherit such adopted son even for bad behaviour, nor could he in the lifetime of the first adopt a second son. 

In Yacheredy Chinna Bassapa and others v. Yacheredy Gowdapa, 4th December 1835, 3, P. C. C. Case 6, and Sudanund Mohapatra v. Bonomally and others, 28th February 1863, Hay's High Court decisions, page 205, the same doctrine of the invalidity of a second adoption in the lifetime of the first adopted son, was affirmed as established beyond all controversy; and in Bhya Ram Singh v. Agor Singh and others, 10th September 1866, Morgan C. J. and Pearson J. remarked that "the adoption of two persons as sons at the same time is not only unusual, but is not a practice sanctioned by Hindoo Law." I. N. W. P., H. C. R. page 203.
An adoption by a Widower is valid according to Hindu Law.

NAGAPPA ADAPA, APPELLANT,
Versus
SUBBA SASTRY, RESPONDENT.

Before the High Court of Madras.

Present:—Frere and Innes, J. J.

This was a suit to recover the property of Kristna Sastry, the plaintiff's uncle, now deceased.

The first defendant, as father and natural guardian of the 2nd defendant a minor, pleaded that Kristna Sastry adopted the 2nd defendant during his lifetime, and that the latter is, therefore, entitled to the estate of the deceased, whose family was divided from that of the Plaintiff.

The District Munsif passed judgment in favor of the plaintiff on the ground that the late Kristna Sastry was a widower, and consequently by Hindu Law incompetent to adopt. This decision was confirmed in appeal by the Principal Sadr Ameen.

In this case the Principal Sadr Ameen has expressly found that the adoption of the 2nd defendant by the late Kristna Sastry actually took place. The only question before us is whether this adoption must be held to be invalid on the ground that Kristna Sastry was at the time a widower.

On this point we observe that the opinion which the Principal Sadr Ameen has formed in the reference to the subject appears to be founded chiefly, if not entirely, on a passage in Mr. Justice Strange's Manual of Hindu Law, Section 61, in which he quotes as his authority the Datta Mimansa of Somanath. We cannot find, however, that this latter work has been regarded at any time as of much weight on points of Hindu Law, nor is it specified by Mr. Justice Strange himself among the authorities, of which a list is given at the commencement of his Manual. On the other hand the
views expressed on this point by Sir Thomas Strange, Vol. 1, page 65, Ed: 1825; by Sir W. MacNaghten, Chap. VI, "of adoption," page 66; by Colebrooke in his Digest, Vol. III, page 252; and by Sutherland in his Treatise on the Law of Adoption, Appendix, Note IV, are all opposed to that now enunciated by the Principal Sadr Amin, and are in favor of the validity of an adoption made by a widower.

We think, therefore, that the pleader for the plaintiff has failed to make out his case, or to show that an adoption by a widower, as in this instance, presents any exception to the general rule of Hindu Law, which allows the privilege of making such adoption to one destitute of legitimate male issue.

We resolve accordingly to reverse the judgment of the Principal Sadr Amin, and to dismiss the claim of the plaintiff for the recovery of the estate of the late Krishna Sastry, as against his adopted son the 2nd defendant. The costs of suit will, however, be charged to the respective parties throughout the entire case.—Appeal allowed.

The Datta Mimansa mentioned in while, it is probable, that the former the above judgment must not be confused with the leading treatise on adoption bearing that title, of the Benares and Mithila Schools. The author of the latter was Nanda Pandita, while it is probable, that the former is identical with the Datta Mimansa mentioned by Ellis (Law Books of the Hindus, p. p. 21—22), the author of which was Vidyaranya Swami.
The Hindu law does not prevent a Leper from giving his son in adoption.

ANUND MOHUN MOZOOMDAR, AND OTHERS,—Petitioners.

Versus

GOBIND CHUNDER MOZOOMDAR AND OTHERS,—Opposite Party.

Before the High Court of Bengal.

Present:—Shumoonath Pundit, J.

Petitioner contends that the Lower Courts did not find any issue for the determination of the question, whether the natural father of the adopted son being sick of leprosy, could legally give his son in adoption. Now the adoption was at issue in the case, and it was not at all necessary to make separate and distinct issues regarding the several acts and proceedings connected with the adoption. The petitioner as plaintiff was to prove, first, the fact that the natural father was so sick, that, under the Hindoo Law, that disease could operate as a bar to his power to give his son in adoption. The petitioner does not pretend to say that he has done so, and his pleader here cannot shew any text in support of his Hindoo Law point. As there is no proof of the fact of the diseased state of the natural father, and also nothing to suggest that, assuming the fact to be as the petitioner alleges, he is in a position to make anything of his law point. I see no reason to admit the review, and so reject this application.

As to a leper's legal competency to adopt, two contradictory cases are cited by Macnaghten in his second volume, page 201. In the first case (No. XX,) the Pundit who was consulted declared that "a person afflicted with leprosy is incompetent to adopt a son, for he bears the impurity till death"; but in the second case (No. XXI), the opinion was to the effect, that "after performance of the prescribed penance, (the person afflicted with leprosy) becomes purified, and is competent to perform Praman, or double rites and ceremonies as declared in the Veda; therefore the adoption made by the person so purified is good and legal." In a footnote to this latter case, Macnaghten says:—"The opinion is correct, but the law officer by whom it was delivered has omitted to support it by any authority. The following passage from the Digest of Jaganath may serve to supply the omission. Baghunandana holds, that expiation for a man afflicted with elephantiasis, or other similar disease, is ordained for the purpose of enabling him to perform acts of religion ordained in the Veda." By parity of reasoning he becomes competent to inherit property, as well to perform religious ceremonies.

The persons excluded from inheritance are, according to a text of Yajusya-svalaya, the impotent person, the out
east and his issue, one lame, a mad man, an idiot, a blind man, a person afflicted with an incurable disease, and others similarly disqualified," Sec. X, Chapter II, para. 1 Mitaceshara; and, as Sutherland points out (vide note IV attached to his Synopsis), "the admissibility of a doubt as to the legality of an adoption by such persons, is suggested with reference to a passage in the Mitaceshara, (Ibid, para. II,) which declares, that, of the specific mention of the "legitimate son" and 'son of the wife' in a text of Yajnyawalkya (Ibid para. IX), providing for the inheritance of such sons of disqualified persons, is intended to forbid the adoption, by them, of other sons. The author of the Duttaka Chundrika likewise arguing from the same or a parallel text, that an adopted son, is not ordained for disqualified persons, excludes such son of those persons, from succeeding to the estate of the paternal grand father. In the absence, however, of other authorities, those alluded to, can hardly be admitted as sufficient to establish a general rule vitiating in toto the adoption by one excluded from inheritance. In fact, the author of the Duttaka Chundrika, without advancing such position, merely denies the right of one so adopted to inherit of his adoptive grand father, and perhaps no more was intended by the author of the Mitaceshara." It is also worthy of note that the Mitaceshara distinctly provides that in the case of disqualified persons, "if the defect be removed by medicines or other means (such as penance and atonement, according to the commentator, Balam Bhatia) at a period subsequent to partition, the right of participation takes effect, by analogy to the case of a son born after separation. "When the sons have been separated, one who is afterwards born of a woman equal in class, shares the distribution," Chap. II, Sec. X, para. 7.

It clearly follows from this that the removal of the defect by any of the above ordained means, would render the disqualified person capable of receiving a son in adoption, and the son so adopted would undoubtedly inherit the adopter's property.
THE QUALIFICATION AND RIGHT TO BE ADOPTED.

I.—According to the doctrine of the Supreme Court of Calcutta, the High Court of Madras, and the High Court of Bombay, the adoption of an only son of an advanced age, and even after tonsure, is improper, but not invalid.

II.—Per High Court of Bengal, such an adoption is absolutely invalid.

1.—(a.)—SREEMUTTY JOYMONY DOSSEE, 

Versus 

SREEMUTTY SIBOSOONDNY DOSSEE,

Before the Supreme Court of Calcutta.

Ryan C. J. in giving judgment said:—This bill comes on for further directions, after an issue directed to the common law side of the Court. The bill prays amongst other things that one Collycoomar may be adopted. It has been found upon the issue that there was a direction to adopt. The defendant's counsel has objected first, that Collycoomar is the only son of his father, and secondly, that the initiatory ceremonies, and particularly tonsure ought to be performed in the adoptive father's house. On the first point the adoption of an only son is no doubt blameable by Hindu Law, but when done it is valid. We entertain therefore no doubt as to the first point and think that Collycoomar may be adopted. Parties—having two modes of doing the same thing, the Court will not suppose that the party has adopted that one, which is immoral or blameable. The agreement between the adoptive and natural father may be for him to become Duyamushyayana or son to both fathers. We think in this case that Collycoomar may have been thus adopted, and if so he will have been adopted without blame. Upon the second point as to the ceremony of tonsure having been performed in the house of the natural father it is no bar to the adoption; for after performance, a sacrifice to fire, even amongst the three
first classes may be resorted to, and this will undo its effects. But in this case the parties are Sudras and there is no ceremony but marriage for them.—Grant and Malkin, Js. concurred.

I. (b.)—CHINNA GAUNDAN AND ANOTHER,

Versus

KUMARA GAUNDAN.

Before the High Court of Madras.

Present:—Scotland, O. J. and Frere, J.

Scotland O. J. — This is a short point on which we may clearly come to a conclusion. Two questions are raised:—First, did this adoption in point of fact take place? Secondly, if so, was it valid in point of law? It is admitted that the first question must be answered in the affirmative. Then, as to the second, the only authority produced is a passage from Mr. Justice Strange's Manual of Hindu Law. Every thing found in that book is undoubtedly deserving of much respect; but it must be observed that the passage in question is not supported by any cited authority. And on perusing it attentively it is, I think, clear that the learned author must have been dealing with religious considerations strictly; and that when he says the adoption of an only son is 'void,' he means void from the orthodox theological point of the view of the Castras and commentaries, and as being likely in Hindu belief to entail painful consequences in Put. But we are here to decide on temporal rights, not to consider such spiritual liabilities; and the application of the maxim factum valet to such a point as the present is wise, I think, and justified by many authorities which quite precede our giving effect to the conclusion stated in Mr. Justice Strange's Manual.

"The result of all the authorities" says Sir Thomas Strange:—(a) "is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one, not being precisely him who on spiritual con-

(a.)—Hindu Law, 185.
siderations ought to have been preferred." And again with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply they are directory only; and an adoption of either, however blameable in the giver, would, nevertheless, to every legal purpose, be good; according to the maxim of the Civil Law prevailing, perhaps, in no code more than in that of the Hindus, *factum valet, quod fieri non debuit*" (a)—Then there is the case of *Veerapermall Pillay v. Narram Pillay*, with those of the Rajah of Tanjore, Arunachalam Pillai v. Ayyasami Pillai, Nundram v. Kashee Pandi, (b) Sreemutty Joymong Doosee v. Sreemutty Sibsoondry Doosee, all of which are noted in the first Volume of Morley's Digest, page 17, and all of which support Sir Thomas Strange's doctrine.

Referring to Mr. Justice Strange's argument, I may observe that it rests on the assumption that it is the birth or adoption of the son that delivers the natural or adoptive father from the danger of *Put*. But surely this is erroneous. It is the son's performance of his father's exequial rites, not his birth or adoption, that relieves the father from the danger in question. Would the father after the birth or adoption of a son, be considered safe from *Put* if those rites were not performed owing to the son's death, his loss of caste, or for any other reason? If the mere birth of a son were all that was required, it would hardly be laid down, as it is (c), that on the death of such son the affiliation of another is indispensable.

Adoption takes place according to *Atri* (d) "for the sake of the funeral cake, water and solemn rites," and according to *Manu* (e) for these objects and also for the celebrity of the adoptive father's name. But not for the sake of the supposed efficacy of the mere

(a)—*Hindu Law*; 87.  (b)—3, S. D. A. 70. *L. Morl. Dig.* 17.
(c) *Dattaka Chandrika* I, 5.  (d) Ibid 1, 8.  (e) Ibid and *Dattaka Mimansa*, I, 9.
act of adoption. If, then, the saving virtue is solely in the performance of the exequial rites, Mr. Justice Strange's doctrine of the total expenditure on the natural father of the efficacy of his son's birth does not seem to warrant his conclusion. The adopted son may well perform his adoptive father's rites, and in certain cases it appears when he is a dwyamushyayana, those of his natural father also. It cannot, then, be said that the adoption "fails in its essential use," and is for this cause void. I may remark that the hostility shown in the Shastras to the adoption of an only son arose, probably, from other than mere religious considerations. The true reason, perhaps, is furnished by Jagaunatha (a) who lays down the law thus: "Let no man accept an only son, because he should not do that whereby the family of the natural father becomes extinct; but this" he goes on to say, "does not invalidate the adoption of such a son actually given to him."

On the whole, the case is concluded by authority; but I must say with all possible respect for Mr. Justice Strange, that upon principle and reason I should have felt myself bound to decide the point in the same way. Frere J. Concurred.

1. (c.)—RAJE VYANKATRAV ANANDRAV NIMBALKAR, APPELLANT.

Versus

JAYAVANTRAV BIN MALHABRAV BANADIVE, RESPONDENT.

Before the High Court of Bombay.

Present, Warden and Gibbs, J. J.

Vishvanath Narayan Mandlik, for the Respondent, was called upon to prove the fact of the adoption as he admitted that in the event of the adoption not being established, the Appellant would then be the heir.

Pigot, for the Appellant. There are several objections which, I submit, are fatal to the adoption. The person here adopted, Jayavantrav, the Respondent, was at the time of his adoption a father, and possibly a grand-father. There is not even indirect evidence in the

(c) 3 Celcb. Dig. 243.
case to show that the husband of Gajrabai had given her authority to adopt. Jayavantrav, the Respondent, is besides, the only surviving son of his father, and could not, according to the Hindu law, be adopted. Nearly seventy years having elapsed since the death of Gajrabai's husband, it was an adoption to the widow alone.

Vishvanath Narayan Mandlik, Contra:—The Hindu law, although it does not recommend, permits the adoption of an only son; at least it does not set aside such an adoption otherwise validly performed. As to the question of the effect of adoption, S. A. No. 507 of 1863, decided by Arnould C. J., and Forbes and Warden JJ. (13th October 1864), ruled that adoption by a widow has the effect of divesting the widow's rights, and carrying back the effect of the adoption to her husband's death.

Warden, J. This action is brought by the Plaintiff to be declared heir to the estate of Gajrabai. On the side of the Defendant an adoption is set up, and the Counsel for the Appellant urges that this adoption should be held invalid, on the ground that by the Hindu law an only son cannot be adopted. The authorities state that an only son should not be given in adoption; but if such an adoption has taken place, and the requisite ceremonies have been duly performed, then it cannot be set aside. I agree with the District Judge in holding that the adoption was performed with the proper ceremonies.

The terms of the deed of adoption generally, and particularly the use of the word "ours" therein, shows that the property referred to was common to Gajrabai and her deceased husband. The adopted son, therefore, becomes the heir not only to the property of the widow alone, but to that of both. I therefore confirm the decree of the lower Court with costs.

Gibbs J. I agree in the conclusion arrived at by my brother Warden. The suit was brought by the Plaintiff as the heir of Bhavantrav, the husband of the deceased Gajrabai. When the case came on for trial, the learned Counsel for the Appellant, Mr. Pigot,
and Rao Sahib Vishwanath Narayan Mandlik for the Respondent, admitted that in the event of no extraordinary circumstance, such an adoption, being established, the Appellant would be the heir; and further it was admitted that no question would arise as to the moveables, as the deed of gift by Gajrabai was on a sufficiently stamped paper. The Court was, therefore, limited by consent (1) to the question of adoption, and should that not be held proved, (2) whether the immovable property, the inam and patilki watan was confiscated by Government, and regranted for political purposes to Gajrabai, i.e., whether it was a personal grant or not.

The case really turns on the question of adoption; and after carefully considering the evidence adduced, I can arrive at no other conclusion than that it did take place. The District Judge's finding is so obscure that we found it a matter of some doubt whether he held the adoption proved or not; and had we been hearing a special appeal, this uncertainty would have given us some trouble, but this being a regular appeal, we are Judges of fact as well as law, and can decide the issue for ourselves.

It appears that this old lady was left a childless widow in A.D. 1794, or about seventy-one years before she died, if we may believe she was ninety years old at her death; and undoubtedly she was found a claimant to a very considerable landed estate when the British Government succeeded to that portion of the Dakhan in which this inam is situated. It is not denied by the plaintiff that Bhavanrao was a divided member of his father's family, and that his widow had, at all events, a life-estate in the immovable property. It appears, then, that she took as an adopted daughter (I here use the word "adopted" in the ordinary English meaning, and not as it would be applied to a son under Hindu law) the mother of the Respondent, and the Respondent was born in Gajrabai's house and always lived there. Now it is proved by the deed of gift, No. 12, that Gajrabai on the 11th of February 1857, made a settlement of all she possessed on the respondent, reserving a life interest in it for herself; and as this document is on a
eight rupee stamp, and does not set out the value of the property, it is valid, if otherwise proved (which I find it to be,) under Reg. XVIII, of 1827, Sec. XII, Cl. 2, which governs the case.

Some negotiations appear to have been going on between the old lady and the Government regarding her inams, and these were not concluded at her death, three days before which, to make the case of her protege, the respondent, stronger, she appears to have adopted him, with the usual ceremonies, and further to have executed the deed of adoption, No. 14, which is dated 4th February 1865. It has been urged that this document requires a stamp; but the Counsel for the Appellant admits that he can find no law requiring such, and I consider that it is not inadmissible on this ground if otherwise proved, which I hold it to be.

The only serious argument on this subject that has been addressed to the Court is, 1st, that the ages of the adopter and the adopted are both too great, as also the interval between the death of Gajrabai's husband and the date of the adoption, to admit of an adoption being permitted, and also that the adoptee was an only son. But the rulings of this Court, as shown from 2 Born, p. 83 downwards, as also of the Calcutta Courts, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on the giver and receiver alone; but the adoption must stand. Under these circumstances I need not say more on this portion of the argument. 2ndly, it is urged that the adoption is made by the old lady for her own estate, and is not good as affecting the estate of her late husband, and, therefore, that it will not affect the succession to the Inam and Watan. Mr. Pigot admits that he is unable to quote any precedent, but argues that as the object of adoption by a widow is to benefit the soul of her deceased husband, Gajrabai, having waited seventy years before she made this adoption, must be held to have done it for her own sake, and not for that of her husband's soul. He further urges that the wording of the deed of adoption shows this. Rao Sahib Vishvanath Narayaon the contrary
quotes Section A. No. 507 of 1863 decided on the 13th October 1864, by Arnould, acting C. J., Forbes and Warden J. J., in which it was held that the adoption by the wife is an adoption to the husband's estate, and he urges that in this case the pronouns are in the plural throughout the deed of adoption, it must clearly apply to the joint estate. I have no doubt that the old lady believed that the immovable property had vested solely in herself; and the conduct of Government throughout led her to this opinion, and she never conceived that any thing more was required than the deed of gift plus the deed of adoption to establish her protégé in the estate; but the latter in itself does not so clearly show this as the Counsel for the Appellant would have us to hold.

It is very general in its terms, and certainly does not exclude the husband's estate. But the real question is what is the Hindu law as held on this side of India on this point? Sir Thomas Strange states that an adopted son is in the same position as a posthumous son, and his inheritance dates from the death of the adopted father and that a widow may adopt to her deceased husband is a fact invariably held. It is asserted that a widow cannot adopt an heir to herself; but the case of the Satara Rani has been alluded to as opposed to this. I believe the Rani would have been only too willing to adopt to her late husband, had the paramount authority, the British Government, whose consent was necessary, permitted any other adoption save that to her own estate; but whether such an adoption is good or not is not a question which need be settled in the present case. I am of opinion that a son adopted is in the position of a natural son, and surely if a widow adopts, she must be held to adopt a son, not illegitimate as her son by other than her husband would be, but a son in the place of a legitimate natural born son of her deceased husband. I think the silence of all texts or cases on the point raised so ingeniously by Mr. Pigot shows that such an idea would be contrary to the principles of Hindu law on the subject of adoption. I, therefore, consider the adoption of Joyavantrav good and binding on the estate of Bhavanrav, and the
second question therefore does not arise; and I would confirm the
District Judge's decree, throwing out the claim of the Plaintiff with
all costs.

II. RAJA UPENDRA LAL ROY.

Versus.

Srimati Ram Prasannamayi.

Before the High Court of Bengal.

Present.—L. J. Jackson and Mitter, J. J.

This was a suit for establishing the title of the Plaintiff as the
adopted son of the late Raja Nanda Lal Roy, and for possession of
the property left by him.

The widow, defendant, Rani Brahmainayi, contended that the
Plaintiff being a minor was not entitled to bring this suit; that as
the Plaintiff was the eldest and the only son of his natural father,
and having lost his mother prior to his alleged adoption, he could
not, under the principles of the Hindu law, be taken in adoption by
any other person; and that the minor, Jogendra, was duly adopted
by her husband on the 16th Falgun 1268 (30th December 1862.)

The Judge without entering into the merits of the case, dismissed
the suit, on the ground that the Plaintiff was a minor.

The Plaintiff appealed to the High Court. At the time the case
came on for hearing, both parties admitted that the Plaintiff was then
18 years old; and the case was, therefore, allowed to be argued on the
merits.

Mr. Allan (with him Baboos Bama Charan Banerjee and Bhowani
Charan Dutt) for Appellant.

Baboo Ashutosh Chatterjee, for Respondent.

The Judgment of the Court was delivered by Mitter, J.—We
are of opinion that the Judge below was wrong in dismissing the
suit on the ground that the Plaintiff was a minor. Instead of dis-
missing the suit upon such a ground, the Judge ought to have, in our opinion, allowed the suit to stand over pending the appointment of a guardian or next friend to conduct it on behalf of the plaintiff. It is unnecessary for us, however, to say any thing further on this point. It is admitted on all sides that the Plaintiff is now a major, and as the case is otherwise, ripe for decision, we will proceed at once to try it on the merits.

We think that the Plaintiff has succeeded in showing that he was adopted by the late Raja Nanda Lal Roy; but it is unnecessary for us to enter into the evidence bearing on this point. It appears that the Plaintiff was the only son of his natural father, and as the adoption of an only son is contrary to the Hindu law, the title set up by the Plaintiff must necessarily fail. That the adoption of an only son is prohibited by the Hindu Shastras, is beyond all controversy. The two leading authorities on the subject, namely the Dattaka Mimansa and the Dattaka Chandrika, are unanimous in declaring that such an adoption should never be made. "By no man having an only son (eka putra), is the gift of a son to be ever made" (1).

He who has an only son, or one having an only son, the gift of that son must never be made. For as Vasishta declares, "an only son let no man give." Therefore, a prohibition against acceptance is established by the text in question. Accordingly Vasishta says, "let no man give or accept, &c." (2) "To this he subjoins a reason, 'For he is destined to continue the line of his ancestors. His being intended for lineage being thus ordained: in the gift of an only son, the offence of extinction of lineage is implied.' Now, this is incurred by the giver, and the receiver also" (3). "By no man having an only son, is the gift of a son ever to be made" (4).

The passages cited above are sufficient to show that the adoption of an only son is forbidden by the Hindu law. It has been said that the prohibition contained in these passages amounts to nothing more than

(1.)—Datt. Mimansa. S. IV, Verse I. (2.)—Ibid verse III.
a mere religious injunction, and that the violation of such an injunction, cannot invalidate the adoption, after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindus, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion: and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. "By a man destitute of male issue only," says Menu, "must the substitute for a son of some one, description always be anxiously adopted, for the sake of the funeral cake, water and solemn rites,"

(1.) It is clear, therefore, that the subject of adoption is inseparable from the Hindu religion itself, and all distinction between religious and legal injunctions must be necessarily inapplicable to it. Suppose, for instance, that a son has been adopted by a childless widow without the permission of her husband; the prohibition against such an adoption is contained in the following passage:—"Let not a woman either give or receive a son in adoption, unless with the assent of her husband" (2.) Can it be said that such an adoption would be valid in law? It will be observed that the language employed in the preceding text is precisely similar to that employed in the text prohibiting the adoption of an only son, and it would be difficult to suggest a reason why an adoption invalidated in the one case for temporal purposes, upon considerations arising out of the religious view of the matter, should not be equally invalidated in the other case upon similar grounds. One of the essential requisites of a valid adoption is that the gift should be made by a competent person, and the Hindu Law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the subject of a sale or gift. (See the text of Vishnou quoted in Verse 5, Section 4, of the Dattaka Mimansa). Such a gift, therefore, would be as much invalid, as a gift made by the mother of the child without the consent of the father. It is to be

borne in mind that the prohibition in question is applicable to the
giver as well as the receiver, and both parties are threatened with
the offence of "extinction of lineage" in case of violation. Now,
the perpetuation of lineage is the chief object of adoption under the
Hindu Law; and if the adoptive father incurs the offence of "ex-
tinction of lineage," by adopting a child who is the only son of his
father, the object of the adoption necessarily fails. It is true that
the doctrine of factum valet is to a certain extent recognized by the
lawyers of the Bengal School; but if we were to extend the applica-
tion of this doctrine to the law of adoption, every adoption when it
has once taken place, will be, as a matter of course, good and valid,
however grossly the injunctions of the Hindu Shasters might have been
violated by the parties concerned in it. The case of Chinna Gaundan
v. Kumara Gaundan (reported in I Stokes' Madras Reports. page 54) is
no doubt in favor of the appellant; but for the reasons stated above, we
are unable to concur with the learned judges who decided that case. On
the other hand we find two cases in our own Presidency which are directly
in favor of the view we have taken, and what is of still greater impor-
tance, both these cases have been cited with approbation by Sir William
MacNaghten himself. The first case is reported in page 178,
Volume II, of his work on the Hindu Law, and the second is to
be found in page 179, of the same Volume. We may also observe
that the learned translator of the Dattaka Chandrika and the Datta-
ka Mimansa is of the same opinion.

For the foregoing reasons we are of opinion that plaintiff's suit
must be dismissed, but without costs. The late Rajah had, in
point of fact, adopted the plaintiff; and if the title set up by the
plaintiff has failed, it is for no fault of his.

It will be seen that the latest decision of the Calcutta High Court, above re-
ported, altogether controverts the opinion, which had heretofore been held, of the
validity of an adoption of an only son; and while fully alive to the presump-
tion of questioning the correctness of such a decision, especially when it was
pronounced by a Judge whose "special-
lity" is the Hindu Law, and for
whose general learning and ability no one can fail to entertain the highest
respect; I think it must still be ad-
mitted that the weight of authority is
decidedly in favor, rather than against,
such adoptions. There is in the first
place, the decisions of the late Supreme
Court of Calcutta, and of the High
 Courts of Bombay and Madras, reported in the text, to which may be added the names of the most eminent European writers on Hindu Law, Sir Thomas Strange. (I. H. L. 87) and Sir W. McNaghten. (Principles, page 70, Note, Wilson's Edition.) Then again, we have the direct opinion of Jagannatha that the prohibition contained in the text of Vashishta, against the gift or acceptance of an only son would not invalidate an adoption which had actually taken place, Digest, Book V. Ch. IV, Sec. VIII, CCL, Note, page 317, Vol. II, Madras Edition; and the learned Shama Churn Sircar, does not think this opinion as inconsistent.

"for" he says "if the giver give his only son in adoption, causing his own lineages to become extinct, there is no reason why the adoption of such a son should be invalid, though it be a blamable act." Vyanashta Darpana page 983, note 2nd edition, see also "Remark" at page 830. It should also be remembered that the same texts which prohibit the adoption of an only son, extend the prohibition to the elder of several sons (Mitaccharama Chapter I, Section XI, para. 12) and have been interpreted as even prohibiting the gift of one of two sons. Dattaka Chandrika Section I, para. 7,8, Dattaka Chandrika Section I, para. 30. Now, with regard to an elder son it has been held by the High Court of Calcutta (Steer and Morgan J. J.) that the adoption of such a son, though improper is nevertheless not illegal, Sesta Ram v. Dhawasi Dharse Subhe, 2nd September 1862, Hay's Rep., page 260; and it is somewhat remarkable that the learned Judge who pronounced the decision in the recent case of Rajah Upendra Lal Roy, was one of the counsel who were engaged in that case to represent the Respondents and oppose the adoption. The Chief Court of the Punjab has also followed the authority of McNaghten and upheld the validity of an adoption of an only son. Mukhun Lal v. Must, Sookhees, 21st November 1867. It should also be remarked that the Madras decision above reported. (Chinnam Goundan v. Kumara Goundan), has been cited with approval, together with that of the Supreme Court in Joymony Dossee v. Sreemutty Sibosoodry Dossee, in the very recent case of V. Singamma v. Pinjumari Venkatacharlee, 23rd November 1869, IV Mad. H. C. Reports, 371. See also Must v. Lalla Hurreelall, 15th March 1864, Sp W. R. 133, where Raines, J. said:—

"though it is allowed that a father should not give up his eldest or an only son for adoption by another, we are not shown any reliable authority on the illegality of such selection when once made and acted upon."

2. In practice there is no doubt that the adoption of an elder, but more especially of an only son, is common, and I may mention that in a case recently tried before the Deputy Commissioner of Delhi, Ajoodiah Percabk v. Must. Deva, widow of Narain Das, it was ascertained that several adoptions of only sons among the Superior castes of Hindus had previously taken place in that city without any objection having been raised as to their validity; and in a treatise on adoption published by Pundit Bisheshwar Nath, a learned Hindu gentleman of Delhi, it is distinctly stated that in modern times only an elder son are given and received in adoption, and, that disappointed collaterals, whose succession is effectually cut off by the act of affiliation, should at times endeavour to take advantage of a religious prohibition, is not to be surprised at; but the very fact of the Courts in the various Presidencies being called upon now and then to set aside such adoptions on technical grounds, proves the existence of a wide spread custom overriding the strict letter of the law, and, one moreover, of no very recent origin.

3. It is argued that since adoption is essentially a religious institution, originating chiefly, if not wholly, from motives of religion, the doctrine of 'factum valet, even in schools where it is most recognised, has no application to the law of adoption, and it is therefore impossible not to give effect to an express prohibition of that law. But surely this is not the principle which has heretofore guided our Courts? To mention only one instance: The Hindu Law lays down certain forms to be observed and prayers to be recited on the occasion of adoption, and Nanda Pandita gives it as the general conclusion to the section on 'the mode of adoption,' "that the filial relation of adopted sons, is occasioned only by the proper ceremonies. Of gift, acceptance, a burnt sacrifice, and so forth, should either be wanting, the filial relation even fails," Dattaka Chandrika, Sec. II, para l3; and the text of Manus quoted in the Dattaka Chandrika, Sec. VI, para 3, lays down the rule that:—

"He who adopts a son without observing the rules ordained should make
him the participator of the rites of marriage, not a sharer of the wealth.

Now it cannot be denied that these provisions of the Hindu Law are as strongly affirmative of the absolute necessity of the observance of the stated ceremonies in order to render an adoption valid, as other provisions of the same law are prohibitory or condemnatory of an only or an elder son being given in adoption. But in the face of the current of decisions to the contrary, and the notorious fact that in modern times such ceremonies are frequently disregarded, could it now be contended that an adoption which had not been accompanied by the prescribed ceremonial forms was invalid? And if the strict provisions of the law are disregarded in the one instance, it is difficult to assign a valid reason why they should be enforced to the letter in the other.

4. Then it is urged, adopting the same analogical process of argument which I have just used, that the language employed in the text prohibiting the adoption of a son by a childless woman, is precisely similar to that employed in the text prohibiting the adoption of an only son, and that it would therefore be difficult to suggest a reason why an adoption invalidated in the one case for temporal purposes, upon considerations arising out of the religious view of the matter, should not be equally invalidated in the other case upon similar grounds. It appears to me that the reason is obvious: the widow acts simply as agent for her husband, it is he alone can derive any spiritual benefit from the act of adoption, and it is right that before she is permitted to divert the line of succession, so to speak, into a new channel, that she should show that she had been specially authorised in that behalf, by her husband, before his death. If this was not the case a widow, whose power of alienation under the Hindu Law is restricted within very narrow limits, could easily deprive the reversionary heirs of their rights by adopting a son of her own accord. It is therefore perfectly intelligible why the Courts have refused to relax the rule of law in this respect. Besides, it must be remembered that in her own right a woman is supposed to be incapable of performing the requisite sacrifices for a valid adoption; but when acting as agent for her husband this incapacity is in a manner avoided by her ability to employ a substitute for that special purpose. Sutherland's Synopsis, Head First, and Notes V and VI.

5. Lastly, it is contended that extinction of lineage "would follow if an only son was permitted to be given in adoption" (Dattaka Mimansa, Section IV, para 4), but it should be observed that there is nothing in the texts of Vashishta or Saunaika to show that the extinction of lineage would apply to both the contracting parties; it is purely an assumption of Nanda Pandita based on the ground that the reason for prohibiting an adoption of an only son (i.e. 'for he is destined to continue the line of his ancestors') is subjoined after both verbs, 'give' and 'accept.' To my mind this is by no means a fair or natural deduction, and it is remarkable that Devendra Bhalla does not adopt it; on the contrary he seems, and consistently so, to restrict the consequential extinction of lineage to the giver, Dattaka Chandrika, Sec. I para 30.

Now it may well be admitted that a person would act morally wrong in causing the extinction of lineage to another person, which would of course result from the latter giving away his only son; but how can it be said with any show of reason, that the acceptor would incur the same offence? Prior to the adoption the acceptor's lineage had already, subject of course to the remedy afforded by the fiction of adoption, become extinct, and it is hard to conceive that when he availed himself of that remedy the extinction would still continue or be made permanent. Moreover, if by the mere act of giving and receiving extinction of lineage ensued as against both parties, to whom would the boy belong? I am aware that it has been ruled that where an adoption is invalid, the boy retains his original position in his natural family, Babu Ram Saunoksa Pundit, V Ambabay Anmal I. Mad. H. C. R. 363, see ante, p. 50. But I am not now dealing with the doctrines established by Courts of Justice, but rather with the grammatical structure of particular texts of Hindu Law, and the natural inferences to be deduced therefrom; and it seems to me to lead to a reductio ad absurdum to hold the construction put forward by Nanda Pandita: the result of that construction would be that as the natural father would have severed his connection with his son by the act of 'giving,' and, according to the commentator, have suffered immediately for his sin, by the consequent extinction of lineage; the innocent son would not only be deprived of his inchoate rights in his own family, but be denied a status in
that of his adoptive father, and be practically thrown upon the world as a fatherless, nameless being, whom the Hindu legislators had refused to recognise. On the other hand, if the meaning of the text is interpreted by the language actually employed, without the introduction of any foreign implications, all inconsistencies vanish, and the Hindu Law is then found in this instance, as in most others, to be based on humane and equitable principles. The legislator (Saunaka) thus lays down the rule, "By no man, having an only son, is the gift of a son to be ever made. By a man having several sons, such gift is to be anxiously made." Dattaka Mimansa, Sec. IV, page I. The sage Vashishta explains the reason of the rule why an only son should not be given in adoption, "for" he says, "he is (destined) to continue the line of ancestors" Ibid para. 4. Now surely all that is here laid down is to depurate the gift of an only son, because it would result in the extinction of lineage to the giver; this is humane enough, for it is unnatural that a father should part with an only child; but supposing the father chose to disregard the moral precept enjoined for his observance, where is there any thing in the original text to show that feudal relationship would not be established between the acceptor and the adopted? Moreover could not the natural father supply the place of his natural son, by adopting one from another family? I can certainly see nothing in the Hindu Law Books to prevent him, and if he had this power the evil consequence of extinction of lineage would be overcome. On the whole, therefore, while entertaining the greatest respect and deference for the deliberate opinion, judicially expressed, of two of the learned judges of the High Court of Calcutta, I feel myself compelled to differ from it; and I have the less hesitation in doing so, when I am fortified with decisions passed by judges entitled to equal respect and deference.
A brother cannot be adopted by a brother.

(A childless Hindu widow will not succeed to her husband's share of a joint undivided estate, if he have any brothers living.)

BABOO RUNJEET SINGH, Appellant.

Versus.

BABOO OBHYE NARAIN SINGH, Respondent.

Before the Sadr Dewani Adalat of Bengal.

Present:—R. Ker and G. Oswald, J. J.

The following is a genealogical sketch of the family of the parties:—

BABOO AJEET NARAIN SINGH.

Dij Bijeh Singh, Saroopjeet Singh, Omrao Singh, (died without issue.)

Bhoop Narain Singh, Runjeet Singh

Defendant.

Obhye Narain Singh, Bhooj Narain Singh, (a minor.)

Plaintiff.

This suit was instituted, (first in the Zillah Court of Tirhoot, but removed, under Regulation XIII, 1808 to the Provincial Court of Patna,) by the respondent, on behalf of himself and a minor brother to recover possession of a moiety of talook Kesbho Narainpoor, &c., an ancestral estate. The plaint set forth, that on the death of Baboo Ajeet Narain Sing, his three sons succeeded to his estate, as members of a joint undivided family, and one of them Omrao Sing, dying without issue, his share devolved on his two brothers; that the estate was managed by Dij Bijeh Sing, the eldest son, and after his death the second son Saroopjeet Sing, the father of Runjeet Sing, the defendant, and the defendant himself, had successively managed it; that they had, from time to time, paid a part of the profits to the plaintiff and his father for their maintenance; but that on defendant refusing to give up possession of his share, a petition was presented to the Collector, by the plaintiff, praying that his name, and
that of his brother might be entered as proprietors of a moiety of the estate; that the Collector having informed him that he must first prove his title to the same by a civil action, he had instituted this suit for that purpose.

The defendant in reply, acknowledged that the family was undivided, but denied that the plaintiff had any claim to any part of the estate in question.

He stated that Dij Bijeh Sing had large sums of money in his hands, the joint property of the family, that when the brothers wanted to share it among them, he gave up his share of the estate in question, but conditioned that his name should be continued as proprietor till his death, and that the females of his family should be supported during their lives; that his son Bhoop Narain, father of the plaintiff, also executed a deed confirming the one executed by his father. With regard to the third share, that of Omrao Sing, he stated that he, before his death, appointed Suroopjeet (defendant's father) his Kurta pootra, and gave him up all his property. He moreover claimed that share under a deed, executed by the widow of Omrao Sing, whereby she relinquished her share of her husband's property to him, the defendant, on receiving 700 rupees for her maintenance.

The Provincial Court did not consider the relinquishment of their share by Dij Bijeh Sing and Bhoop Narain at all established, and having doubts as to the legality of the alleged adoption, and the validity of the deed executed in favor of the defendant by the widow of Omrao Sing, proposed the following questions to their Hindu Law Officer:

1st.—Is the appointment of a Kurta pootra valid without written deeds?

2nd.—Is the adoption of an elder by a younger brother valid?

3rd.—Ancestral property being in the possession of three brothers one dies leaving a widow. Who will succeed to his share? His widows or his brothers?
The Pundit gave the following answers:

1st. — The appointment of Kurta postra is not invalid from no written documents having been entered into, though it were better that such had been written.

2nd. — An elder brother cannot be the Kurta postra of a younger brother, for it is written in the Dattaka Mimansa according to the doctrine of Saunaca, that an elder brother, an uncle, &c., cannot become a son.

3rd. — In case of undivided property, if the deceased left no issue the brothers, and not the widow, will succeed to his share.

This is according to the doctrine of Narud Munes, as entered in the Mitackshara and other tracts. At the request of the Vakeel of the defendant, a fourth question was put to the Pundit: — Whether an elder brother might not be adopted if there were no younger brother? To this he replied, that according to the doctrine of Boudhayana, as stated in the Ushtembeh, an elder brother cannot be adopted. The Court on considering the answers of the law officer, and the evidence adduced, were of opinion, that the claim of the defendant to the whole share of Omrao Sing was unfounded, either on the plea of gift, or adoption; and that the deed of gift executed in his favor by the Widow of Omrao Sing was invalid, she having no right to the share of her deceased husband. A decree was accordingly passed in favour of the plaintiff, directing that he should be put in possession of a moiety of the estate in question. An appeal having been preferred by the defendant to the Sadr Dewani Adalat, that Court (present W. Ker and G. Oswald,) confirmed the decree of the Provincial Court, and dismissed the appeal with costs.

1. The passage of the Dattaka Mimansa referred to in the answer of the Pundit in the above case, is to be found in Section V. para 17, page 74, of Kishen Kishore's edition of Sutlerland's translation of that work, and the same point was decided by the Madras Sadr Court in the case of Muthuswamy Naidu v. Lutchmeedavumma, 30th August 1852, M. S. U. Dec : page 96.

2. It is also well established that one brother cannot give another brother in adoption, for brothers stand on an equality, See Cons. H. I. page 207-208, and Strange's Manual of H. L. § 97. An uncle likewise cannot give a nephew in adoption. Strange's Manual, Section 80.
I.—In Bombay the adoption of a Sister's son by a Hindu of the Vaishya caste is valid.

II.—But a Brahmin cannot make such an adoption.

a.—A custom which has never been judicially recognised cannot be permitted to prevail against distinct authority.

b.—The theory of adoption is a complete change of paternity.

I. GANPATRAO VIRESHVAR AND OTHERS, Appellants,

Versus

VITHOBA KHANDAPPA AND OTHERS, Respondents.

Before the High Court of Bombay.

Present:—Couch, O. J., Newton and Warden, J. J.

W1 July 1867, Couch, 0. J.—It appears to me that the law, as stated in Strange's IV Bombay H. C. Reports 130, A. C. J. Manual and the cases before the Privy Council, permit the adoption of a Sister's son, and that, when it is once done, it cannot be set aside. We must confirm the decree of the Lower Court with costs.

II. NARASAMMAI, Appellant,

Versus

BALRAMA CHARLU, Respondent.

Before the High Court of Madras.

Present:—Frere and Holloway, J. J.

131st Oct. 1868, Holloway J.—This was a suit brought by the widow of a deceased Brahmin to recover from the person alleging himself to be his adopted son the property left by that Brahmin.

The defence was that the defendant, a son of the sister of the deceased, was legally adopted by him.

Both the Lower Courts have found that a ceremony took place which, if the boy could be legally adopted, would constitute him an adopted son; and this finding is, in point of law, impugned upon

* Vithooba, the adopted son in the above case, was a Lingayat, and consequently belonged to the Vaishya caste, but it is extremely doubtful whether the law is correctly stated in this case, see note, page 160.
in this appeal upon the ground of the absence of the father, who had, however, expressed his assent.

The Lower Courts have followed an opinion of the late Mr. Ellis (2 Strange's Hindu Law, 101.):—"In practice, the adoption of a sister's son by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single text, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions." On this opinion and that of the senior pandit of the late Sadr Court, that in the Dravida country the prohibition was not binding, the judgment of the Lower Court has gone.

It is admitted on both sides that there is no judicial authority upon the subject, so that the case is one of first impression and must be decided upon the principles of Hindu Law, unless it be shown that in the country of the parties that law has been modified by customs which have received judicial recognition. A very short experience will suffice to satisfy any Judge that a pandit will always overcome a passage of Hindu Law too stubborn for other manipulation by the often baseless allegation of custom; and in our judgment no custom, how long soever continued, which has never been judicially recognized, can be permitted to prevail against distinct authority. Now the passage quoted at page 101 distinctly forbids the adoption of a sister's son by one of the three higher classes, and the weight of the prohibition is increased by the addition of the doctrine that the sister's son may be adopted by a Cudra. Mr. Sutherland, the greatest English authority on the subject (p. 223) lays it down as a fundamental principle that the person to be adopted must be one with the mother of whom the adopter could legally have intermarried.

Nanda Pandita lays it down in distinct terms that the daughter's son is not such a reflection of a son as can legally be taken in adoption, and the commentator, Dattaka Chandrika, Section II para 8, defines the reflection of a son, as the "capability to be begotten by the adopter through appointment, and so forth." It is manifest that the sister's son is not such an one: Section V para 18 of the Dattaka
Mimansa: “For the three superior tribes a sister’s son is nowhere (mentioned) as a son;” and again, “prohibited connexion is the unfitness (of the son proposed to be adopted) to have been begotten by the individual himself through appointment (to raise issue on the wife of another):” There exist, therefore, the very highest opinions in favour of the illegality of such an adoption, and to these is to be opposed the extra-judicial opinion of a gentleman, doubtless of great eminence, but still a mere opinion.

Mr. Justice Strange in the second edition of his Manual lays it down “that usage has sanctioned the departure from the rule to the extent that there (the Madras Presidency) a daughter’s or a sister’s son may be adopted.” In the former edition at page 17 Sec. 92, it was said, on the authority of extra-judicial proceedings of the Sadr Court, to prevail as an usage in South India, that is, the Dravida country, and in Section 94, quoting the opinion of a Pandit of the Provincial Court of the Northern Division, it was stated that the usage did not prevail there. This passage has been altogether omitted in the later edition, perhaps on the authority of the opinion given by the senior Pandit in this very case. The Civil Judge has shown by an old map that the country in which he was administering this supposed custom was not the Dravida country; and there seems to us no doubt whatever that this is the case, and that the opinion of a pandit of the Northern Division, as to the non-existence of the custom there, was certainly of much greater weight than a vague statement such as that contained in the opinion of the Sadr pandit.—Dravida is the Tamil country and Andhra is the name for Telingana: it is true that the family of languages spoken in this Presidency is called the Dravadian family, but this does not affect the meaning of geographical terms.

It is to be observed, too, that Mr. Ellis, a Sanskrit Scholar, was himself not a Telugu Scholar, although profoundly versed in the Tamil language and customs.

This is a case, then, in which it is sought to set up a supposed custom, which has never received the sanction of judicial authority
against the express language of the greatest authorities. We are strongly of opinion that such customs cannot, even if proved to exist, operate in a Court of justice bound to administer the law. More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself a logical deduction from the very nature of the subject to which it applies. The whole theory of an adoption is the complete change of paternity.

For the purposes of this argument, the son is to be considered as one actually begotten by the adoptive father. He is so in all respects, save an incapacity to contract marriage in the family from which he was taken. It is not uninteresting to observe that the same theory of relationship in the adoptive family was adopted in the Roman Law. *Item amitam, licet adoptivam, discere usorem non licet.*—(a).

We are unable therefore to agree that the text is not pointedly prohibitory; and even if there had been no such text, we are of opinion that as being a logical consequence of the very nature of an adoption, the Court would be bound to decide that such an adoption is invalid. The Civil Judge is not very correct in the basis of the dilemma in which he has placed the widow. He says that if not governed by the School which prevails here, he must be governed by the Bengal School which would validate any act done, and the meaningless words, "a fact cannot be altered by a thousand texts," are supposed to embody a principle which would govern the case. It is clear, however, that by the Bengal School of law, this transaction would as an adoption be absolutely void.

In treating this adoption as an alienation we further think the Civil Judge wholly unfounded. It is true that a philosophical Jurist of our own time, has told us that an adoption is in Hindu Society a substitute for the Will, which is purely of Roman invention (b); but to alter the disposition of property made by the law, there must be an adoption. This is not one. The result, therefore, is the same as it would be if a man capable of disposing of property by will, had executed a document, which from some defect was not a will. It could

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(b).—Maine's Ancient Law, 193.
by no possibility be argued that the intent to alienate being clear the
attempting testator had actually alienated. We are clearly of opin-
ion that the decree of the Lower Court should be reversed and a
decree be given for the plaintiff; but that there should be no costs
on either side.—Appeal allowed.

The invalidity of an adoption of a sister's or a daughter's son, rests on the
text of Saunaka "but a daughter's son, and a sister's son are affiliated by
Sudras. For the three superior tribes, a sister's son is nowhere (mentioned
as) a son;" see Dattaka Mimansa, Sec. I, 74; and Sec. V, 18. The prin-
ciple is, that as a son is created by the act of adoption, "such a person only
is to adopted, as with the mother of whom, the adopter might have carnal
knowledge," Ibid Sec. V, 20. An adoption of a sister's son, however, by
a Hindu of the Vaiyaka caste, that is one of the three superior tribes, was
upheld by the Privy Council in the case of Ramalinga Pillai v. Sadasiva
Pillai, IX M. I. A., 506; but their Lordships appear to have rather as-
sumed the validity of the adoption in the particular case before them, from
the fact that the appellant's father had three times deliberately styled the
respondent an adopted son, a designation which, to use the language of Lord
Chelmsford, who delivered the judgment of their Lordships, "if there were no
adoption at all, or if the actual adoption were for any reason legally invalid,
theRespondent would of course not be entitled to." In fact, in the opinion of
their Lordships, "they amounted to a complete admission of the whole title
of the Respondent, both in fact and in law, and showed that the objections
which had been urged to his claim, in the opinion of the Appellant's father,
who probably was well acquainted with all the circumstances, and may be as-
sumed to have known the Hindu laws and customs, had no foundation."

I observe that the Madras Court (Holloway and Frere J. J.) has also
taken the same view of this decision of the Privy Council. "To avoid misap-
prehension," said the learned judges, "it is, however, necessary to state
that we do not consider the question settled by the case at IX Moore's Indian
Appeals p. 506, because, in the first place, the parties in that case are clearly
Sudras and not Vaiyakas; and in the second, the judg-
ment of the Privy Council upon a point never raised in the Court below, as
indeed it could not have been raised, went upon admissions of the appel-
ellant's father, who would have been acquainted with Hindu laws and cus-
toms and have been aware of the legal invalidity of the adoption if there had
been any. On the point of the validity of the adoption of the son of a person
with whom the adopter could not have intermarried, there will be found great
conflict of opinion among the Pandits, but none whatever upon the authori-
ties. They are all perfectly consistent in declaring such adoptions invalid.
"Jinani Bhai v. Jiw Bhai, 2 Madras H. C. Report 467-468. The learn-
ed judges, however, were mistaken in saying that the parties in the Privy
Council case were Sudras; on the contrary it is distinctly stated by Counsel
that both adopter and adopted were Vaiyakas, see, page 511 of Moore's Report.

2. The case of Gampatras v. Vithoba,
reported in the text, is professedly based on the above decision of the
Privy Council, and while it may well be questioned how far that decision will bear
the interpretation which the Bombay Court has put upon it, there can be no
doubt that general usage, except perhaps in the case of Brahmins, is in favor
of such adoptions. See Strange's Manual, Sec. 88 and 89, and as regards the
Punjab, Maya Dass v. Sannus, case No. 818, II, Punjab Record, 161. In the
Mithila country, where the Kritrima form of adoption prevails, the adoption
of a sister's son by even persons of high caste, was held to be valid. Chowdi
Purnessur Dutt Jha v. Hunooman Dutt Roy, 1, Morl. Dig. 19. It was also
in one case held, by the late Court of Bengal, that even in the
case of a Brahmin, an adoption of a sister's son, was legally valid; (Ram-
H. L. 167.) But this decision was clearly wrong, and the contrary doctrine
has since been repeatedly affirmed: see Kora Shanker Tukoob v. Beebee Munner,
East's Notes case 20, 1 Morl. Dig. 18, Lutchmenath Rao Naik Kaleyah v
Mt. Bhuma Bace, 7 N. W. P. 441, 443; and the last decision on the subject is
the elaborate and very able one deliver-
ed by Mr. Justice Holloway in the Madras case reported in the text.

3. It was also held by the late Supreme Court of Calcutta, that a Brahmin widow could not adopt her uncle’s son, as she could not be his mother uncontroversially, Dagumbharee Dabee v. Taramoney Dabee, Macn. Cons. H. L. 170.

4. The adoption of a wife’s brother is valid, Runganaigum and another v. Namasevoya Pillai and others, 29th April 1857, M. S. U. Dec. for 1857, page 94; so likewise the adoption of a wife’s sister’s son, (I Morl. Dig. 1855,) for there would have been no legal bar to the marriage between the adopter and the wife’s sister in her maiden state, and this is the principle which should guide the Courts in determining the validity or otherwise of an adoption in each case. Kristniengar and others v. Venamamalai Iyengar, 24th Dec. 1856. M. S. U. Dec. page 213.
According to Hindu Law, a Sister's daughter cannot become an appointed daughter, or her son a 'Patrika-Putra'; nor is the adoption of a Patrika-Putra valid in the present day.

NURSING NARAIN AND OTHERS (DEFENDANTS) Appellants,

Versus

BHUTTUN LALL AND OTHERS (PLAINTIFFS) Respondents.

Before the High Court of Bengal.


Glover J.—These are all appeals from the same decision. Plaintiffs sue as nearest of kin to one Lalla Holas Narayan for possession of certain Mouzahs, Malikana lands, and other property, by the determination of their heritable right, and by cancelment of various conveyances under which defendants hold. They also sue for the reversal of the summary order of the Judge of Patna passed under Regulation XIX of 1841.

It appears from the record that the original acquirer of the property in suit was Lalla Koshal Narayan, who adopted Holas Narayan, and bequeathed to him all his possessions. Holas Narayan married Hur Koowar, and died childless in 1827, A. D. The widow deceased on the 20th of November 1862, from which date the respondents, who admit Hur Koowar's life interest in the property left by her husband, claim.

The defendants, (appellants in this case) reply generally that Holas Narayan, during his life time, adopted his niece (Sister's daughter) Chuttur Koowar, on the understanding that, when she married and had issue, her son should be his (Holas Narayan's) adopted child. Chuttur Koowar is said to have been adopted in 1222 F. S., and to have married in 1225 F. S., she was then, as usual in this country, a mere child, and her son Utulbehares alias Nursing Narayan, the principal defendant in this suit, was not born till 1236, F. S., about five years after Holas Narayan's death. They aver, also,
that from that date, *Nursing Narayan* has been both, constructively through his guardian, and after he attained majority in 1847 A.D., actually, in possession of all the property of his adoptive father. The other appellants claim various portions of the property by purchase, either from *Hur Koowur*, or from one or other of the representatives of *Holas Narayan*. In some cases, *Utulbeharee* is said to have been the vendor, in others, he and his mother together, and in two, all three are said to have joined in the conveyance. The Judge found that the suit was not barred, as alleged, by the statute of limitations, and that the adoption was not a valid one. He considered that *Hur Koowur* was a trustee with a life interest only, and powerless to alienate any part of her late husband's property except for certain necessary purposes. He, therefore, cancelled the sales executed by her, *Chutturdaree* and *Utulbeharee*, and decreed the case in favor of the plaintiff.

The points for consideration in this appeal are:

1. Is the suit barred by the statute of limitation?

2. Are the plaintiffs (respondents) in a position to sue as heirs of the deceased *Holas Narayan*?

3. Was the adoption of *Utulbeharee* as a "*putrika putra*" valid?

If these issues are found against the appellant *Utulbeharee*, it will be necessary to consider the *bona fides* of the different sales, the necessity of the alienation and the right of the different vendors to sell.

On the first issue appellant urges that the respondent's cause of action was his (*Utulbeharee's*) adoption and succession to the property of *Holas Narayan*. Appellant was born in 1829, attained his majority in 1847, and has been all along in possession of the property. But it appears to us that the question of limitation turns altogether on the legality of *Utulbeharee's* adoption. If it be admitted that the *putrika putra* form of adoption is valid, and that *Utulbeharee* stood in that relation to the deceased *Holas Narayan*, no question of limi-
tation could of course arise; but if the adoption be not valid, then respondents' rights in Holas Narayan's property did not commence till the death of the widow Hur Koowar in 1862, in which case the respondents would be amply in time. The decision on this point, therefore, will follow that on the 3rd issue.

There is no finding on the 2nd issue in the Judge's decision; but from the fact of both appellants and respondents having filed their genealogical trees, and from the evidence on the record, we presume that he took it into consideration; and we find from these documents that, even admitting the appellant's "Kurseenamah" as the correct one, the respondents are not further removed than the 7th or 8th degree of relationship from the deceased Holas; so that, although they may not, perhaps, be sapendes ("near kinsman, sharer of the undivided oblation"), in the exact sense of the term, they are clearly Samanodakas ("allied by a common oblation of water"), belonging to the gottra (race or general family) of Holas Narayan, and, according to Hindoo Law, sufficiently cognate to succeed to property in default of parties nearer of kin (vide, Colebrooke's digest, Vol. III page 532).

With regard to the third point of law taken in this case, the respondents argue that, even admitting the truth of all the appellant's statements, they disclose no valid title quoad adoption under Hindoo Law.

The appellant's allegations on the subject of his adoption and succession to the property of Holas Narayan have already been recorded, and we proceed to consider the question of "title." This would seem to divide itself into two heads:—

(1).—Was such an adoption as the appellant's ever valid under the ancient Hindoo Law current in the provinces governed by the Mitakshara?

(2).—Is such an adoption valid at the present day?
There is no doubt that, in ancient times, there were many legal substitutes for the sons of the body (ouras), Menu (Chapter 9, V. 180,) and Yajnavalkya, (Mitakshara, Chapter I, Section 2) enumerate no less than twelve including the legitimate son of the body, and the latter authority ranks the son of an appointed daughter (putrika putra) next to the legitimate son, and equal to him. It is contended by the appellant in this case that a sister's daughter may be adopted under this authority, and become "an appointed daughter," and her son a putrika putra, but we do not see the slightest resemblance between the two cases. The daughter appointed to raise up issue for her father must, according to the old Hindoo law books, be a man's own daughter, the child of his own loins, and it is solely on the ground of this near relationship that the son of the daughter, viz., the putrika putra, is classed in the same rank with the lawful son of the body.

It is true that, in default of an ourasa daughter,—a daughter of the body, that is—a man could, under the old Hindoo Law, adopt a subsidiary daughter as a substitute for her; but these adoptions were "for the sake of obtaining the heaven-procured by the daughter's son" (vide Dattaka Mimansa, page 138, Section 18), and not for the purpose of obtaining a putrika putra, an adopted son by means of an appointed daughter.

The appellant's Counsel have quoted from page 142 of the same work "that the daughter given, resembling the legitimate daughter," is a substitute for issue; but this clearly refers to the adoption of a daughter by substitution, not with a view to obtaining "the heaven-procured by the daughter's son," but for the purpose of obtaining a son by the adopter.

The only other authority brought forward by the appellant in support of his views is the case of Nawab Rai v. Bhugbuttee Koowar, reported at page 5, Vol. 6, Sudder Dewanny Adawlut, Select Reports. In this case it was laid down that, "notwithstanding what is stated at page 102, Vol. 1, of Macnaghten's Hindoo Law, the
adoption of the daughter of a brother on the condition that her eldest son shall be the putrika putra (son of a daughter) of the adopter, is legal; but it is necessary to the validity of such an adoption that it should take place previous to her marriage."

Now, in referring to the case itself (which by the way is one from the District of Sarun) it seems that the Pundits who were consulted differed in opinion. The Pundit of the Sudder Dewanny Adawlut held that the adoption of a brother's daughter was invalid during the Kaliyug (the present age, that is,) and that a putrika putra of this description was not mentioned in the Shastras; whilst the Supreme Court Official (a Bengallee Pundit) held it to be valid according to the authorities followed in Upper India. Under these circumstances, and, as, moreover the case was, after all, decided on a point of evidence, the precedent is not one of high authority; but even were it admitted law, it would only carry an adoption of the kind now before us as far as the brother's daughter, and would be no authority for the adoption of a Sister's daughter (which was Chuttar Koowar's position), a stranger in blood to be an appointed daughter for the purpose of raising issue, for the appointing father. We think, therefore, that the appellant in the present case is not a Putrika putra, that is, he is not the son of an appointed daughter in the proper sense of the term, and has according to ancient Hindoo Law, no status in the family of Holas Narayan.

Taking this view of the case, it is not necessary for us to enter at very great length into the second point. All the great authorities on Hindoo Law admit that, except the Dattaka and Kritima, no other forms of adoption are allowable in the present age.

Strange in his work on Hindoo Law, Vol. 1, page 63, has the following passage:—"And now these two, the son by birth emphatically so called (ourasa), and Dattaka, the son by adoption, meaning always the son given, are generally speaking the only subsisting ones allowed to be capable of answering the purpose of sons, the
rest and all concerning them being parts of ancient law, understood
to have been abrogated as the cases arose, at the beginning of the
present, or kali age." Macnaghten also (Hindoo Law, Vol. 1 page
65):—"In the present age, two or at most three forms of adoption
only are allowed in these provinces. The Dattaka or the son given,
and the Kritima, or the son made, are the most common; the
latter obtains only in the province of Mithila. In strictness,
perhaps, adoption in this form should be held to be abrogated as
the affiliation of any but a son legally begotten or given in adoption, is
declared obsolete in the present age."

The Dattaka Mimansa, a work of the very highest authority
throughout the provinces governed by the Mitakeshara, lays it down
(page 24, para. 64):—"Sons of many descriptions, who were made
by ancient saints, cannot now be adopted by men by reason of their
deficiency," &c., &c.

The Dattaka Chundrika, a work of paramount authority in Bengal,
takes the same view.

In connection with this, we remark that Mr. Sutherland, in a
note to his Synopsis at the end of the two works above mentioned,
says that the putrika putra does not appear to be regarded as a
subsidiary son, and it is not unreasonable to infer that the affiliation
of such son would be valid in the present age," but this, though the
opinion of a very learned person, can have no weight with us, opposed
as it is to the law as laid down distinctly in the Dattaka Mimansa
and other standard authorities and to the practice of the people living
in the present, or Kali age. We think, therefore, that in no point
of view can the appellant Utulbeharie's allegations be sustained, and
we dismiss his appeal No. 426 with costs.

With regard to appeals Nos. 413, 414, 415, 416, and 459, the
Judge's decision appears to us incomplete. The appellants in these
cases are holders by purchase of various parts of the property left
by Holas Narayan, and they (as appears from the record) offered
to prove that the sales were conducted *bona fide* and for the purpose, either of paying off old debts due by *Holas Narayan*, or for the benefit of the estate itself.

The Judge has laid down the law on this point correctly, but has made no attempt to apply it to the present case. There are certain circumstances under which alienations by a Hindu childless widow are permissible; and the appellant's purchases could not be disposed of summarily, as the judge has disposed of them, without giving the vendees the opportunity of proving their special pleas.

These cases must, therefore, as there is no sufficient evidence in the record to enable this Court to decide them, go back to the Judge (the Nos. remaining on the file of this Court), with directions to the Judge to take, with the least possible delay, such evidence as to the legality of each particular alienation as may be preferred by either side, and to adjudicate on each separate claim, with advertisement of course to the decision adverse to *Uttalbeharee's* rights recorded above, returning his finding, with the evidence in support of it, to this Court as laid down in Section 354 of Act VIII of 1859.

*The Hindu Law does not allow of the adoption of a Paluk-Putro.*

**KALEE CHUNDER CHOWDHRY (DEFENDANT), Appellant,**  
**Versus**  
**SHEEB CHUNDER (PLAINTIFF), Respondent,**  
**Before the High Court of Bengal.**

*Present:—E. Jackson and F. A. Glover, J. J.*

This was a suit by the special respondent to recover possession of certain land on the ground of purchase from one *Gudadhur*, the alleged heir of *Huree Koomar*. The plaintiff's case was, that the land was sold by *Gudadhur* to *Kedarnath* on the 1st of *Assoj* 1260, B. S., and by *Kedarnath* to plaintiff on the 23rd of *Jyte* 1269, B. S., the plaintiff added that the defendants had likewise obtained a deed of
sale from Gudadhur and, on the strength of it, kept him out of possession.

The defendants (who are special appellants before us) admitted the title of Haroo Koonar, but alleged that on his death, the property went to his widow, Juadamba, and to his adopted son, Banee Chunder; that Banee Chunder was in possession of his property long after the date of Gudadhur's deed of sale to Kwaarnath, which sale, was, therefore, manifestly worthless; Gudadhur having at the time no rights in the property. They add that, on Banee Chunder's death, Gudadhur succeeded as next of kin and after getting possession, sold that land to them under a Kubalah dated 13th Srabun 1267, B. S.

The Court of first instance found for the defendant holding the adoption of Banee Chunder to be proved, and that he was alive and in possession at the date of the plaintiff's Kubalah from Gudadhur, and holding likewise, that this Gudadhur succeeded to Banee Chunder and sold the land to defendants after his succession to the property.

The Principal Sudder Ameen, tried the appeal, and an original suit brought by one Biyrubnath to prove himself nearest of kin and heir to Banee Chunder, together; and found on the entire evidence, as disclosed in both cases, that Banee Chunder's adoption was not proved, and that the plaintiff's purchase was valid.

The only points urged before us in special appeal are:—(1) that the Principal Sudder Ameen acted illegally in trying the two cases together; and (2) that a Paluk putro is a good and valid adoption amongst Sudras according to Hindoo Law.

The second objection may be disposed of at once: there is but one form of adoption recognized by Hindu Law Books for the Bengal Provinces, and there is, quoad that, no distinction made between different castes.

The special appellant's pleader has been unable to shew any precedent supporting his view of the case, or to point out any passage in any book of Hindoo Law which allows of such an adoption.
With regard to the first point taken in special appeal we do not see in what way the Principal Sudder Ameen acted illegally. On the pleadings in this particular case, the first issue was:—Was Banee Chunder the adopted son of Hurree Coomar or not? And this was like-wise the first point to be decided in the case in which Bhyrubnath was plaintiff. So far then from the special appellant having been endangered, or taken by surprise, he had all the benefit derivable from the evidence adduced by Bhyrubnath, who, though opposed to him ulteriorly, had an equal object with him in proving Banee Chunder's adoption. He had, in fact, the advantage not only of his own evidence, but that of another party besides.

We see, therefore, nothing illegal in the Principal Sudder Ameen's proceedings, or any ground for allowing this special appeal. — Dismissed with costs.

According to Hindu Law an Orphan cannot be adopted.

SUBBALUVAMMAL AND ANOTHER, Appellants,

Versus

AMMAKUTTI AMMAL AND OTHERS, Respondents.

Before the High Court of Madras.

Present:—Phillips and Holloway J. J.

This was a special appeal against the decree of Kristnaswami Ayyar, acting Principal Sadr Amin of Tanjore reversing the decree of Lankara Ayyar, District Munsif of Pappavinasami, in original suit No. 1421 of 1861; and the chief point was whether the adoption of one Narayanappaiyan was valid, both his natural parents being stated to have been dead at the time of the alleged adoption. The Sadr Amin held that even if this were so, the adoption would have been valid on the principle factum valet quod fieri non debuit.
Rajagopalacharlu, for the Appellants, the Plaintiffs.

Bangachariyar, for the Respondents, urged that even if the adoption were invalid, the Plaintiffs could not be heard to say so as they had acquiesced in it since 1849.

Per Curiam:—In Veerapermal Pillay v. Narrain Pillay.—(a) it was held that though both parents were dead a child might be given in adoption by his elder brother. But this position is ably contested by Sir F. W. MacNaghten in his Considerations on Hindu Law; and his citations (page 210), from Kalukabhutta, Vachespati Micra and the Aditya Purana certainly seem to show that, according to Hindu Law, an orphan cannot be adopted. To constitute a valid adoption there must be a giving as well as a receiving. Here there seems to have been no one to give the child. No amount of ratification can supply the absolute essentials of a transaction like the present. There must be an issue directed as to whether or not both parents of the child were alive at the time of the alleged adoption.—Issue accordingly.

The adoption of a boy of above 5 years of age, though the selection be not laudable, is valid according to the Hindu Law of Bengal, provided the initiatory ceremonies have been performed in the family of the adopter, and not in that of his natural father.

KEERUT NARAIN, Appellant,
Versus
MUSSUMMAT BHOBINESREE, Respondent,
Before the Sadr Dewani Adalat of Bengal.
Present:—H. Colebrooke, and J. Fombelle. J. J.

This was an action brought by Mussummat Bhobinesree, in the Zilla Court of Dacca Jelalpore, to recover from Keerut Narain, an estate consisting of Tappa Dowlutpore, and an eight anna share of

(a).—1 Strange's notes of cases, 91.
pergunnah Ikrampore, together with moveable property belonging to it. The value was estimated at 5,211 rupees. The circumstances of the case were these; the plaintiff was the daughter of Myaram, late zemindar of the lands in dispute, who, in consequence of apprehensions excited by the predictions of astrologers, respecting the duration of his own life, and that of his only son, gave a written authority to his wife, in the event of his own decease being followed by the death of his son without issue, to adopt another. The zemindar died soon afterwards, and shortly after his death the son died also. The widow adopted the defendant, at the age of about eight years, with the usual legal ceremonies; and, on her decease, the defendant took possession of the estate. The question to be decided was, whether the adoption was legal? The plaintiff claimed the succession to the estate, alleging, that the title of the adopted son was not good in law, from his having been adopted at an age exceeding five years. The defendant pleaded that such adoption was legal and valid. The point was referred to the pundit of the Zillah Court, who gave an opinion, that "a boy who is under five years of age, and whose head has not been shaved, with the usual formalities in his own family, is the fittest for selection; but that, if he be above the age of five, and the proper ceremonies of tonsure be performed in the family of the adopter, the selection is indeed improper, but the adoption is valid." In the present case the tonsure of the defendant, and other accompanying ceremonies, being ascertained to have been performed solely in the family of the adopter, and not in that of his own father, the estate, under the above opinion, was considered by the Zillah Judge to be the legal property of the defendant, as adopted son, and the claim preferred to it by the plaintiff, was dismissed in the Zillah Court, with costs.

On appeal by the plaintiff from this decision to the Provincia Court of Dacca, the Pundit of that Court gave an opinion, that the adoption of a child, when above the age of five years is illegal, and stated the opinion of the pundit in the Zillah Court to be wholly
erroneous. The decision of the Zillah Judge was in consequence reversed by the Provincial Court, and the estate adjudged to the claimant or daughter of Mayram, with costs payable by Kerutnarain.

On appeal by this person from the decision of the Provincial Court to the Sudder Dewanny Adawlut (present H. Colebrooke and J. Fombelle), the question of law was proposed to the Pundits of this Court, from whose answer it appeared, that according to the Hindu law of Bengal, the adoption of a boy above five years of age, though the selection be not laudable, is valid, provided the initiatory ceremonies (Sunskar) have been performed in the family of the adopter, and not in that of his natural father. The authority to adopt a son having, in the present instance, been given by Mayram to his widow, only in the event of the death of the son then living, the pundits were further asked, at the instance of the respondent, whether this circumstance made any alteration in the opinion they had given. They answered that it did not. The Sudder Dewanny Adawlut, therefore, determined, in conformity with the opinion of their law officers, that the adoption of the appellant at the age of eight years, was valid, and entitled him to the estate. A final judgment was accordingly passed against the claim of the respondent, (a).

(a).—A very important question of Hindu law was here finally determined. It had been previously agitated in other cases before the Supreme Government formerly exercising judicial authority in regard to the succession to Zemindaries, and had been then determined on similar principles. But the question was now for the first time decided in the Sudder Dewanny Adawlut. A passage cited as an authority of law by the Hindu writers whose works are current in Bengal expresses, that, after the fifth year, a child should not be adopted by any of the forms of adoption, but that a person desirous of making an adoption, should take a child of an age not exceeding five years. On this passage a question arose, whether the limitation of age was to be understood as positive, and constituting an indispensable requisite to the validity of the adoption, or whether it admitted of any latitude of construction. In other provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son, or other nearest male relation of the husband, would be unquestionably valid, at an age much exceeding that specified. But in Bengal where the adoption of strangers to the family is practised the settled doctrine is, that the boy's age must be such, that his initiation, the principal ceremony of which is tonsure, may yet be performed in the adopter's name and family. Admitting then the authenticity of the passage, and its interpretation, both of which are however contested, the best authorities in Bengal acknowledge the restriction thus explained, and not as confined to the particular age of five years. Accord-
ingly, in the case under consideration, the boy not having been previously initiated in his natural father's family, was held by the Court to have been legally adopted—Colebrooke.

The doctrine laid down for the first time in the case reported in the text has since been repeatedly confirmed, not only in Bengal but in other Presidency Courts as well; thus in the case of *Rames Narayana Nachiar v. Stree-mathoo Heraniah Gurbak*, the Sadr Adawlut of Madras held that a child could be adopted from the twelfth day after his birth to the day of Upamanaya, or his investiture with the sacred thread worn across the body, and this decision was upheld in appeal by the Privy Council on the 28th April 1828, and in *Must. Chemne Base and others v. Guito Base*, 2nd September 1863, page 636, North-Western Provinces Reports, it was held that by the usages of the sect of Surogees adoption at the age of nine years was valid.


In the latter case it is true that the decision of the Sadr Court was ultimately reversed in appeal by the Privy Council, but this was on grounds unconnected with the age of the adopted son (cour X, M. I. A. page 165), on which point their Lordships did not express any dissent from the view of the law taken by the learned judges of the Sadr—who held that although the plaintiff was near twelve years of age at the time of his adoption, and the ceremony of tonsure had been performed in his natural family, yet as he had not been invested with the thread previous to his adoption, the adoption was a valid one. In this case, however, the adopted boy was the nephew of his adopting father, and the Court proceeded on the authority of the Madras case of the Raja of Tanjore, (I Morl. Dig. 22,37) in which it was laid down that "an adoption is good though the adopted should have passed his fifth year at the time and have undergone the ceremony of purification by tonsure, provided he be a Sogatra or descended in a direct male line from a common male ancestor, or that he be the son of a near relation on the paternal side of the adopter." How far the ceremony of tonsure being performed in the natural family, would raise an impediment to the adoption in the case of a stranger, was a question which the learned Judges did not profess to decide; and although in a case reported by MacNachten, Vol. II, 181, the Pandit who was consulted declared that adoption after tonsure in the natural family would be invalid, and the learned judges of the Sadar also, in the case of *Rames Nitro Dages v. Bholanath Dass*, laid down the same doctrine, there is the high authority of Chief Justice Ryas and two other Judges of the late Supreme Court of Calcutta—(Grant and Malkin), against it. Sree-mutty Joymony Dosesse v. Sreemutty Sibomodry Dosesse, 1, Fulton 75, ante page 138. Sutherland too in his *Synopsis* doubts the correctness of the rule laid down by the Sadr Court on this point, and sums up as follows:—

"1st.—Such rule would be at variance with the doctrines of the Dattal-a Mimansa and the Dattaka Chandrika. 2nd.—The authenticity of the passage, attributed to the Kalika-purana, on which the opinion of Jaganatha, and the Pundits of the Sadar Deicani is founded, is justly denied, and it is interpreted, as admitting the adoption of one, although initiated in tonsure, by his natural father. 3rd.—The received definition of the Kritrima son, and particularly the mode of affiliation current in the Maithila country, obviously refer to one of years somewhat mature, who, if not necessarily, would mostly, be initiated in tonsure, by his natural father; and the adoption of such person is certainly justified by practice, obtaining in some parts of India," Head Second, page 182, *Kishore's Ed*:

The Dattaka Mimansa undoubtedly declares that the effects of tonsure performed in the natural family, may be removed by the performance of a sacrifice for male issue, Section IV, 49, 62, and it was on this ground that the Supreme Court in the case already cited, ruled that tonsure was no bar to adoption. See also *I Strange's Hindu Law* p. 91; *Macnaghten's Principles of Hindu Law*, p. 75-79, and *Vivartha Darpana*, pages 856-862, second edition.
It is quite certain, however, that a boy once initiated in Upanayana, or investiture of the sacred thread in his natural family, is thereafter rendered incapable of adoption; and this ceremony may be postponed in the case of a Brahmin until sixteen years after the date of conception; twenty-two years after the same date, in the case of a Kshatriya, and after twenty-four years in that of a Vaishya. Macnaghten's Principles of Hindu Law page 76, Wilson's Edition. See also Venkatesaiya v. Venkata Charlu, III Madras Rept. 23.

According to the Jain Shastras, the age qualifying for adoption extends to the thirty-second year. Maharaja Govindnath Roy, v. Gulal Chand and others. 23rd March 1823, 5 S. D. A. Report 276.

In the Punjab where the "strict rules of the Hindu Law of adoption, especially as regards age, are frequently disregarded," (Section VII, para 4, Punjab Civil Code), an adoption at the age of 45 years was held to be valid. Bhagat Singh and others v. Boodhoo and Dyal Singh, II Punjab Record 108. See also Makhun and others v. Nikka and others, 28th March 1863; III Punjab Record 94.

In the case of Sudras, the Hindu Law permits adoption at any age previous to marriage; Sreemutty Joymony Dosses v. Sreemutty Sibasoundry Dosses; I Fulton 75; Rames Nitro Dayee v. Bholanath, S. D. A. Reports for 1853, p. 553; Chetti Culum PrasunnaVenccatachelia Reddier v. Chetti Culum Mudu Venccatachelia Reddier, case No. 7 of 1823, 1st Decr. M. S. U. 406. See also I, Strange's Hindu Law p. 91, Vyavastha Darpana, pages 866 and 862, and Macnaghten's Principles of Hindu Law p. 75. But in a recent case, where the parties were Sudras, and the adopted was a man of mature age and married, the High Court of Bombay held the adoption to be valid. Raja Vyau-katrao Anandrao Nimbalkar v. Jaya-vantrao bin Maharao Ranadive. IV, Bombay Reports 191, A. C. J. ante page 141.
The non-performance of the Pootrooishito-jag, i.e., Oblation by fire, the Choora-kurun, or tonsure, and other ceremonies, does not invalidate an adoption, the operative part of the ceremony of adoption being the giving and receiving.

DYAMOYE CHOWDRAIN AND OTHERS, Appellants,

Versus

RASBEHAREE SINGH, PLAINTIFF, Respondent.

Before the Sudder Court of Bengal.

Present:—Sir R. Barlow, W. B. Jackson and R. H. Mytton, J J.

Sir R. Barlow.—The majority of the Court having ruled that the case must proceed, I now record my judgment.

It has already been stated in the early stage of the hearing of this case, that plaintiff, Rasbeharee Singh, comes in as the adopted son of Gooropershoud Singh. He states he was adopted Cheyt 1233, and founds his claim upon a deed dated 29th Sawan 1237, to succeed to
the whole of the deceased's estate. The action is brought against Dyamoye, the surviving widow of Gooroopershaud, and against other parties who bought lands in execution of decree, some of them after the institution of this suit.

The above deed of 1237 is styled a "Hibbanama" or deed of gift. It recites that having no son, Gooroopershaud, agreeably to the consent of his two wives, the defendant Dyamoye and Unoopoorna, deceased, adopted Rasbeharee. It makes over the whole of Gooroopershaud's estate to his two wives in gift to be enjoyed by them, desires that their names be registered in the collectorate, and enjoins the continuation of the family ordinances and customs.

It then goes on to say, "the ceremonies of Pootrooishto-jag, &c., of my adopted son, Rasbeharee Singh, have not been performed; you will perform them; when this said Rasbeharee becomes major, and you shall in your judgment think he has become a fit person, you will cause his name to be registered as proprietor of the Zemindarees included in the deed. You will obey these injunctions, and faithfully carry them out."

Gooroopershaudd died in Bhadoou 1237, in the next month after the above deed was signed.

It is clear from the plaint, on which the assertion is four times repeated, that the ceremonies Pootrooishto-jag, i. e., oblation by fire, Choora Kurun, or tonsure, &c., were never performed; that assertion is to be found in no less than four different places, and the plaintiff, in a supplement filed nearly 2½ years after his plaint, and long after the defendant's answer was on the file, prayed that the Court would award to him the property he claimed, and cause his mother to perform the said ceremonies. There can be no doubt then that the claim to the estate is founded on the plaintiff's right as adopted son of Gooroopershaud Singh.

* Unoopoorna, his other wife, had died previously.

† Without which the child of Hindoo parents is not admitted to be a member of the Hindoo community.
The defendant Dyamoye pleads that the requisite ceremonies were never performed; that plaintiff's claim as adopted son is therefore invalid, that after the death of the plaintiff's natural father, and without his permission, his mother and brother took rupees 601 from Gooroodooershau'd, her husband, and gave plaintiff to him; that the deed of 1237 is silent on the subject of permission given; that the gift was therefore not legal; that no ceremonies could be performed, and that her husband on this account performed none of the ceremonies, though the plaintiff was living in the house with him for four years before his death. She then goes on to say that plaintiff addicted himself to every vice, lived as man and wife with a low caste woman, with whom he was in the habit of eating, and by whom he had a family; he thus became an outcaste. She claims under the terms of the deed the authority to exercise a discretionary power as to giving or withholding the estate from plaintiff; and as regards the sale of the property, states it was made on account of her husband's responsibilities.

Upon the above pleadings the first point for decision is, whether the plaintiff's claim as adopted son of Gooorooershau'd, can legally be admitted, the ceremonies prescribed by Hindoo Law for adoption, viz. *Pootrooishhto-jag, Choora Kurun, &c.,* never having been confessedly performed in his case. There cannot, I think, be much doubt that the objection raised, in her answer by the defendant Dyamoye, that there is no proof or allegation that Rasbehere was given by his natural father's permission as required by the Shaters to Gooorooershau'd, is a valid objection; the admitted fact too that Gooorooershau'd for four years, during which plaintiff lived in his house, did not take an opportunity of performing himself the ceremonies which he enjoined on others, is calculated to create considerable doubt in the case. But these may be after questions.

A third issue arises, whether any obligation amongst Hindoos in Bengal, legal or moral, binds the defendant Dyamoye personally

* *Pootrooishhto-jag, Choora Kurun &c.*
to the performance of the *Pootrooishto-jag, Choora Kurun,* &c., and
to the adoption of the plaintiff; with this question, the effect of
her non-compliance in both matters must be considered.

Briefly the points to be decided are:

First.—Is the performance of the ceremonies referred to neces-
sary to adoption in Bengal,* or is the mere naming a party, though
the ceremonies be not performed, sufficient to place that party in the
position of an adopted son, according to the Hindoo Law?

Secondly.—Is it obligatory on the widow, under the Hindoo
Law, to perform those ceremonies and adopt, and can the Court
exercise compulsory powers in such cases?

Thirdly.—What is the effect of her non-compliance, and what
the penalty?

If mere indication and naming the party be legally sufficient,
we need make no further inquiry. The deed of 1237 records in so
many words that "Rasbeharee is adopted," and a decree must pass
in favor of plaintiff.

If, on the other hand, the further provisions of the deed in
which *Gooroopersaud* enjoins the performance of the ceremonies there-
in referred to, but admitted by him not to have been performed up
to the date of his executing the deed, be, according to the Bengal
Law, absolutely necessary, then it remains to determine whether his
instructions were obligatory on his widow,* and whether the non-
performance of those ceremonies and her non-compliance do, or do
not, under the Hindoo Law, shut out the plaintiff's claim as adopt-
ed son though she may have been guilty of a moral wrong.

And first as to the necessity of the performance of the cere-
monies referred to in the deed:—"The ceremonials of adoption is now

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* The family of *Gooroopersaud* are Singhs, and probably came from the
West, but the fact that he enjoins *Pootrooishto-Jag,* &c., and the claim being also
to enforce the performance of those ceremonies, shows that the family recognize
the law as current in Bengal, and the *Duttaka* form, not the *Krtrimuna,* current
in the West.
Having given humble notice to the King, and after making an oblation to fire with holy words from the *Vida*, giving gold and winter corn in conformity with usage, let the adopter, ascertaining his name, family and class in the presence of kinsmen, receive a boy for whom the ceremony of tonsure and the like has not been performed, whose age does not exceed five years, and who is given by his father, or by his mother with the assent of her husband, provided that they have another son. Let him next perform the sacrifice on adopting a boy (*pootroishto*); this *pootroishto* sacrifice, say experienced lawyers, must be performed by one who maintains a consecrated fire, but by him who does not maintain such a fire, an oblation must be made with the mysterious words from the *Vida*, as directed by *Vasishtha*. In fact the oblation to fire with holy words from the *Vida*, which is directed by *Vasishtha*, should precede adoption: the *Pootroishto* sacrifice ordained in the *Calica Purana* should be performed after adoption; this appears from the form of expression used in the texts, (‘having made an oblation, he may receive a son,’ and ‘having taken a boy five years old, he should perform a sacrifice.’). At present some omit through laziness the sacrifice called *pootroishto*, in the same manner that the ceremony of combing a wife’s tresses is not now practised. Thus authors direct the ceremonial of adoption.” See page 262, 263, Volume III, Colebrooke’s Digest.

In the Synopsis of the Hindoo law of Adoption, or the *Dattaka Mimansa* and *Dattaka Chundrika*, two original treaties on the subject translated by James Charles Colebrooke Sutherland, edition 1834, page 152, is a summary of the form to be observed in adoption and the effects of its omission, and the following passages occur:—

“The form propounded by *Vasishtha*, and more particularly those by the other holy writers in persuance of the words of eminent authors, may be correctly regarded as referring exclusively to the son given, i. e., *Dattaka*, the adoption of a *Kritima* son being held to be valid without the observance of any particular form or ceremony.
"Should a son be adopted, without the observance of prescribed form, his filial relation would not be established, but he would be entitled to assets sufficient to defray the expenses of his marriage.

"The dattaka adopted son must be initiated in certain rights in the name of the family of his adoptive father, and the Kritima son in some instances may, but in all need not necessarily be so much initiated. The question as to particular rites required has already been discussed under the preceding head."

The authorities quoted in support of this doctrine are Dattaka Mimansa, Section V, paras. 45, 46; Dattaka Chundrika, Section II, para. 17, Dattaka Chundrika, VI, para. 3; Dattaka Mimansa, Section IV, para. 22 et seq.

And again, "He O Lord of the earth, on whom the ceremonies should be performed under the family name of his father, is not deemed a son until the ceremony of tonsure has been completed; he becomes the son of another, under whose family name it is performed."

"Sons given, and the rest, when the ceremonies of tonsure and the like have been performed on them by the adopter's own family are deemed adopted sons, any other is called a slave,"—Chapter CLXXXII, page 148, Idem. *—Not only are the Hindoos deeply impressed with the certanity of a future state, upon a conviction and dread of which the practice of adoption is founded, but they also consider sin to be so inherent in our nature as to require distinct and specific means of expiation,—hence the institution, of a series of initiatory ceremonies commencing previous to conception and producing altogether, in the three superior classes, regeneration.

It is in the performance of these, in the family and name of the adoptive father, that filiation is considered to be effectually accomplished, &c., &c.—With regard to two of them in particular, it is of importance that they should remain to be performed in the family of the adopter subsequent to adoption. These are tonsure, shaving

* Calika Purana. ‡ This last is said to be a doubtful passage.
of the head, and investiture of the cord,"—p. p. 76 and 77, Strange Volume I. See also p. 69, Volume I, MacNaghten's Hindoo Law. "It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party, with the prescribed forms and solemnities."*

The above authorities seem to lay down abundantly the necessity of the performance of some ceremonies in the case of adoption according to the Dattaka form, which obtains in Bengal, to prove beyond doubt the intention of the adoption; in contradistinction to the rules of adoption in the Kritima form, which prevails in the province of Mithilah. "This form requires no ceremony to complete it, and is instantaneously perfected by the offer of the adopting and the consent of the adoptive party." MacNaghten on Adoption, Volume I, page 98.

It has been argued by certain writers that some of these ceremonies only are necessary in particular classes, and Colebrooke, at page 244, Volume III of the Digest, lays it down "that oblation to fire, pootrooishto-jag, with holy words from the Vida, is an unessential part of the ceremony"† of adoption. This ruling, however, does not affect the case before us. Had it been a question whether this or that ceremony was essential or otherwise, or had the argument for the plaintiff been grounded on the plea that certain ceremonies had been performed which satisfied the requirements of Hindoo Law, the case would have been a different one. The declaration, however, in the deed of 1237, under which plaintiff comes in, that pootrooishto, &c., ceremonies had not been performed, which can only mean that none at all had been performed, and the four times repeated declaration in the plaint itself that neither pootrooishto-jag, Choora Kurun, &c. &c., had ever been performed, with the prayer

* For an enumeration of the ceremonies enjoined at adoptions, see Summary Hindoo Law, page 52, and Elements of Hindoo Law, page 82, et seq.; but the exact observance of these ceremonies is not indispensable—Dig. Vol. III, Hindoo Law, p. p. 101, 106, 244.

† Strange, page 83, Vol. I, It is essential in regard to the three superior classes only.
of the supplemental plaint, filed after the answer of the defendant, repudiating plaintiff's claim as adopted son on the ground of non-performance of the said ceremonies, are clear and ample proof that no ceremonies whatever were performed. The adoption then, with the performance of the necessary ceremonies as required by the law obtaining in Bengal, and by the universal practice of Hindoos in the province up to the present day, never took place, and the plaintiff cannot claim as adopted son. His having been brought for adoption and named is not sufficient under the Shasters. The following case reported, decided in the Calcutta Court of Appeal at page 197, Vol. II, MacNaghten's Principles and Precedents of Hindoo Law, which in many respects is similar to that now before us.

"A Sudra, with the intention of making him his adopted son, took a boy four year's old from his brother and supported him, and performed the ceremony of his marriage under his own adopting father's name." It was asked, supposing the prescribed ceremony for the adoption not to have been performed by the individual in question at the time when he took the boy, in this case is the adoption complete so as to entitle the adopted son to inherit the property left by the adopting father, or otherwise."

The answer was, "that the prescribed ceremony was not performed by him at the time of his taking the boy for the purpose of adoption. Here, according, to the law, the affiliation of the boy cannot be considered as complete, nor is he entitled to the property of the person who took him for adoption. This opinion is consonent to the doctrine cited in the Dattaka Mimangsa, Dattaka Chundrika, Vivada Chintamony, and other authorities."

At page 84 of his work on Hindu Law, Volume I, Sir Thomas Strange observes, with reference to the sacrifice of fire, "even with regard to Brahmins admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the rite (of adoption) for civil purposes; but the contrary is to be inferred; and the conclusion is, that its validity
for these consists generally in the consent of the necessary parties, &c., the prescribed ceremonies not being essential.” Reference is here made to a letter from Mr. Colebrooke, 18th May 1812, in answer to a question. Does purchase alone amount to adoption, or can adoption grow out of it? the answer is, “that the rest of the ceremonies prescribed are the same in both forms, (that is adopted by purchase and a son given.) The unintentional omission of some part of them would hardly invalidate the adoption, though the wilful omission of the whole by him might have that effect, since the performance of the ceremony of tonsure and other rights in the family of the adopter are indispensable to the completion of the adoption in one form, and must I conclude, be held to be so in the other,” &c. These premises do not appear to me to bear out the conclusion which has been drawn by the late Sir Thomas Strange, and are, it would seem, inconsistent with what follows at page 85. The author proceeds with a text from Jugannatha, “when he who has procreated a son gives him to another, and the child so given is born again by the rights of initiation, then his relation to the giver ceases, and the relation to the adopter commences.”

“Adoption being a substitution for a son begotten, its effect is by transferring the adopted from his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties. Of these the principal are the right of succession to the adopter on the one hand, with the correlative duty of performing for him his last obsequies on the other.”

The right attaches to the entire property of the adopter, real and personal, and in the form under consideration (the Dattaka) it operates lenially and collaterally which in some other forms is not the case, &c., the authorities and precedents for the above dicta are quoted in the footnote at page 85.

It is with great difficulty that I venture to doubt the correctness of the dictum at page 84, already quoted, reading it with what
follows in the next page; the latter version, so far as I can gather, is the true legal interpretation of the Shasters, and as far as I can ascertain, is invariably the rule of law which guides the Hindus of Bengal; if so, it can hardly be said that the performance of the rites is not essential to the efficacy of adoption for civil purposes.

But to meet the imputation of breach of duty charged by the plaintiff to the defendant Dyamoye, it must be considered whether it is obligatory on a widow, though unwilling to perform the ceremonies and to adopt under the Hindoo Law, and have the Courts authoritative jurisdiction in such cases. Without entering into the reasons assigned by Dyamoye, in her answer for the non-performance of the ceremonies, it may be asked, where is the text of the Shasters which lays down the legal obligation and responsibility of the widow in such matters, and denounces the penalties attached to the omissions on her part to adopt. No such text has been quoted, and I know of no precedents on that point. Moral guilt, no doubt, attaches to the widow under such circumstances, but the moral delinquency of a Hindoo widow as to her deceased husband's spiritual interest cannot create a legal right of succession in a party claiming as adopted son of the deceased, when the ceremonies which are prescribed by law, i.e., by the Hindoo law, have not been performed.

There is a very strong opinion upon this point of compelling a Hindoo to adopt, given at page 64, Vol. I,—Strange's Hindoo Law:—"No good Hindoo lawyer, sitting in any of the King's or Company's Courts in India, would listen for a moment to an application to compel a childless Hindoo to adopt, succession to his property being at all events provided for whether he have a son to inherit it or not." If such be the law as regards a man who has in himself the power to adopt, what authority can the Civil Courts possess to compel a person to act who only holds delegated
power from him over whom those Courts in that matter have no control.

The author has just remarked, "that a son therefore of some description is with him (the deceased Hindoo) in a spiritual sense next to indispensable, is abundantly certain. As for obtaining one in a natural way, there is an express ceremony (Punsavana) that takes place at the expiration of the third month of pregnancy marking distinctly the importance of a son born, so is the adopting of one as anxiously indicated when prayer and ceremonies for the desired issue have failed in their effect; but exacted as it is, wherever the want exists in terms sufficiently peremptory, it is a right and not a duty, the enforcement of which belongs to the civil power."

Reference is here made by the author to the 2nd Volume of his work, page 59, to a case in the Court Zillah Salem, in the Madras Presidency in which it was asked, "on the death of a party having two widows, a widowed sister, also a mother, to whom does his estate go?"

The answer given was as follows:—"the mother must be maintained, and so must the sister, if left destitute by her husband. As to the widows, they should adopt a boy, but if they cannot agree to do so, then the estate, after deducting as above, is divisible between them, &c."

To this is attached a remark by Colebrooke.—"These widows' rights of succession are declared in the Mitacshara on inheritance. Passages of law recommend but do not enjoin adoption, particularly Atri, Institute 52. By him who has no male issue a substitute for a son should be adopted for the securing the oblations of food and libation of water to the manes." A text of Menu of similar import, which does not however occur in this Institute, is quoted. "By him who has no male issue, a son, such as it may be practicable to obtain should be adopted, for the sake of the oblation of food and obsequie and for the honor of his name."
Sir Thomas Strange, in the preface to his work, page 22, when speaking of the "remarks" (of Mr. Colebrooke), attached to his work, says "the principal in number and value are Mr. Colebrooke's" and concludes, "of the magnitude of the service then rendered to every one in the slightest degree occupied in Hindu Jurisprudence, it must be sufficient to have said of the 'remarks' to which it applies, that they are Mr. Colebrooke's."

Such are the authorities on which I come to the conclusion that it is not obligatory on a Hindu under any peremptory injunction of the Hindu Law to adopt if he be unwilling to do so, and further, that the Civil Courts have no competence to compel him to adopt. It is true that the remark at page 64 in Strange refers to a male Hindu, but the note attached to the observation, and to which reference is made in page 59 Vol. II, gives the case of females, widows, of the party whose estate was in litigation, and Colebrooke's remark already quoted is to the effect that "passages of law recommend but do not enjoin adoption." The rule of non-interference of the Civil Courts must be held equally applicable to either case in the absence of any direct, clear and peremptory injunction laid down, and recognized as Hindu Law by the best commentators on the subject. What then is the effect of the widow's non-compliance in the case now before us, a case it must be remembered to which the law current in Bengal applies? No precedent has been brought forward, nor text of the Shasters quoted in the course of the argument, which decides authoritatively that it is incumbent on a Hindu Widow, though unwilling, to adopt a son by order of her husband; nor do I find any legal penalty, such as succession of her own rights as widow, by transfer of the estate to the next heirs, or the like, attached to her non-compliance. The delinquency involves moral guilt, no doubt affecting the spiritual interests of her deceased husband and those of his ancestors. But I must again ask, does the non-performance of a moral duty involve questions of law and legal results, and can the Courts compel performance? If no legal adoption has taken place (and it appears to
me that the non-performance of any of the necessary ceremonies, as shown above, proves that no legal adoption has taken place), the right of a widow to succeed to her husband’s estate in default of nearer heirs is recognized by the law as current in Bengal, page 19, Volume I, Macnaghten on Inheritance. She has not, however, an absolute proprietary right, for the law provides her successor, and restricts her use of the property to very narrow limits. Be that however what it may, a widow cannot be deprived of it, even though she were to change her creed, for by Act XXI of 1850 forfeiture of rights and property in such circumstances is now barred. What these restrictions are it would be useless in this case to lay down.

If what is adverted to in this judgment be in accordance with Hindoo law, (which I believe it to be) the rejection of the plaintiff’s claim leaves the deceased Gooroopersaud’s estate in the hands of the defendant Dyamoye, with all and every responsibility attaching to her when her rights are challenged by any claimant legally empowered to sue her.

Her adjustment of the suit with the plaintiff in the present stage of appeal, and her acknowledgment of his rights and claims, after her elaborate argument against them in her answer and her positive repudiation of his adoption throughout the Lower Court’s proceedings, are manifestly a fraud in collusion with him to defeat the claims of third parties, with whom she has acted in the case up to the present month. Judgment has been given against Dyamoye and her co-defendants by the Principal Sudder Ameen. The repugnant pleas she has now put forward must not for a moment be allowed to operate to the detriment of those Co-defendants. I would dismiss the plaint, as no right of action has in my judgment been established, nor can the Courts exercise compulsory powers in such cases in respect to adoption. The property of the deceased Gooroopersaud will thus remain in statu quo as regards the defendants under the respective rights by which they may have acquired them. I would reverse the decision of the
Principal Sudder Ameen as regards the appellants, defendants, and charge all their costs, save those of Dyamoye to the respondent. Dyamoye having adjusted with plaintiff in appeal, no order is, as regards her necessary.

Mr. Mytton.—The questions for our consideration are:—

First.—Whether the adoption of the plaintiff is legally complete?

Secondly.—If it be so, whether, with reference to the terms of the Hibbanama, his claim for possession of his adoptive father's property, is good and valid. To the validity of the adoption two objections have been taken viz., first, that the natural father did not give him away or consent to his being given, and secondly, that the pootrooishto-jag, &c., not having been performed, the adoption is not complete.

The Pundit of this Court has given a bywusta in favor of the validity of the adoption on both these points. Mr. Macnaghten's authority has been quoted against this bywusta, but Colebrooke's Digest, Section VIII, volume III, supports it, and numerous precedents quoted at page 19 of Morley's Digest show that several Courts in different parts of India have decided that nothing but giving and receiving is essential to the adoption in a Soodra's family. These precedents are founded on Menu, Book IX, verse 168, Strange's Hindoo Law, pages 98 and 131, 2 and 87, and Colebrooke's Digest, page 244 of the Edition of 1801, in which latter book it is distinctly stated that the omission of the sacrifice of fire, which Baboo Ramapernaud admits is synonymous with the pootrooishto-jag, does not invalidate the adoption; it is an unessential ceremony. It is clear to me, therefore, that the adoption is valid.

I come now to the consideration of the second question. It is not denied that a Hindoo having legal heirs can, nevertheless, dispose of his property by gift or by will. The deed before us is called a deed of gift; it conveys all the property of the donor to his two wives, admitting nevertheless, that he has an adopted son, the plaintiff
and directs the widows to perform the *pootrooishko-jag*, and to induct the son into the property when he may be of age and they may consider him to be worthy.

The plaintiff does not come into Court alleging the surviving widow has exercised an unsound discretion in refusing to induct him into the property, and requesting the Court to set her aside and pronounce him worthy, but under an assertion of positive right to succeed his father as his adopted son. Such a claim as this is in my opinion clearly barred by the terms of the *Hibbanama*. The widows, or the surviving widow has plainly a discretion to refuse the plaintiff induction, if she considers that he is not worthy, and she has given very substantial reasons for not considering him worthy *viz.*, that he has associated with a low woman, cohabited with her, and lost caste thereby.

The suit, ought in my opinion, to have been dismissed. I would therefore reverse the decision of the Principal Sudder Ameen. As therefore I concur with Sir Robert Barlow in the order which should be passed, though on different grounds, the decision is therefore reversed according to the precedents of this Court in the case of *Baboo Ram Sahai Singh versus Chundun Singh*, 5th March 1831, and *Roy Radha Govind Singh versus Gorachund Gouain*, 15th April 1833

_Mr. Jackson,—The hibbanama is admitted by both parties; in this Gooropersaud, deceased, states that he has given over the whole of his property by *hibba* to his two wives, who are to have full authority over it; he mentions that *his adopted son*, Rasbeharee, is a minor, and directs that on his attaining majority, when, or, if the two wives shall be of opinion that he is fit, they shall perform the ceremony of *pootrooishko-jag*, &c., and shall make over charge of the property to him:—under the discretion vested in them by this document, they have not performed the ceremony, nor made over the property, a result which might have been anticipated, inasmuch as their interest lies the other way; one of the wives is dead, but the
surviving wife, Dyamoye, defendant refuses to perform the ceremonies and to make over the property to plaintiff, on the ground that the plaintiff's character is disreputable; and further, has made over portions, indeed it is asserted the greater portion, of the property by sale to third parties.

We have, therefore, to consider what was the intention of the Hibbanama, which is in effect a will, having been written by the deceased in anticipation of his death according to the recital contained in it. Was it intended to make over the rights in the property unconditionally to the wives, with full power to sell and dispose of the property for their own benefit? Certainly not, inasmuch as conditions are assigned, viz., that when the plaintiff becomes fit, the property—not a part, but the whole of the property—is to be made over to him; the plaintiff is called by the testator his adopted son, and in virtue of that character it is declared that he shall succeed to the property: his right does not depend on whether he is or is not the adopted son; the testator believes him to be, and calls him by that title, but as he is named, the bequest is independent of this consideration. The word "hibba" no doubt means a gift out and out, but if a Hibbanama is written containing conditions, it is no longer a gift out and out, but an assignment for a purpose, viz., the performance of those conditions; in taking the property under the Hibbanama, the wives tacitly engaged to perform the conditions.

As the whole property is to be made over to the adopted son, as contemplated by the will, it appears to me that the wives could not alienate any portion of it, but they were competent to take the usufruct of it.

The expression used in the will, which gives a discretionary power to the wives, is this,—"when my adoptive son reaches majority, and you (the wives) shall think him fit for the purpose," you shall perform the ceremony and put him in possession; nor is it competent to the defendant, the sole surviving widow, under this discretion to withhold the property altogether as well as the cere-
mony, on the plea that the plaintiff's character is disreputable, and to get rid of the property by transfers for her own personal benefit? I cannot think this is consistent with the directions of the testator; the widow is by the terms of the _hibba_ made the judge of when the adopted son became fit to take charge of his property after majority, and any reasonable delay on the ground of the son being more or less fit by disposition or by acquirements for the exercise of his right of ownership was discretionary, but I do not think an objection of a mere moral nature is sufficient to justify the withholding of the property: the discretion is limited by the other conditions of the _hibba_, the main object of which is that the son shall, on his attaining majority, receive the property sooner or later; as the testator declares the plaintiff to be his adopted son, he must have been aware that this son had a right to the property on becoming of age; and the object is not to deprive him of this right, but to secure the property to him, reserving to the widow the usufruct till he became of age. The condition of fitness does not evidently refer to moral character, for that is no legal impediment to a son's succeeding to an inheritance, but merely to the ability to manage the estate; for instance, had the son turned out an imbecile or a lunatic, or even if he were, on reaching majority, more backward than other boys of that age, and less able to exercise his rights, I should hold that the widow might withhold possession till he appeared in her opinion fit in that respect: the expression "when you shall think him fit" cannot refer to fitness to be adopted as a son, because the will calls the plaintiff his adopted son already, and considered him so; it must refer only to the fitness to manage the estate only. It is quite certain no degree of unfitness could justify the widow in alienation of the property, either directly or by fraudulent arrangement, nor could the property in my opinion be sold in satisfaction of the widow's debts; the effect of the term _Hibba_ used in the deed would be to render the widow not liable to claim for the proceeds of the property during the son's non-age, nothing more; the remaining effect of the word _Hibba_ being done away with by the positive con-
ditions imposed purposely as limitation on that expression, viz., that the property is to be made over to the son on his reaching majority; this document can never have been intended to vest the widows with power to deprive the son of his patrimony altogether.

It is evident in this case that the widow is not acting bona fide; the evidence of *mala fides* is to be found in the alienations which render the execution of the conditions of the will absolutely impossible; and when there is proof that a trustee is acting fraudulently for her own benefit and to the injury of the real owner, it is the duty of the Courts of Justice, in exercise of their equitable jurisdiction, to step in for the relief of the party injured, and deprive the fraudulent trustee of the discretionary authority which he has abused: this is the state of the present case; the widow, defendant, has acted fraudulently for her own benefit and the injury of the ward, and has exercised her discretionary authority in a manner not contemplated in the will: it is the duty of the Court, therefore, to interfere to set aside the fraudulent acts she has committed to the injury of the property and the ward, and to deprive her for the future of the power of effecting further injury. I would therefore declare the widow's authority null, and would proceed to carry out the provisions of the will without reference to her wishes.

As regards the adoption I am of opinion that with reference to the *Byvusta* of the pundit in the case, the opinion of Mr. Colebrooke and other authorities cited, among them the Institutes of *Menu*, that the adoption is good and legal without the ceremony of *Pootrooikto-jag*, &c. The authorities cited seem to me to prove that the legal *giving* and the legal *taking* are sufficient to constitute adoption, and that the subsequent forms are not indispensable. The passage cited from the *Dattaka Chandrika*, and *Dattaka Mimsansa*, is to the effect that the prescribed forms must be observed; but I conceive that refers to the form of giving and taking, not to the subsequent performance of the sacrifice by fire, the shaving of the head, and naming the child, which may be deferred to any period, or altogether neglected; I think these ceremonies are not
essential, and that the adoption of the plaintiff was complete without them. The testator evidently thought so too, as he repeatedly calls the plaintiff his adopted son in the will. It is of no importance whether the adoption is complete or not; the right under the Hibba in attaining majority would be equally good had the plaintiff been a perfect stranger; the simple meaning of the will being, that the widows shall hold till the majority of Rasbeharee, who is mentioned by name in the will as well as by designation as the adopted son.

To carry out the intention of the testators therefore, as there is no reason to believe the plaintiff unequal to the task of managing his property, I would award him possession of the property claimed, setting aside the transfers which have been made by the widow to his prejudice, and the sales of property which have been made in payment of her personal debts.

To strip the case of the irrelevant matter, the deceased left a will disposing of his whole property; the suit is for possession under this will, and charges the trustee (the widow) with fraudulent alienation of the trust property: this will supersede the usual law of succession, but is valid by the Bengal Law of inheritance: it bequeaths the estate to the two widows for their use with the express condition that when Rasbeharee (who besides being designated by name is also called "my adopted son" in the will) becomes of age, the property shall be made over to him; a discretion is left to the widows as to the time of making it over after his majority with reference to his fitness, not to be an adopted son, (for the testator considered him so already,) but his fitness to manage the estate; the widow has alienated part of the estate, which she had no authority to do under the will; she has therefore committed a breach of trust: I would deprive her of the authority of trustee, which she has abused, and as Rasbeharee is apparently fit to manage the estates, I would award possession to him under the will, declaring the alienations by Dyamoye, and those in payment of her debts, void and null. I consider the terms
of the will are equally binding whether Rasbeharee is or is not an adopted son with reference to the special law of Bengal. The arrangement between Dyanoya and Rasbeharee is in my opinion void altogether, as it involves the interests of third parties.

II.—V. Singamma and Another, Appellants,

Versus

Vinjamuri Venkatacharlu, Natural Father and Guardian of Srinivasa Charlu, Alias Ramanuja Charlu, Respondent.

Before the High Court of Madras.

Present:—Bittleston and Ellis, J. J.

This was a suit to recover certain inam lands which had been alienated by the 1st defendant to the 2nd and 3rd defendants.—The plaintiff sued as the adopted son of 1st defendant's deceased husband, the alleged adoption having been made by her under authority from her husband. The adoption was denied, but both the Lower Courts have found that an adoption in fact took place.

When the case came first before this Court on special appeal we considered the finding of the Lower Appellate Court ambiguous, and accordingly we sent the case back to the Civil Judge for a distinct finding upon the issue, whether there has been any valid adoption of the infant plaintiff according to Hindu Law. This issue has now been found by the Civil Judge in the affirmative; but he adds that it was not proved that the datta homam or any other ceremony, except giving and receiving, was performed at the time of the adoption; and the ground of special appeal is that the adoption, even if true, is invalid, inasmuch as the datta homam was not performed. It is necessary, therefore, for us to decide in this case, whether, in order to establish a valid adoption in a Brahmin family, proof of the performance of the datta homam is essential; and, upon a consideration of the authorities, we are of opinion that it is not.
In the two celebrated treatises on adoption translated by Mr. Sutherland (the Dattaka Mimansa and Dattaka Chandraika) the observance of the prescribed solemnities (including a burnt sacrifice and recitation of prayers denominated the Vyakrit,) is certainly treated as essential to the validity of the adoption, and to the establishment of the felial relation, in the case, at all events, of the son given. But the writers of these treatises depend mainly upon the texts of Vashista and Caunaka as the authorities for their position, and these texts enjoin in similar terms the observance of various other solemnities on the occasion of an adoption, some of which appear not to be regarded as essential by any commentator.

And in the Digest of Jagannatha, there is a very elaborate commentary on this very text of Vashista in which he concludes that the oblation of fire with holy words from the Vida is an unessential part of the ceremony. In the Madras edition (1865) of Mr. Colebrooke's translation at page 389, the passage will be found in which Jagannatha states that the adoption is not void if that oblation be omitted; and at page 391, this passage. "If the declared intention be expressed in these words, 'I give him to you as a son,' and if the acceptor's intention be thus expressed 'I take him as a son,' he becomes a son; nothing else is required."

This view of the subject has long been entertained by the principal English Authorities.—Sir T. Strange in his judgment in Veerapermal Pillay v. Naraina Pillay, I, Notes of Cases, page 117 says:—"The operative part of the ceremony seems to be giving and receiving, the rest is matter of customary solemnity, of decorum, of charity and conviviality varying under different circumstances in different parts of India, or at least in the idea of different Pundits and Shastrees, but one opinion is common to all which is indeed frequently repeated in the late translated digest, viz., that nothing of this kind is so essential to the act as, being omitted or mistaken, can have the effect of invalidating the adoption." In another part of the same judgment at page 133, with reference to the question as to the proper age of the child he says:—"This question of age
appears to have undergone a good deal of investigation in the late case of the Rajah Nobkissen at Bengal, in which the mere act of giving and receiving seems to have been considered as alone constituting a valid adoption without regard to limitations or ceremonies as in any degree essential unless in the case of Brahmins;" and the same learned Judge in his work on Hindu Law, (we quote from the edition of 1830, page 95,) says further:—"There must be gift and acceptance manifested by some overt act. Beyond this, legally speaking, it does not appear that anything is absolutely necessary, for as to notice to the Rajah and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession, and even with regard to the sacrifice of fire, important as it may be deemed in a spiritual point of view, it is so with regard to the Brahmin only; according to a constant distinction in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire and those who do not keep such fires, i.e., between Brahmins and the other classes, it being by the former only that the datta homam with holy texts from the Veda can properly be performed, as was held in the case of the Rajah of Nobkissen by the Supreme Court at Bengal. And even with regard to Brahmins, admitting their conception in favor of its spiritual benefit, it by no means follows that it is essential to the efficacy of the right for civil purposes; but the contrary is to be inferred, and the conclusion is that its validity for these consist generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only son or the eldest son of the giver, the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained, but that a lawful one, actually made, is not to be set aside for any informality that may have attended its solemnization."

In support of this conclusion Sir T. Strange refers not only to the Digest of Jagannatha, but to the opinions of Mr. Colebrooke.
and Mr. Ellis, which are collected in the 2nd Volume and those opinions, though not at all in terms quite consistent, seem to us, when considered together, fairly to warrant the conclusion.

At page 126 Mr. Colebrooke quotes the 3 Digest 244. "The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption," and adds, "the adoption being complete it cannot be annulled." Mr. Ellis says:—"certainly, however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside on any account whatever, a fortiori not on account of any informality."

Further at page 220 we find amongst the remarks of Mr. Ellis upon the ritual of the datta homam extracted from the Datta Mimsa this statement. "He concludes the result, with respect to practical use, to be that if the performance of the datta homam be established, the adoption is established; but if otherwise, that the converse does not hold good, and that further evidence may be adduced, adding that in no case can the omission of the ceremony affect an adoption in other respects valid; but that if not performed, when the adoption is from another gotram, it would seem from analogy that the son, so adopted, must be Anitya Datta." The supposed distinction between the Nitiya and Anitya Datta is pointed out in the Pundit's answer at p. 121, and Mr. Ellis remarks thereon at p. 122, quoting a text from the Nirnavasindhu; and assuming it to exist for any practical purpose it clearly affects only the status of the descendants of the adopted son, and not that of the adopted son himself. In the present case we do not know whether the adopted son was or was not of the same gotra, and it is unnecessary to follow further the analogy suggested by Mr. Ellis.

The opinion of Mr. Colebrooke at p. 155 that the unintentional omission of some part of the ceremonies by the adopter would
hardly invalidate the adoption, though the wilful omission of the whole by him might have that effect, "appears by the context to have reference to an adoption intentionally incomplete and to the omission to perform the ceremony of tonsure and the like in the family of the adopter. The same remark applies to the observation of Mr. Colebrooke at pages 113 and 114. The answer (of the Pundit) presumes the adoption to have been actually made, and the circumstances stated authorize the presumption. It would be otherwise if it were proved, that the party had changed his intention before the essential rites of adoption took place and purposely avoided performing them.” Mr. Ellis, in his remark on the same case (p. 114), explains the sense in which he considers the Datta Homam to be necessary by saying that “with brahmins it is indispensably requisite to produce spiritual benefit.” It is, we think, in the same sense that the observation of Mr. Ellis at p. 131 must be understood to render it; consistent with the opinion expressed by him in other passages. In Mr. MacNaghton’s Principles of Hindu Law, (Madras edition of 1865) at p. 69, it is said:—"It is lastly requisite that the adopted son should be initiated in the name and family of the adopting party with the prescribed forms and solemnities;” and in a note reference is made to the Summary of Hindu Law, p. 52, and the Elements of Hindu Law, p. 82, for an enumeration of the ceremonies enjoined at adoption, adding, “but the exact observance of these ceremonies is not indispensable,” for which the Digest, Vol. III, p. 324, and the Elements of Hindu Law, Appendix p. p. 101, 106 are cited.

Further, in the Judicial Committee of the Privy Council, as long ago as 1834, the same view appears to have been recognised; for in 2 Knapp, page 280, we find Lord Wynford in delivering judgment in Soothramgun Sutputty v. Sabitra Dye, adverting to the fact that, “neither written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions.”

On the other hand, Mr. Justice Strange in his Manual expresses an opinion that the omission of the datta homam will invalidate an
adoption made by the three higher castes; but he does not cite any authority in support of the position, and we are not aware of any other authorities at all equal in importance to the two treatises on adoption already mentioned.

Even Sir Frances McNaghten in his Considerations, where he has criticised so elaborately and severely the judgment of Sir T. Strange in Veerapermal Pillay's case on main questions connected with the Hindu Law of adoption, he refers (page 119) to the statement of Vachispati that "Sudras are incompetent to affiliate a son from their incapacity to perform the sacrament of Homa and, prayers prescribed for adoption," but he says that "this dictum is abundantly contradicted by Saunaca and others. And indeed the authorized practice of every day is a sufficient acknowledgment of the right, and is in itself enough for the confutation of Vachispati." Further, after quoting the text of Vashista at page 126, he says, "the ceremonies to be performed at the time of adoption are there described, and some rules are laid down respecting the age, &c., of the boy to be adopted, but these rules do not equally apply to all castes, and they may be said to be general only and not indispensably applicable to any one caste."

Then he quotes a case of a Kritima adoption under the law prevalent in Mithila decided by the Sadr Adawlut in 1795, in which no religious ceremony was observed, though (he says) "they ought, according to legal strictness, to have previously bathed." This was, he had been assured, a great relaxation of strictness in the doctrine which formerly prevailed by the authority of that School, but he suggests that the Courts in their efforts to get rid of superfluous forms, to remove mere ceremony out of the way of justice ought to be consistent and guide themselves by the same liberal rules. With regard to the Rajah of Nobkissen's case, Sir Francis, who was one of the Counsel for the adopted son, mentions what it was considered necessary to prove in support of the adoption; and though the case was ultimately settled he says:—"I venture to say (and I am justified in saying so from what was declared by each judge upon the
that Gopeemohan Deb was held bound to prove himself within the prescribed age, to prove that the initiatory ceremonies had not been performed in the family of his natural but in that of his adoptive father, and to prove not only a giving and a receiving but that all the rites of adoption had been duly observed." The opinions of the judges thus referred to could only have been given in the course of the hearing, and do not seem to have been quite satisfactory to Sir Frances himself, who in the next paragraph says that he should indeed have thought that the circumstances of that case might have exonerated the complainant from the proof of actual adoption and of its having been attended with all necessary formalities.

The authority of Sir Frances McNaghten cannot therefore, as it seems to us, be regarded as decidedly at variance with that of Sir T. Strange on the point which we have now to decide. Those two learned writers are decidedly at variance on the question whether there could be a valid adoption of an only son, but this Court in Special Appeal 412 of 1862 (I Madras High Court Reports 54) and the Supreme Court of Bengal in Sreemutty Joymony Dossee v. Srimutty Sibosoondry Dossee, (Fulton 75) have upheld the opinion of Sir T. Strange on the ground that such an adoption, though blameable, when done is valid; factum valet. Further, we may refer to the judgment of this Court in Special Appeal 38 of 1863, (I Madras High Court Reports 368) in which it is incidentally observed that the customary rites and ceremonies connected with adoption would probably not be treated as necessary to its legal efficacy as regards the civil rights of the persons adopted; and to the allusion made in the judgment of this Court in the Ramnad case (Volume II, page 234), to "all essentials of a valid ceremony," but it is certain that on neither occasion did the Court intend to express any clear opinion, or in the last case any opinion at all, on the point now under consideration.

We were referred by Mr. Parthasarathy Ayangar, to the late Sadr Court's Decisions of 1852, at p. 62, special appeal 74 of 1851,
but that case only decides that a mere foster son is not entitled to the privileges of an adopted son according to Hindu Law, and the passages quoted from Nirmaya Sindhu (of which we have been furnished with a translation) does not appear to us to add much weight to the authority of the Datta Mimansa and Datta Chandrika. The same text of Vashista already referred to is that on which the author relies; and so in the Mitakshara it is the text of Vashista which is quoted as the authority for the form of adoption, together with the more general passage from Menu:—“He is called a son given whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water.” But these texts are in their language directory only, and the question is, what part of the direction given is essential to the validity of the act?

We have not had the advantage of hearing this case argued on both sides; but, so far as we have been able to examine the authorities, the result in our judgment is that proof of the performance of the Datta Homam, was not in this case essential to the establishment of a valid adoption, and that being the only ground of appeal, this special appeal must be dismissed and the judgment of the Lower Court affirmed.

1. There is no doubt that according to the strict letter of the Hindu Law, certain ceremonies, such as burnt sacrifice, recitation of the fire prayers, the initial words of the first of which are, according to the text of Sannaka, Te-yaj yagna, and repeating the mystical invocation Aspadangat, are ordained as essential to the validity of an adoption, vide section V Dattaka Mimansa 45, 46, 55, and 56, and section II Dattaka Chandrika. It is declared also in the former work, on the authority of a text of Menu, that “the marriage only of one adopted, without the form for adoption, is to be performed; no wealth is to be bestowed on him; on the contrary, in such case, the wife and the rest even succeed to the estate.” Section V, 46. But practically, the observance of the prescribed religious ceremonies has fallen into desuetude, and all that is now looked for by our Courts, appears to be the act of giving and receiving, which the best text writers declare to be sufficient to complete the change of paternity and to constitute a valid adoption; I. Strange’s H. L. 95-97; Mac. H. L. page 57 note. Grady’s H. L. page 51, Vyasavaha Darpana page 566, 772. Thus in the case of Rajah Nobissens, referred to in the cases above reported, it was ruled conformably with the case of the Rajah of Tandore, in which the learned Sir William Jones was consulted, that the sacrifice of fire, important as it may be deemed in a spiritual point of view, is so with regard to the Brahman only; and in Vercapermall Pillay v. Narain Pillay, 5th August 1801, it was distinctly decided that the operative part of the ceremony of adoption was the giving and receiving.
and that nothing beyond being so essential to the act, as being mistaken or omitted, could have the effect of invalidating the adoption.

2. The giving and receiving, however, in order to constitute a valid adoption must be actual, and not only a constructive giving and taking by the execution of deeds, the one purporting to be a gift, and the other an acceptance of the child by the parties executing the deeds; and where a father after execution of such deeds refuses to give his child for the purpose of adoption, the other party has a right to come to Court for relief and ask to have the deeds declared void. See Narain Milter v. Kishen Soonderee Dosee. 6th March 1869, XI Suth. W. R. 196, Civil Rulings; II, Bengal Law Reports, 279 A. J. C. So also the want of permission of the ruling authorities, the non-convention of kin, the fact of the adoption having been held in place of others, than the place of residence of the parties, are not sufficient to invalidate an adoption. Bhasker Suchajes v. Naroo Ragonath, 1826, Select Rept. 24, Alisk Manjari v. Fakir Chand Sirkar 11th September 1834, 5, S. D. A. Report, 356.

In the latter case it was, however, held that the Yajua, or sacrifice, was essential; but although this ceremony is regarded by Hindu lawyers as the most important of any ordained, it is doubtful whether even this ruling would now be rigidly followed, except perhaps in the case of Brahmins, especially in Bengal, where the doctrine of factum valet so largely prevails, and where the inadvertent omission of a ceremony is said not to invalidate the adoption. Jagannath’s Digest, 1844, 3, p. 25. See also Colbroke’s remarks to case of Cooty Verty Cootah v. Sambiah and Venkiah, 11 Strange’s Hindu Law 131. Indeed, according to Mr. Ellis, “however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside, on any account whatever; a fortiori not on account of any informality." Ib. p. 126. This language is perhaps too broad and general, and would tend to render the Hindu Law on the subject of Adoption, even on points where the Courts have ruled it to be most absolute, altogether nugatory. The most correct rule perhaps to lay down is, that where an adoption is otherwise valid, the strict observance of the prescribed religious ceremonies is not absolutely essential. Thus in Perkash Chander Roy and others v. Dhamwayne Dosee and others. 24th Jan. 1853, S. D. A. page 96, the adoption of a son was held to be proved on strong circumstantial evidence, in the absence of direct proof of the performance of the necessary ceremonies, and one of the Judges by whom this case was decided was Mr. R. H. Mytton, whose judgment in Duyamoy versus Rasebhari is reported above. In both these cases, however, the parties were of the Sudra caste. In Radhaballen Gosee v. Radhaballen Gosee, 17th September 1862, Hoy’s Reports page 311, it was ruled that the Court when satisfied that permission to adopt existed, will exact slight proof of the performance of the ceremonies, and so also in the very recent case of Saka Rama and another v. Nuboghun Mylee. 17th April 1869, Jackson and Markby, J. J. held, that “when there is satisfactory evidence showing a party to have been given and received in adoption, and when the adoption has been continuously recognised in a series of years, and the party adopted is shown to have had possession, either in person or through his guardian of property which would devolve upon him by reason of such adoption, a Court may dispense with formal proof of the performance of the ceremonies: and, unless it were distinctly shown, on the part of a person contesting against the adoption, that the ceremonies had not been performed, the party adopted would be entitled to enforce all his rights as adopted son." XI, Suth. W. R. 380, Civil Rulings.

3. In the case of a Kritrima adoption in Tirhoot, where a Zemindar adopted one of his kindred by a verbal declaration in the presence of witnesses, but without any religious right or ceremony, and the person so adopted was acknowledged, after the Zemindar’s death, as his heir, at the obsequies, the adoption was held to be good. Kullian Singh v. Kirpa Singh and others, 23rd April 1856, I, Select Reports, 11, new, Ed.—The agreement of other parties, however, is essential to the validity of an adoption according to the above form. Durgopal Singh and another v. Roopun Singh and others, 3rd September 1839, VI, S. D. A. page 271.

4. The Madras Sadr Court has held that, in the case of dancing girls, recognition as daughter suffices to constitute adoption without any formal act. Venatachellum v. Venkataseammy, 23rd April 1856, M. S. A. Dee’s, page 65; and in a recent case the High Court of the North Western Provinces, refused to allow objections regarding the omission of the usual ceremonies, or the age of the adoptee, to be raised for the first time.
in Special Appeal.—


5. Under the Punjab Civil Code great laxity is allowed in the observance of the prescribed ceremonies, (vide Section VII. para 9), and in more than one case an adoption has been upheld by the Chief Court where there was no proof whatever of any ceremonies having been performed. Mukhun and others v. Nikka and others, 25th March 1868, III, P. R. 96, and Lehna Singh v. Cheina, 3rd December 1868, Ibid, page 283.
A conditional adoption is not sanctioned by Hindu Law.

(Insubordination to widow of deceased adopting father is insufficient to exclude an adopted son from the inheritance.)

RAM SURN DASS, (DEFENDANT) Appellant.

Versus.

MUSSUMMAT PRAN KOER, (PLAINTIFF) Respondent.

Before the Sadr Dewani Adalat, N. W. P.

Present: W. Edwards and F. B. Pearson, J. J.

This suit was brought on the 13th February 1864, by the widow of Jumnadass, who died on the 17th September 1859, to exclude his adopted son, the defendant, from the inheritance of a father's estate, on the averment of his having infringed a condition which was attached to his inheritance at the time of his adoption, of obedience to his mother, and having thereby forfeited his right to inheritance, such condition having been recorded by Jumnadass himself, shortly before his death in the paper of administration (Wajib-ool-urz) of Mouzah Shakiapore; and the record having been authenticated by the defendant himself on 5th February 1862, after he had attained his majority. The defence was, that the adoption of the defendant by Jumnadass was unconditional; that the defendant was as much entitled to succeed to his father's estate as his adopted, as he would have been if he had been his own begotten son; that the entire estate belonged to him, that the plaintiff had a right to maintenance only, and was not competent to sue to set aside the adoption, that, taking advantage of his minority, she contrived to be represented as a co-heir with him in Jumnadass' estate, in which she has no right to any share at all; that Jumnadass was not a party to the entry on which she relies in the Wajib-ool-urz of Mouzah Shakiapore, having died three days before the date of that document;
that the defendant himself had never authenticated the entry, or acknowledged the alleged condition, and was a minor in February 1862; and lastly, that he had not been guilty of disobedience to the plaintiff, but had only objected to her transferring her property to her daughter and son-in-law. The Principal Sudder Ameen decided all the issues which arose out of the pleadings of the parties in the plaintiff's favor. He held that a conditional adoption was not prohibited by the Hindoo Law; that the adoption of the defendant by Jumnadass was proved to have been saddled with the alleged condition that Jumnadass was proved to have caused the condition to be recorded in the Wajib-ool-urz of the above named Mouzah, and to have personally authenticated that document, notwithstanding that it had been accidentally post-dated, the defendant was of age in February 1862; and had himself then authenticated the same document, and thereby admitted the correctness of the entry in question, and could not therefore repudiate the condition it recites; and furthermore that he had infringed that condition, and forfeited his right of inheritance to his patrimony. The pleas in appeal are, that the alleged conditional adoption is untrue, and unsanctioned by Hindoo Law, and notwithstanding, the entry in the Wajib-ool-urz notwithstanding; that the Principal Sudder Ameen had wrongly held the entry to have been made at Jumnadass' instance, and to have been assented to by himself after coming of age; and that the accusation of disobedience is unfounded.

**JUDGMENT.**

We do not believe, and cannot find, that the Hindoo Law recognizes a conditional adoption, which appears to leave unsecured and in jeopardy the objects contemplated by the adopting, and to involve an element of injustice to the adopted party. Sir Thomas Strange expressly declares *that* "an adopted succeeds to the rights of a begotten son." That a Hindoo adoption is permanent, "except

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* See Chapter on Adoption.
in the case of an a Nitya Duyamushyayana; nor can the adopted be deprived of its advantages for any cause, or upon any pretence that would not forfeit to a son begotten his natural right to inherit.” No such cause is shown in the present case for the exclusion of the defendant from the inheritance in suit, insubordination to the widow of the deceased adopting father being an insufficient one. We entirely discredit the parole evidence adduced in support of the allegation, that the defendant’s right of inheritance was made conditional at the time of his adoption, on his submissiveness to the plaintiff; and we observe that the allegation is not in the least corroborated by the entry, on which so much stress is laid by the Lower Court in the Wajib-oool-urz of Mouzah Shakirpore. We view with similar distrust the evidence which has satisfied the Lower Court that Jumnadas when about to die, endeavoured to attach such a condition to his son’s inheritance; and we hold that he could not either then, or before, legally do so; and that the entry of such condition in the Wajib-oool-urz is worthless and ineffective. Nor do we admit that any value or efficacy would accrue to the entry, or that any validity would be given to the condition even if the defendant in February 1862, when still very young, whether he were legally of age or not, authenticated the Wajib-oool-urz, pro forma, with the view of curing the ostensible defect of its having been authenticated by his father after his decease.

It would, in our opinion, be extremely inequitable to hold that he thereby deliberately intended to express his assent to the condition entered in the sixth para. thereof, of which it is quite possible, and not at all unlikely, that he was ignorant. Now if he were aware of it, and ignorantly supposed himself to be bound by it, we are not prepared to admit that he is for that reason bound by it. We consider him entitled to inherit the whole of his father’s estate. Accordingly we reverse the Principal Sudder Ameen’s decision, and decree the appeal with costs.
ADOPTION

Continued:—Limitations on Actions regarding.

A suit to set aside an adoption must be made within 12 years from the cause of action; and the period will be reckoned not from the date of the adoption, but from the date of the widow's assent, or from the time when there was distinct knowledge and recognition of the adoption.

PETUMBUR DOBEY (DEFENDANT) Appellant,

Versus

SOOBURNOMONEE DABEA AND OTHERS (PLAINTIFFS) Respondents.

Before the High Court of Bengal.

Present:—H. V. Bayley and W. Morgan J. J.

Regular appeal from the decision of Baboo Banimadhib Shome, Principal Sudder Ameen of West Burdwan.

Subernomonee and her son, Kanyaloll, the plaintiff in the suit, sought to set aside an adoption which Burnomonee, a Hindoo Widow, one of the defendants, alleged she had made under an authority for that purpose given to her by her husband, Gobindloll, who died about the year 1209.

Petumber, the adopted son, also a defendant, contended that, whether there had been a valid adoption or not the plaintiffs were barred by limitation, having neglected to bring their suit for more than twelve years after the fact of adoption, and of possession of the property by him, asserting to be an adopted son, had come to their knowledge. The Principal Sudder Ameen decided that the suit was not barred; and the present appeal was brought against such ruling.

BY THE COURT.—The Principal Sudder Ameen decided that the suit was not barred, and the question in this appeal is whether his

*Peturnomonee, in Hay's Report.
decision is correct. It been has argued that the adoption, under whatever authority made, was in fact made so long ago as 1232, immediately after Petumber's birth; that Petumber has been ever since in possession of the property; and that since 1246, the present plaintiffs have known that Petumber and Burnomonee have asserted the title of the former as adopted son—But we think the evidence clearly shows that long after the time of the alleged adoption, Burnomonee held herself forth as the owner of the property. In 1242, in legal proceedings, she stated that she held the property in the name of Petumber Oopadhya, thus calling Petumber by the name borne by him before the supposed adoption, not by the name Petumber Dobey, which would have belonged to him as the adopted son; and making no mention whatever of an adoption. And although Petumber has apparently for some years asserted against ryots, and against those members of the family with whom he was on friendly terms, such rights in regard to the property as would have belonged to him had an adoption taken place, it no where appears that he has directly asserted his alleged rights against the plaintiff in the present suit,—It is certain that the plaintiffs have for many years known, more or less distinctly, that Burnomonee, or persons who acted in her name, claimed some right to adopt; and that in the exercise of such right, she professed to have adopted Petumber, and that Petumber acted to some extent upon his rights as an adopted son On some occasions they have filed petitions, disputing and denying the adoption, in suits, collusively as we see reason to think, brought by Petumber against other friendly members of the family, or against ryots, in which suits his title by adoption was fully stated. Had there been in the present case such circumstances as existed in the cases of Bhyrub Chunder Chowdhree, versus Kales Kishore Roy * and Koomud Kishore Roy versus Radhamadhub † a distinctly recorded consent of acknowledgment of the adopting mother; an authoritative recognition and enforcement of the supposed adopted son's title as proprietor; or a recognition by the plaintiffs of his position by their

presence at family ceremonies, we should have followed the rules laid down in these cases, and held that the time of limitation must be computed from the date of the widow's assent, or from the time when there was distinct knowledge and recognition of the adoption. We are not enabled in the present case, in which the evidence shows that the position of Petumber has always been uncertain and disputed, to fix upon any time from which to reckon the period of limitation. It is certain that Burnomonee long after the time when, as is now alleged, she made this adoption, continued apparently the owner of the property. Herself and her adopted son, who was the son of Bhoolmonnee, one of her daughters, resided together.

In consequence of her advanced age, it is probable, that for many years past, some person besides herself, would appear manager of the property. It is true that Petumber has asserted his right as adopted son, but the difficulty in the case is to say from what act of himself or of Burnomonee the period of limitation should be reckoned against those who have always denied his title. The plaintiffs so far from having in any way, as happened in one of the cited cases, acquiesced in or recognised the alleged adoption, have always disputed it, and as we are not enabled by any evidence to see that, upwards of twelve years before this suit, either Burnomonee or Petumber by any distinct and unequivocal act, asserted the adoption in such a way as to challenge the plaintiffs to contest it, and as the plaintiffs have always denied it, we think that the appellants (defendants below) have failed to show that the suit is barred by limitation. The only other question raised in this appeal was whether Ladivi puttro, dated the 12th Bhadro 1261, by which these parties professed to have amicably settled their disputes and made a division of the property (the plaintiffs acquiring thereby only a very small portion of the whole), was in fact executed. We have heard and considered the evidence adduced by the defendants to prove the preparation of this document and the mode in which it was registered, and the evidence by which the defendants sought
to prove that the document was afterwards treated by all parties as genuine. We have no doubt that the document is a fabrication, and the Principal Sudder Ameen has come to a right conclusion. This decree is affirmed and this appeal dismissed with costs.

1. In both the Sadr cases referred to in the above judgment, the adopted son had asserted his rights and obtained possession of the estate in the life-time of the adoptive mother, and in the latter case, that of Gobind Kishore Roy, there were facts which clearly showed that the adoption had been recognized by the Plaintiff; but where the adopted son had not obtained possession during the mother's life-time, and there was nothing to show that the Plaintiff, reversioner, had ever recognized his status as an adopted son; the Calcutta High Court held, that the cause of action in favor of the reversioner, arose only on the death of the widow, from which date alone limitation would run against him. "The Plaintiff," remarked Mr. Justice Trevor, in delivering the judgment of the Court, "is the reversionary heir of Kalee Pershad Holder, and under Hindu Law, his rights to succession until the death of Kalee Pershad's widow, was a contingent one, that is, he might on her death, be the reversionary heir, or he might not. Consequently, until her death, when his rights as reversioner were converted into a right to immediate possession, he was not required to sue for possession of the estate of Kalee Pershad Holder. The mere fact of the adoption of the Defendant did not prejudice Plaintiff's eventual rights. Those rights were only invalid so as to give him a cause of action against Rajendronath Holder, when the defendant, on the death of Matunginee took possession of the property of Kalee Pershad Holder, as adopted son." Jugendronath Banerjee v. Rajendronath Holder, 8th April 1867, VII Suth. W. R. 357. It is submitted, however, with the utmost deference, that if the adoption had been set up in the life-time of the widow, and distinct knowledge of the assertion of such a title could have been brought home to the reversioner, supposing the latter to be under no legal disability at the time, limitation ought to have run against him from the date of knowledge of such assertion of adverse title, irrespective of whether he recognized or disputed it; for it is certainly not correct to say, that the fact of adoption would not prejudice the reversioner, whose rights are contingent on the widow's death; because, from the moment of adoption, supposing it of course to be a valid one, the estate would vest in the adopted, and the widow if she continued in possession would merely do so as trustee for him (Muss. Soolukhan v. Ram Dootal Zendeh, 27th May 1811, I Select. Reports p. 434; and Dhuram Dev Panley v. Muss. Shana Suoudri III, M. I. A. 229). The result of this course would be to remove the reversioner's right of succession much further back, and thus prejudice him very seriously. The more correct rule then appears to be deduced from the earlier cases, in the decision given in the text; viz: that limitation must be computed from the date of the widow's consent of the adoption; or from the time when there was distinct knowledge and recognition of the adoption on the part of the reversioner. The rule was also followed in another decision by a Division Bench of the Calcutta High Court, subsequent to the one reported in the text, and only very recently published. "It is perfectly clear," said the learned judges (Raikes and Levinge J. J.) in delivering judgment, "that the plaintiffs had full notice and knowledge both from the contents and construction of the will and the act of adoption, that their rights were affected and jeopardized by the adoption of a son in 1250. They knew that their title to the estates depended on the failure of issue of Nikhamal; they knew that the instant an heir to Nikhamal came into being, either begotten by him or raised under a power of adoption, all their rights were utterly extinguished. Upon this matter, on this single yet vital fact, all their rights and title depended. The plaintiffs therefore must suffer from their own laches, and having permitted more than 12 years to elapse before they bring their suit to test the validity of the adoption which took place under the circumstances detailed in this judgment in the year 1250 B. S., they are now too late." Iswar Chandra Mitter v. Shama.
Soondari Dasi, 12th June 1863, III, B. L. R. 150 (note.) It is obvious that it would not most unjustly in many instances if the reversioner's right of action was allowed to be deferred to the widow's death; for it might then happen that the best evidence of the factum of adoption, and of the husband's permission to the widow to adopt, would no longer be forthcoming; and thus a reversioner, who would probably not have succeeded originally, and who had quietly submitted to the adoption for years, would be able to take advantage of his own dilatoriness, despite the well known maxim, *Vigilantibus at non-dormientibus,* &c., and displace the adopted son. Where, however, a widow adopted in 1851 a son of her husband's brother, and one of the daughters, who had previously admitted the adoption and accepted a Darputni from the guardian of the adopted son, after the widows death in 1866, brought a suit as guardian of her infant son born in 1853, to set aside the adoption and recover possession of the property, it was held (Loch and Mitter J. J.), that the acknowledgment of the adoption by the plaintiff before the birth of her son would not bar his right, and that as the son could himself sue within 3 years after attaining majority, it would be absurd to hold that the present suit was barred, notwithstanding that he was still a minor. Tarini Chara Chowdry v. Sarada Sundari Dasi, 11th May 1869, III, B. L. R. 145.

2. In Radha Kishen Mahapatra v. Sree Kishen Mahapatra, I Suth. W. R. 62, 31st August 1854, it was held that a suit to set aside the adoption of a second son must be made within 12 years from the cause of action; but it is not clear from the report of this case whether the learned judges considered the cause of action arose to the first son on the adoption of the second, whereby his interests were directly injured, or from the date of the father's death, whereupon the second son obtained possession of half the estate. It was not, however, necessary to decide this question, for in either view of the case, more than 12 years had expired, and the claim was therefore clearly out of time.

3. Where a Hindu died leaving a direction to his widow to adopt a son, and upon a partition (in 1848) of the joint property amongst his brothers and widow, a certain property was allotted to his widow as her share of the joint property, which she retained till 1849, when the brothers dispossessed her; and the widow having subsequently (in 1851) adopted a son who attained his majority in 1865, it was held in a suit brought by the latter, a year after he attained his majority to regain possession of the property, that the possession of the widow previous to the adoption, was not that of a trustee for the son to be adopted, and that the suit was barred by lapse of time. Gobind Chandra Surma Mazoomdar, v. Anand Mohan Surma Mazoomdar, 10th March 1869, II B. L. R. 318, a. j. c.; see also Gobind Coomar Chowdri v. Hurochunder Chowdri, VII Suth. W. R. 134, S. C. III Wyman's Report 123.
ADOPTION Continued.—Effect of, previous Decisions on questions of, &c.—

A previous decision on a question of adoption, legitimacy, or that a Hindu family is joint, and such like, in an action in personam, is not a judgment in rem, nor binding upon strangers, nor even admissible as evidence against strangers.

1.—KANHYA LALL AND OTHERS, Appellants,
Versus
RADHA CHURN AND OTHERS, Respondents.

Before the High Court of Bengal.

Present:—Peacock C. J. and Trevor, Loch, Kemp and Macpherson J. J.

This case was referred to a Full Bench by Peacock, C. J., and L. Jackson, J. under the following orders:

Judgment:—It has been contended before us on behalf of the defendants, who are respondents in regular appeal No. 158, and who have also filed a separate appeal, No. 225, that the judgment of the 26th September 1853, in favor of Radha Churn in the suit which he brought against Ramnarain's widow was admissible in evidence and conclusive against the plaintiff:

1st.—Because the Plaintiff having intervened, he was substantially a party to the suit.

2nd.—Because the Plaintiff had brought a cross suit against the defendants.

3rd.—Because the suit of Radha Churn was brought against Ramnarain's widow as heir of her deceased husband, and was consequently binding after her death as against the plaintiff who was only the reversionary heir at the time when that suit was instituted.
4th.—Because the judgment was a judgment in rem, deciding upon the status of the plaintiff.

We think that there is nothing in the first two grounds. As to the first, because, although the plaintiff petitioned to be allowed to adduce evidence in the suit, he was not made a party to it nor allowed to adduce evidence. It is clear that he was not treated by the Principal Sudder Ameen, as a party. Some reliance has been placed upon the expression “third parties” used by the Principal Sudder Ameen at the end of his judgment; but that expression did not, and could not, constitute the plaintiff a party to the suit, or to the decree. If the plaintiff had been made a party to the suit or the decree was intended as a decision against him as a party, there would have been no necessity for the Principal Sudder Ameen to refer to the petition as requiring no order. In the translation of the judgment which is embodied in the fi/sallah, the word used is not “party” but sail, which simply means petitioner.

The fi/sallah shows that the plaintiff in his petition prayed that he might be allowed to adduce evidence, but there was no order on that petition that he should be made a party or be allowed to adduce evidence in the suit, and therefore even if the Principal Sudder Ameen had by his judgment treated the plaintiff as a party, the decision would not be evidence against him.

As to the second ground the plaintiff’s suit was dismissed for default, and was not, as I had at first supposed, set down for hearing the suit brought by the defendants in which the plaintiff had petitioned. Nothing was therefore determined in that suit; and the institution of it could not constitute the plaintiff a party to the suit in which the defendant was plaintiff, or entitle the present plaintiff to be heard in that suit.

As to the third ground, we think that this case is clearly distinguishable from the Shiba Gunga case reported in 9th Moore’s Privy
Council Case which was cited on behalf of the defendants. If it becomes necessary, after the decision of the Full Bench, we will express our reasons as to this point more fully.

As to the 4th ground, we are not prepared to admit the correctness of the decision on the 3rd point in the case of Rajkisto Roy v. Kishoree Mohun Mozoomdar, which was cited on behalf of the defendants from the 3rd volume of the Weekly Reporter, page 14. Our present impression, subject, however, to correction by a Full Bench is that the judgment which was held conclusive by the Principal Sudder Ameen in this case was not a judgment in rem; that it does not fall within the exception to the general rule that a judgment is not evidence against persons who are not parties or privies to it; and that it was not conclusive evidence or even prima facie evidence against the plaintiff. We, however, feel ourselves bound, in consequence of the decision above referred to, to refer to a Full Bench the following question, viz., whether, independently of the three grounds upon which we have already decided, and upon which the case cited is no authority in favour of the defendants, the judgment of the 26th September 1853 was admissible as evidence against the plaintiff; and if so, whether it was conclusive or merely prima facie evidence against him.

As to the contention on the part of the defendant that he ought to be allowed to adduce fresh evidence, our opinion is against him on that point. He has not shown us that he has any evidence to adduce, and if he had intended to apply for liberty to adduce fresh evidence upon the ground, as he now contends, that he was misled by the decision as to the effect of the judgment in the suit brought by the defendant, he ought, as soon as he knew that this appeal was preferred upon the ground that that judgment was not admissible in evidence, to have ascertained whether there was any evidence which, if adduced, would prove the adoption; and he should have been prepared now to show us of what the proposed evidence consists. This he has not done; we are therefore of opinion, that the
appeal of the plaintiff, appellant, ought to be allowed, that the decree of the Lower Court ought to be reversed, and a decree given for the plaintiff with costs in the Lower Court and of this appeal. If the Full Bench hold that the judgment above referred to was not admissible against the plaintiff, or, being admissible, that it was not conclusive; for unless it is conclusive in law, it is not such evidence as would induce us to find that Ramnarain was adopted and to decide against the plaintiff. If the Full Bench hold it conclusive evidence, then this Court will decide as to whether the adoption, being in the Kritima form, caused Ramnarain to cease to be a member of his actual father’s family so as to alter the line of inheritance.

The decree, if given for the plaintiff, will not extend to the setting aside of the decrees of the former 2nd Principal Sudder Ameen and Judge, or the Kobalas and Zuri-peshgee pottahs as prayed in the relief sought by the plaintiff. Those decisions are not binding upon the plaintiff, nor will the Kobalas or other incumbrances effected by Radha Churn be operative against the plaintiff. There is no necessity therefore for us to set them aside.

If the plaintiff’s appeal be allowed, the defendant’s cross appeal No. 226, will be dismissed with costs.

Judgment of the Full Bench:—This suit was brought by Kanhya Lall, as heir of Ramnarain Singh, for a declaration of his right of heirship and for possession of certain lands with mesne profits. The other plaintiff claimed a portion of the estate by purchase from Kanhya Lall.

The plaintiffs alleged that Ramnarain obtained that property from Jhoomuck Lall, his maternal grand father, by deed of gift; that Ramnarain died without issue, leaving Mussamut Deokoonwar his widow, and that upon her death the property descended to the plaintiff as the nephew and heir of Ramnarain, the plaintiff being the son of Ramnarain’s natural brother and grandson of his maternal father.
The Principal defendant (Radha Churn) denied the plaintiff's right as heir of Ramnarain. He alleged that Ramnarain was adopted by Jhoomuck Lall, and that on the death of Ramnarain without issue the right accrued to defendant, (Radha Churn) as an agnate of Jhoomuck Lall, and did not descend to plaintiff as the son of Ramnarain's natural brother.

The other defendants claimed by purchase from Radha Churn. The plaintiffs denied that Ramnarain was adopted by Jhoomuck. The defendants, in support of their allegation of the adoption, relied upon a decree obtained by defendant Radha Churn, in a suit brought by him against Mussamut Deokoonwar, the widow of Ramnarain, to set aside certain alienations made by her and to have his title as reversionary heir established.

The suit was defended by Mussamut Deokoonwar on the ground that her husband had not been adopted, and that he took the property by deed of gift from Jhoomuck Lall, and consequently that Radha Churn was not heir in reversion. The present plaintiff presented a petition in that suit asserting his right on the same ground as that on which he now sues; and the Court held that no order was requisite on his petition, and he was not made a party to the suit.

The court in that case found that Ramnarain was adopted by Jhoomuck Lall, and that the then plaintiff, and now defendant, Radha Churn, was the reversionary heir. Judgment was affirmed in appeal in 1853.

It was contended on the part of the defendants in this case that the judgment was a judgment in rem as to the adoption. On the trial of this case the Judge, upon the authority of a case reported in the Weekly Reporter Volume III, page 14, Civil Rulings, in which Rajkisto was appellant, held that the judgment was a judgment in rem, quoad the adoption, and that it was final and conclusive against the present plaintiff upon that point.
The first Bench before whom this appeal came felt themselves bound in consequence of the decision above mentioned, to refer to a Full Bench the following question, viz. whether the judgment was admissible as evidence, against the plaintiff; and if so, whether it was conclusive or merely *prima facie* evidence against him.

The case has been fully argued and we are of opinion that the judgment was not a judgment *in rem*, and that it was not admissible in evidence against the plaintiff. The petition of the plaintiff in the suit brought by *Radha Churn* having been rejected, the plaintiff was no party to that suit.

The general rule was clearly laid down by Chief Justice De-Grey in the Duchess of Kingston's case, in answer to certain questions put to the judges by the House of Lords.

He said. "It is certainly true, as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine (and he might have added to cross examine) witnesses, or to appeal from a judgment which he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact, the verdict of a jury (or in this country of a court finding the facts and the judgment of the court upon the facts found) although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them.

"From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true, *first*, that the judgment of a Court of concurrent jurisdiction, directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court (or he might have added in another action between the same parties in the Court): *secondly*, that the judg-
ment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

The principle that a judgment is not to be used to the prejudice of strangers was adopted from the Civil Law, of which the following were maxims:—*Res inter alias judicata nullum inter alias prejudicium facit*, or *Res inter alias acta alteri nocere non debet*.

That principle was not applicable to judgments in actions *in rem*. The exception of judgments *in rem* in the Civil Law was no doubt the foundation of the exception in the English Law.

The question as to what is a judgment *in rem* was fully considered by Mr. Justice Holloway in Madras Regular Appeal No. 48 of 1864, 2 Stokes and O'Sullivan's Reports, 276.

Although I cannot concur in the whole of Mr. Holloway's reasoning, I consider that the full investigation which the subject received at his hands in that case has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, viz., that a decision by a competent Court that a Hindu family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in particular family, or upon any other question of the same nature in a suit *inter partes*, or, more correctly speaking in an action *in personam*, is not a judgment *in rem*, or binding upon strangers, or, in other words, upon persons who were neither parties to the suit nor privies. I would go further and say that a decree in such a case is not and ought not to be, admissible at all as evidence against strangers,
I do not think that Mr. Smith's definition of a judgment in rem is accurate. But Mr. Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith—"which very declaration operates upon the status of the thing adjudicated upon, and, ipso facto, renders it such as it is thereby declared to be." This would not be the effect of a finding upon a question of status in a suit in personam, though it might have been so under the Civil Law in a suit in rem, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the status.

I do not agree with Mr. Holloway in his remark at page 281 of his judgment, "that the effect of a decree of every competent Court is to render the person or thing that which it declares him or it to be." A decree, according to the nature of it, may prevent particular persons, or the subjects to a particular Government, or, it may be, the whole world, from averring to the contrary.

According to the Civil Law a suit, one in which a claim of ownership was made against all other persons, was an action in rem, and the judgment pronounced in such action was a judgment in rem, and binding upon all persons whom the Court was competent to bind; but if the claim was made against a particular person or persons, it was an action in personam, and the decree, was a decree in personam, and binding only upon the particular person or persons against whom the claim was preferred, or persons who were privies to them.

This will be made more clear by referring to the note of Mr. Sanders upon Section 1, Book 4, Tit. 6 of the Institutes of Justinian, a Section which is quoted by Mr. Justice Holloway in his judgment above referred to. He says:—

"The first and most important division of actions is that into actions in rem and actions in personam, by the first of which we assert a right over a thing against all the world; by the second we assert a right against a particular person (see introduction, Section 61)."
And accordingly, speaking technically, an action was called real when the *formula* in which it was conceived embodied a claim to a thing without saying from whom it was claimed; and personal, when the *formula* stated upon whom a claim was made. If Titius said that a piece of land belonged to him, there was no necessity that the name of the wrongful occupier should appear in the *formula*; at any rate not in the *intentio*, the part of the *formula* always considered characteristic of the *actio*. 'Si paret Titii esse rem.' This was all. The question to be decided was, does the thing belong to Titius? It was only as a consequence of his proprietorship being established, that the wrongful occupier whose name might appear in the *condemnation* was condemned to lose the possession. But in an action arising on a contract, the name of a person was necessarily introduced into the *intentio*. Titius could not merely say that a thing was owed to him; he must add that it was owed by a particular person. There are indeed some cases, as for instance, a deposit, in which the action may be equally well shaped with or without the insertion of the name of a particular person. There may either be a real action in which the plaintiff claims the thing, or a personal one in which he says that the depositary ought to give it to him. Whenever the action is made to rest on an obligation, it is personal; when on a right of proprietorship it is real."

The case is made still more clear in para. 16, of the introduction. There Mr. Sanders says: "His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim, sanctioned by law, is urged directly; the owner, as he is said to be of the thing, publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect: the claimant insists that there are one or more particular individual or individuals who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged
against particular persons, and not against "the world at large."

On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages on the analogy of terms found in the writings of the Roman Jurists by the phrase jura in re and jura ad rem. A real right, a Jus in re, or to use the equivalent phrase preferred by some later commentators, Jus in rem, is a right to have a thing to the exclusion of all other men. A personal right, Jus ad rem, or to use a much more correct expression, Jus in personam, is a right in which there is a person who is the subject of the right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give or procure, or do or not do something.

It is true that in a real right the notion of persons is involved, for no one could claim a thing if there was no other person against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done."

Besides actions in rem, which related to property, there were certain actions called actiones prejudiciales. Of these it is said in the Institutes, book 4, Tit 6, Section 13, that they seem to be actions in rem, such as those by which it is inquired whether a man was born free or had been made free; whether he was a slave, or whether he was the offspring of his reputed father. These actions no doubt were the origin of the rule laid down as to judgments in actions in which questions relating to status were determined.

Mr. Sanders in his note to that Section says:—"The object of prejudicialis actio was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings. Such actions differ from actions in rem, because in an actio prejudicialis no one is condemned, only the fact is ascertained; but they are said in the text to resemble actions in rem, because they were not brought on any obligation, and because in the intentio, which indeed
composed the whole formula in this case, no mention was made of any particular person."

"Questions of status, such as those of paternity, filiation, and the like, were most commonly the subjects of actiones prejudiciales, but were by no means the only ones. We hear of others":

In Austin on Jurisprudence, Volume 3, page 1865, it is said, "In case a child is detained from his father, the latter can recover him from the stranger by a proceeding in a Court of Justice, which let it be named as it may, is substantially an action in rem. In case a slave be detained from his master's service, the master can recover him in specie from the stranger who wrongfully detains him."

It is a mistake I think to call such actions in rem: they are strictly actions in personam.

An action by a person alleged to be a slave, claiming to have it declared as against all men that he was a free man, was an action prejudicialis in which the judgment would have contained a declaration upon the status.

Great misunderstanding and error have been caused, as is shewn by Mr. Holloway, from the use of the words "status" and "judgment in rem," in some of our English text books, without any precise definition, and, indeed, in some cases without any accurate conception of their meaning. For instance I have seen it stated that "judgments declaring personal status or conditions, as judgments of adultery, are conclusive upon all the world." What a judgment of adultery is, or how adultery can be said to declare a personal status or condition, it is difficult to conceive. Possibly, it means a judgment of divorce on account of adultery; but, if so, it is not a judgment in rem, or conclusive upon all the world of the fact of adultery.

It is unnecessary to consider more minutely the Civil Law upon the subject of judgment in rem or of actiones prejudiciales. It is sufficient to say that they were not in personam, and that the claims in them were advanced generally against every one, and not against particular individuals.
From what has been said it will be readily seen that there are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice Admiralty jurisdiction, which answer to the actions *in rem* of the Civil Law, and none corresponding with the *actiones prejudiciales*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is therefore unnecessary to refer to them. We have not as yet any suits here for divorce *a Vinculo Matrimonii*, so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits.

Decrees by Court of competent jurisdiction by the *absolute dissolution* of marriages are no doubt binding upon third parties. If a Court of competent jurisdiction decrees a divorce or sets aside a marriage between Mahomedans or Hindoos, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife.

This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit, as Mr. Holloway appears to think, for if they had notice they could not intervene or interfere in the suit, but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only as far as the parties are concerned, but as to all persons. A valid marriage causes the relationship of husband and wife, not only as between the parties to it, but also as respects all the world; a valid dissolution of marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.

The record of a decree in a suit for divorce, or of any other decree, is evidence that such a decree was pronounced, (see cases referred to in Smith's Leading cases, Volume 2, page 439), and the effect of a decree in a suit for divorce, *a Vincula matrimoniai*, is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the
parties are no longer husband and wife; but it is not conclusive nor even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a divorce between A. and B. were granted upon the ground of the adultery of B. with C., it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C. that he was guilty of adultery with B. unless he were a party to the suit.

So if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as for instance in the case of a Mahomedan that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.

It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question; and the Indian Succession Act No. X, of 1865, Section 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conclusive.

It is quite clear that there are no judgments *in rem* in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers, either as conclusive or even as *prima facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment or by the finding upon any issue raised in the suit, whether relating to status, property, or any other matter.

If a judgment in a suit between A. and B., that certain property for which the suit was brought belonged to A. as the adopted son of C., were a judgment *in rem*, and conclusive against strangers as to
the fact and validity of the adoption, the greatest injustice might be caused; for instance, suppose that a Hindoo, one of four brothers, should be entitled to a separate share consisting of a large zemindary yielding an annual profit of two lacs of rupees, and also a small piece of land in a distant zemindary, and that upon his death without issue, and without leaving a widow, the surviving brothers as his heirs should enter into possession and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Moonsiff's Court to recover the land so sold, upon the ground that he being the heir by adoption, the brother of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant, without any collusion in establishing the alleged adoption, might succeed and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now if this judgment were a judgment in rem and conclusive against the brothers as to the status created by the alleged adoption in a suit brought against them for the zemindary, they would have no means of defending their possessions, however clearly they might be able to prove there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Moonsiff's Court was perfectly honest, and bona fide, and that the Moonsiff's Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment in rem, and there would be no means of getting rid of the decree of the Moonsiff's Court; and thus the decree of a Moonsiff in a suit for land within his competency would finally and conclusively determine the title to the zemindary against persons who might never even have heard of the suit in the Moonsiff's Court whilst it was going on. There is no ground upon which it could be held that in such a case it could be admissible merely as prima facie evidence. It must either be conclusive as a judgment in rem, or fall within the general rule,
and not be admissible at all upon the question of adoption, if it could be admitted even as prima facie evidence, it might work the greatest injustice by throwing the burden on the defendants and compelling them to prove a negative, viz., that the claimant had not been adopted, and this probably after many years from the time at which the adoption is alleged to have been made. The fact is that the Moonsiff in such a case would be competent to try the rights of the parties to the land claimed, and incidentally to determine the question of adoption. But he would have no power to entertain a suit merely for the purpose of determining a question of status.

We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 25th September, 1853, was not admissible, either as prima facie or conclusive evidence, against the plaintiff upon the question of adoption.

This decision is quite in accordance with the decision of the Privy Council in the Rajah of Shiva Gungah's case, reported in 9 Moore's Indian Appeals. In that case their Lordships remarked that a "judgment is not a judgment in rem, because in a suit by it for the recovery of an estate from B., it has determined an issue raised concerning the status of a particular person or family." It is clear that this particular judgment was nothing but a judgment inter partes.

In the case No 299 of 1864, in consequence of which this case was referred to a Full Bench, the Judges referring to the Shiva Gunga case say:—"In Goodeve on Evidence,* adoption like marriage and bastardy, is expressly mentioned as one of the cases in which the judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the case,† reported at pages 36, and 37 of the Weekly Reporter for April 1865, No. 12, seems to point to the same conclusion."

* Pages 288-290. † The Shiva Gunga case.
So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve.

The case will be sent back to the first Bench which referred it.

On the receipt of the Full Bench ruling the following further judgment was delivered by

Peacock, C. J.—When this case was referred by us to the Full Bench, we stated, with reference to the third issue, that, after the decision of the Full Bench, we would, if necessary, express our reasons more fully in holding that this case is clearly distinguished from the Shiva Gunga case.

The passage in the judgment in the Shiva Gunga case, upon which it was contended that the Plaintiff was bound by the decision in the suit brought by Radha Churn against Musumut Deo Koonwar, Ramnarain's widow, is as follows:—“It seems to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1857, if it had become final in Unya Mootoo's lifetime would have found those claiming the Zemindaree in succession to her. And their Lordships are of opinion that, unless it could be shewn that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special grounds, it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Unya Mootoo. For, assuming her to be entitled to the zemindaree at all, the whole estate would, for the time, be vested in her absolutely for some purposes, though in some respects for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants-in-tail representing the inheritance, would seem to apply to the case of a Hindoo widow, and it is obvious that there would
be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

The question in the suit brought by Unya Mootoo, referred to above, was whether the estate of her deceased husband was self-acquired, and, as such, descended to her as one of his widows, and to his daughters in succession to her, or whether it survived to the nephews of the deceased under the Mitakshara law.

According to the case set up by the widow, the daughters, if they had survived the widow, would have succeeded as reversionary heirs. The widow having failed to make out the case which she set up against the nephews, her suit was dismissed; and the Privy Council held that the heirs in reversion would have been bound, after the death of the widow, by a final decree against her in that suit, and that it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to the widow.

The present is a very different case. The suit relates to the estate of Ramnarain, and the question is, who, upon the death of Ramnarain's widow, was the reversionary heir; and with reference to that question it was important to ascertain whether Ramnarain obtained the estate from Jhoomuck Jail by gift, or by inheritance as the adopted son of Jhoomuck Jail. Upon the death of Ramnarain without issue, his widow obtained possession of the estate as his heir, and she was his heir, whether he was adopted by Jhoomuck Jail or not. The question of adoption or non-adoption did not affect the right of the widow to inherit, though it affected the question who was the reversionary heir upon her death.

The plaintiff claimed as the son of Ramnarain's natural brother, the defendant, Radha Churn claimed as an agnate of Jhoomuck Jail. The decree, which is relied upon as binding upon the plaintiff upon the question of adoption, was pronounced in a suit brought by Radha Churn against Ramnarain's widow to set aside certain
alienations made by her, and to have his title as reversionary heir established, if Ramnarain was not adopted by Jhoomuck Jall, Radha Churn, the plaintiff in that suit, had no right to set aside the alienations made by the widow, nor was he the reversionary heir. The plaintiff in this suit intervened in the suit brought by Radha Churn against the widow, but his petition was rejected, and he was consequently no party to the suit. The Court held that Ramnarain was adopted, and that Radha Churn was the reversionary heir after the death of Ramnarain's widow. Radha Churn did not impeach Ramnarain's title to the estate, in fact, his case depended upon Ramnarain's title, nor did he impeach the title of Ramnarain's widow. The plaintiff also commenced a suit against the widow to set aside the alienations, but he did not proceed with it. The widow had an interest in supporting her own alienations, because she had made them: as protector of the estate, her interest was the other way.

As protector of the estate, or even as the supporter of the alienations which she had made, it could make no difference to her in point of law, whether the alienations were impeached by Radha Churn or by the plaintiff. They had no legal interest in the determination of the question whether Radha Churn or the plaintiff would be the reversionary heir upon her death, any more than a tenant-in-tail in England, to which a Hindoo widow taking by inheritance was compared by the Privy Council, would have in the question whether upon the termination of the estate tail, the estate would go to A. or B. as remainderman. I do not well see how a similar question to that raised in this suit could arise between persons claiming to be remaindermen.

The suits to which the Privy Council intended to refer appear to us to be suits in which the title of the settler or the validity of the estate tail was in issue, and not to suits against the tenant in tail in which a question might incidentally arise, and be determined as to who was the remainder man who would be entitled to succeed upon the termination of the estate tail.
For these reasons, we think that the judgment in Radha Churn's suit was not conclusive against the plaintiff, or admissible in evidence against him, upon the ground that it was brought against Ramnarain's widow whilst she was holding the estate by inheritance from her husband.
ALIENATION:—Power of, by father—

Under the Mitakshara Law a father can dispose of his self-acquired property, moveable and immovable, at his pleasure, and he can, by Will, make an unequal distribution of the same amongst his heirs. An alienation of ancestral immovable property without the concurrence of sons is not necessarily void though it may be avoided, unless the purchaser can shew that it was made, during a season of distress, for the sake of the family, or for pious purposes.

( Landed property acquired by a grand father and distributed by him amongst his sons, does not by such gift become the self-acquired property of the sons to enable them to dispose of it by gift or sale without the consent, and to the prejudice, of the grand sons.)

MADDUN GOPAL THAKOOR AND OTHERS, (PLAINTIFFS), Appellants.

Versus

RAM BUKSH PANDEY AND OTHERS (DEFENDANTS), Respondents.

Before the High Court of Bengal.

Present:—J. P. Norman and E. Jackson, J. J.

This is a suit to set aside a deed of sale executed by the plaintiff’s father to the defendant, as being invalid under the Mitakshara Law, and for the recovery of the lands conveyed thereby. The plaintiff’s grand father originally acquired the lands in dispute. He had several wives and several sons. By the disputed deed of gift he gave the property in question to the plaintiff’s father, and, in fact, by other deeds of gift, provided for all his sons.
The first Court treated the deeds of gift as being in effect a mere partition of the grand father's property and gave the plaintiff a decree.

On appeal the Judge reversed the decision of the first Court, on the ground that the property having been acquired by the plaintiff's father, Heera Lall, by gift, it must be deemed to have been his self-acquired property, and therefore capable of being alienated by him.

The plaintiff appeals to this Court. The first point appears to be whether, even assuming that the property was self-acquired, the plaintiff's father was capable of creating a valid title to it by sale without the consent of his sons. In the Mitaksara on Inheritance Chapter I, Section I, there is an argument as to whether property is by birth or not, (Sections 21 to 27). The conclusion appears in Section 27, where it is said: "It is a settled point that property in the paternal or ancestral estate is by birth. The father is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor, since it is ordained, though immovableables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should therefore be made."

The following Clause contains an exception shewing that the father "may conclude a donation, mortgage or sale of immoveable property while the sons are minors, during the season of distress, for the sake of the family, and especially for pious purposes."

The principal passage above cited is referred to by Mr. Colebrooke, in a case which is to be found in Strange's Elements of Hindoo Law, Volume II, page 5, and cited by MacNaghten, Volume I, page 44, with reference to the father's incompetency according to the Law of Benares, to dispose of immoveable property, though acquired by
himself, without the consent of his sons. It accords with the original texts of Yajnavalkya, Colebrooke's Digest, Chapter IV, Section 2, Article I, paras 13, 14, 16, Ed, 1798, pages 228, 242.—

"Of precious metals or stones, of pearls, coral, and other moveables the father has power to give or sell the whole, but neither the father, nor the grand father shall alienate the whole of his immovable property."

"Land or other immovable property, and slaves employed in the cultivation of it, a man shall neither give away or sell, even though he acquired them himself, unless he convene with all his sons." On the other hand, we find, in the Mitakshara on Inheritance, Chapter I, Section 5, para 9, the grandson has a right of prohibition if his unseparated father is making a donation or sale of effects inherited from the grand father; but he has no right of interference if the effects were acquired by the father (para. 10). Consequently, the difference is this:—"Although he has a right by birth in his father's and in his grand father's property, still, since he is dependent on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must acquiesce in the father's disposal of his own acquired property; but since both have indiscriminately a right in the grand father's estate, the son has a power of interdiction if the father be dissipating the property." The apparent conflict between this passage and those before quoted is reconciled, if the right of the sons in the self-acquired property of the father is treated as an imperfect right incapable of being enforced at Law. (See Mitakshara on Inheritance Chapter I, Section I, para 18). It is not immaterial to observe that the words are "should not," and "shall not," which imply a prohibition, but not an absence of power to do the prohibited act. A color is further given to this construction by a passage in the Mitakshara on the Administration of Justice, Chapter IV, Section I, para. 10; MacNaghten's Hindoo Law, Volume I, page 227, where, the author, in stating who are capable of maintaining actions says:—"In case of land acquired by the grand father, the ownership
of father and son is equal, and therefore, if the father make away
with the immovable property so acquired by the grandfather, and if
the son have recourse to a Court of Justice, a judicial proceeding
will be entertained between the father and the son."

The right of suit is not mentioned as extending to the case when
the father alienates his own self-acquired immovable property.
Compare Yajnyavalkya, Colebrooke's Digest, Volume III, Book V,
paras 31, 33, and 92, pages 40, 48, and 128; Vrikhaspati, Ib., Volume
II, Book II, Chapter IV, Section I, para 5, and Section 2, Article I,
para 18, pages 213, 246; and see page 256, Ib., Volume III, Book V.
Chapter II, para 90 page 117; Vishnu Ib., Volume III, Book V,
para 25, page 39, Menu and Vishnu, para 91, page 118; Vyasa Ib.
para 94, page 119; Jagannatha Ib., Volume III, page 88. The
Chapter in the Mitakshara, Chapter I, Section 4, and passages in
the Digest, as to effects not liable to partition, and the case referred
by the Lower Court, Case No. 39, MacNaghton's Hindoo Law,
Volume II, page 246, are in accordance with the construction above
suggested, though they do not decide the question. (See Mitakshara
Chapter IV, para 1). It may well be that, in property acquired
by a man, his sons may have an interest, though mere co-sharers,
such as brothers who have not contributed in any manner to the
acquisition, may not be entitled to participation.

The result is that we must hold that, according to the law as
laid down in the Mitakshara, a father is not incompetent to sell
immovable property acquired by himself. It would be very incon-
venient if the law were otherwise.

The second question is whether, according to the Mitakshara,
landed property self acquired by a grand-father, and distributed by
him amongst his sons, becomes by such gift the self acquired pro-
erty of the sons, so as to enable them to dispose of it without the
consent and to the prejudice of the grand sons. The principle to be
deduced from the several texts on this subject (Mitakshara on Inheri-
tance Chapter I, Section 4), appears to be that, if the gift or
acquisition is upon a consideration personal to the donee, as marriage, or the personal regard of a stranger for him, the property given is treated as self acquired. (See *Katayand*, Colebrooke’s Digest, Volume IV, Chapter V, para 347, page 35; and *Menu* Ib., 345; *Vyasa*, Ib. 346). But if, in cases other than the first above mentioned, the acquisition has been made, directly or indirectly, by means of, or at the charge or expense of, the ancestral estate, the property so acquired is treated as joint and liable to partition. (see *Mitakshara*, Chapter I, Section 4, paras 1-6-8; *Katyayana*, Colebrooke’s Digest, Volume IV, Chapter V, para 349, page 42; *Nareda* Ib., Volume IV, para 357 page 62, and the Commentary of Jagannatha, citing the opinions of *Chandoswara* and others, Ib, page 64.)

In the *Mitakshara*, Chapter I, Section 4, Para 1, page 268, of effects not liable to partition, it is said: “Whatever else is acquired by the co-parcener himself without detriment to his father’s estate, or as a present from a friend, or gift at nuptials, does not appertain to the co-heirs.” See also the text of *Yajnyavalkya* to the same effect, Colebrooke’s Digest, IV, para 352, page 44. In this passage it would appear, that property obtained by gift from a father is not mentioned as not liable to partition. *Nareda* in Colebrook’s Digest, Vol. IV, para 353, page 45, of wealth not subject to partition, says, “anything that has been received by the favor of a father,” Jagannatha adds, “or other friend.” The absence of these words in the original seems to show that the construction put on the passage by the author of the *Mitakshara*, Chapter I, Section I, para 19, is correct, and that it means no more than that the property so acquired, is exempt from partition amongst the brethren. (See further, *Mitakshara*, Chapter I, Section 4, para 28, as explained by Section 6, paras 13 and 16; *Menu*, translated by Sir W. Jones, Chapter IX, Section 206.)

The text of *Vyasa*, Colebrooke’s Digest, Volume IV, para 354, page 46, admits of the same explanation. The ground of that opinion, viz., that the intent of the parties must have been to exclude partition, stated in the *Mitakshara*, Chapter I, Section I, para 19, does not apply when the question arises between father and son.
We think then that according to the Mitakshara, landed property acquired by a grand-father, and distributed by him amongst his sons does not by such gift become the self-acquired property of the sons; so as to enable them to dispose of it by gift or sale without the consent and to the prejudice of the grand-sons.

The property cannot be said to have been acquired without detriment to the father's (i.e. ancestral) estate, because it was not only given out of that estate, but in substitution for the undivided share of that estate to which the father, under the passage first cited, appears to have been entitled. It cannot, therefore, be taken to have been given simply by the favor of the father, but upon consideration of the father surrendering some interest or right to share in the grand-father's estate, which he did by the acceptance of this separate parcel.

We think that the father took it with the incidents to which the undivided share for which it was substituted, would have been subject. But it does not follow that the sons have a right to ask that the sale shall be cancelled unconditionally. The sale by a father of ancestral immovable property without the concurrence of the sons is not necessarily void, though it may be avoided, unless the purchaser can show that it was made during a season of distress, for the sake of the family or for pious purposes. *(In the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family; therefore, if the son seeks the aid of the Court to set the purchase aside, he must do equity, and offer to repay the purchase-money unless he can show that no part of such purchase-money or the produce of it, has ever come to his hands. (See Story's Equity Jurisprudence, Volume I, paras 696-707.) Were this otherwise, the plaintiff might get the estate and keep its price, while the purchaser might have no remedy. The decision of the Court below must be reversed, and the case remanded to the first Court, with liberty to the plaintiff to amend his plaint in the mode above suggested, on payment of all the costs already incurred,*

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*This ruling has been set aside by a Full Bench decision, see subjoined note, para VII.*
within one month after the amount thereof has been settled and notice served on the plaintiff.

But should the plaintiff omit to signify his intention to exercise the option thus allowed to him within two months, or should he after having declared such to be his intention, fail to pay the costs already incurred within one month after having received notice of the amount, this suit must be dismissed on the ground that it is improperly framed.

I. The absolute dominion of a Hindu father over his self-acquired property, moveable or immovable, may be said to be now firmly established, except perhaps in the Madras Presidency, where I observe it was held in one case by the late Sadr Court, that "urgent necessity" is required to exist in order to give validity to the sale of immovable property, whether ancestral or self-acquired, to the prejudice of sons. M. S. A. Dec. 1860, p. 227. It is true also that in the comparatively recent case of Musunut Kishnu Dari v. Musunut Gunna Dari, 13th February 1867, H. P. R. 68, the late lamented Mr. Justice Roberts quoted with approval, as a correct exposition of the Benares law, the passage from Macnaghten's Principles wherein it is stated that the law "prohibits the unequal disposition by the father of ancestral property of whatever description, as well as of immovable property acquired by himself," page 46-47, Wilson's edition. But in the face of the current of decisions to the contrary by the Sadr Court of Agra and the High Court of Bengal, in cases governed by the authorities of the Benares School, such an exposition must now be regarded as obsolete and distinctly overruled. Moreover, Macnaghten himself in a previous part of his work, ( Chap. I, of proprietary right) writes as follows:

"With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility." Principles, page 3.

2. Thus in the case of Haree Punt Bhoo and Seeve Nowm Rao, (Plaintiffs) v. Nuna Sirain Rao, 2nd April 1855, North Western Province Reports, page 146, three Judges of the Agra Sadr Court held, that the competency of a Hindu to make a testamentary disposition of his self-acquired property could no longer be regarded as open to discussion; but that as a practice was opposed to the general feeling of the Hindu community, by whom such a disposition is regarded as contrary to the spirit, if not to the letter, of their Shastras, and as an irreligious and unjust act, reflecting discredit on the testator, the most convincing and impeachable evidence should be required to support it. The same doctrine has since been repeatedly confirmed by the same Court. See Gunnamath, proper v. Jodlanath and Musunut Ramdei, 17th March 1859, N. W. P. Report 63; Khen Chaud v. Guananee Kor, Ibid for 1861, page 423. The decisions of the Calcutta High Court, on the Mitakshara law of alienation, subsequent to and following the case of 1863 reported in the text, are Ajoodhya Pershad Singh v. Ram Sara and others, 5th July 1866, VI. Suth. W. R. 77; Sudamand Mohapatre v. Bononalee Das Mahapatre, 26th September 1866, Ibid, pages 256-259, 261-262; and Bena Misser v. Rajah Bishen Prokash Narain Singh, X. Suth. W. R. 287. *.

* Since the above was written the High Court at Agra has engrafted the singular qualification on the power of a Hindu over his self-acquired property, that while he may make an unequal distribution of that property "he has not the power of disposal so absolutely by gift in his lifetime as to enable him to give it all to one son or grandson in exclusion of the rest." Maha Sookh and Budree, 21st May, 1863, I. H. C. N. W. P. Rent. 57, printed at Government Press Allahbad. This ruling is certainly opposed to the view of the law taken in the other cases above referred to, which I think conclusively show that the father has complete power over his self-acquired property, whether as regards a gift inter vivos, or by a will to take effect after his death.
3. In Bengal, where the Dayabhaga of Jimuta Vahaua prevails, it has been repeatedly held that a father has complete power over every description of property, whether ancestral or acquired. Ramkumar Mullick v. Kishenkunkur Tark Bhosun, 24th November 1812, 11, Select Reports, 52, new edition; Jugomohan Roy v. Neemoo Dosses, 21st November 1831; and Soojemonee Dosses Denobundo Mullick and others, 20th June 1850, 1. Tay. and Bel. Reports 341. In the recent case of Gannendrmohan Tagore v. Opendermohun Tagore and others, 1st April 1869, Mr. Justice Phear said:—"I have never heard it doubted that the Hindu Law, as prevalent in Bengal, under the construction of it which at present obtains and is binding on this Court, permits a man to dispose by will of all his property, whether self-acquired or ancestral, with complete discretion of his heir." Supplement to "Englishman," 20th April 1869.

4. According to the Mithila Law, as under the Mitakshara, the consent of sons or grandsons is requisite in the case of any alienation of ancestral immovable property, except on proof of necessity, in which event the father is himself empowered to effect a sale or other transfer. Gopalchund Panda v. Babookooneur Singh, 3rd April 1830, V., S. D. A. Cal. Reports 24; Modde Jall v. Mitterjee Singh and others, 29th June 1836, VI. S. D. A. Cal. Reports 71; Sree Prabhakar Jha v. Ram Jha, 23rd April 1866, V. Suth. W. R. 221; and Kuntero Lall v. Greenhavre Lall, 16th April 1868, IX. Suth. W. R. 469. It has even been held that a father cannot give a Makurrari lease of even a very small portion of ancestral land, at a nominal rent, as a reward for long and faithful service, when his children do not consent to such a grant. Pratapnarayan Das v. Court of Wardes, on behalf of Baboo Srigunranarayan Singh and others, 12th April 1869, III. B. L. Rept. 21, A. J. C. And where a settlement made by a father of ancestral property is not assented to by the sons living at the time, and another son is afterwards born, no subsequent assent of the former would be binding on the latter. Harfodonto Nammin Singh v. Beer Nammin Singh, 12th May 1869, XI. Suth. W. R. 480.

5. As to what constitutes necessity within the meaning of Hindu Law, it is hardly possible to lay down any general rule; but it must be at least of an urgent character and one which cannot be avoided except by having recourse to the sale of the ancestral estate. The words of the Mitakshara are: "when a calamity affecting the whole family, or the support of the family, or indispensable duty such as the obsequies of the father or the like, renders alienation unavoidable." Chapter I, Sec. I, 29. It must be admitted, however, that by the use of the words indispensable duties, a wide field for discussion is left open, as it is nowhere defined, so far as I am aware of, what duties the Shasters would recognise as 'indispensable.' The following cases, however, will show what circumstances have been accepted by our Courts as justifying alienation.

6. Where decrees of creditors were in execution against the father, and the latter was himself in confinement under a criminal prosecution, and had been fined 100 Rupees, it was held that these circumstances justified alienation. Luchmun Koour v. Madari Lall, 16th September 1850, I Select Report, N. W. P. 77. The head of a family may alienate hereditary property during minority of sons or brothers, for their support, or for the services of religion or other pressing necessity, without the consent of sons, whose power of interdiction to prevent alienations of the ancestral estate extends only to acts of dissipation or waste. Ibid; M. S. A. December for 1859, page 142; Ibid, page 270; Ibid for 1860, page 49; Ibid, page 227; Bimmu Naik v. Sudashreeh Mohapatru, 9th September 1864, I, Suth. W. R. 96; White v. Biskotchunder Biswas, 16th May 1863, Hay's Reports 567; and Mohere Singh v. Hawara Singh, 11th April 1866, I, F. R. 53. The payment of Government Revenue is a legal necessity. Sahib Zadeh Mohopersetba Singh and others v. Ramghureeb Chouhee, 18th August 1851, I, Select Reports, N. W. P. 173; Gooroo Purnda Jana v. Muddun Mohun Soor and others, 11th December 1856, S. D. A. Cal. Reps. 980; and Gopalchunder Mansa v. Gour Munee Dosses and others, 28th June 1866, VI. Suth. W. R. 52. A Hindu widow has the power of alienating from one to three sixteenths of her husband's property for the benefit of his soul. Ramchunder Sarna v. Gunja Gobiad Bannerjee, 1st February 1826, III. A. Cal. Reps. 117. She can also alienate her husband's property for the purpose of performing his Srada, or for the maintenance of a minor son. Sukkenah Banoo
v. Hurro Churn Buruj, 20th June 1866, VI, Suth. W. R. 34. So also for the payment of his bona fide debts. Rambhau Majmynder v. Mummat Tara Munen and another, 18th December 1811, I, Calcutta Select Reports 481, new edition; see also Vol. VII, Cal. Select Reps, 354. But the debts should not be of small amounts which might well be met by other means. Ramdhone Ghose v. Ranee Doorga Sundry, 8th July 1864, Leg. Remem. 111. It is also incumbent on the party claiming under such a sale, to show clearly both that the debt was the debt not of the widow but of her husband, or his ancestor, and that the creditor brought his suit against the widow as executor of the estate, and obtained a decree in such a form as to render the estate liable and not the widow only. Baboo Joy Kurun Lalt v. Doolab S-ingh, 9th June 1864, Ibid, page 52; Collector of Mamlipatam v. Cauvaly Vencata Narainapak, 21st December 1861, Suth. P. U. Judgments 476. In the latter case their Lordships remarked that "for religious or charitable purposes, or those which are supposed to conduces to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for this last, she must show necessity." The building of a Thakurduara and the sinking of a well, although in obedience to the wishes of her late husband, were held not to justify the alienation by a widow of his real ancestral property. Kurn Kour v. Ramdhan, 22nd August 1866, I. P. R. 139. Where a father, while a member of an joint family, being unable to give his quota towards the marriage expenses of his younger brother, executed a release of his share of the inheritance, it was held that as the payment of the marriage expenses were necessary for the preservation of the family credit, the release was valid. Narain and Beeru v. Dhuuma and others 12th May 1866, Ibid, 87.

7. As to the party on above, the onus probandi lies to prove or disprove the fact of necessity in such cases, see post, page. A purchaser is not bound however to prove the appropriation of the monies borrowed. Sukhram Banoo v. Hurro Churn Buruj, 20th June 1866, VI, Suth. W. R. 34; and Kum Porshad Singh v. Nagbhunshkee Koer, 27th April 1866, IX, Suth. W. R. 501. But where a father had improperly sold ancestral property and the purchaser claimed refund of purchase money from the son who sued to set aside the sale, it was held by a Full Bench of the Calcutta High Court, overruling the contrary decision of the Division Bench in the case reported in the text, that the onus was on the purchaser to show that the son had the benefit of his share of the purchase money. Madhoo Dyal Singh v. Gulbub Singh 29th April 1868, IX, Suth. W. R. 511, See post page 241.

8. With respect to ancestral movable property, notwithstanding that Macnaghten understood the Benares law to impose the same restrictions upon it as in the case of ancestral immovables, (side Principles of H. L. p. 46-47 Wilson's edition, but see page 3 of same, edition), it is quite clear that the Mitakshara draws a distinction, and confers dominion on the father over "Gems, pearls, and other movables, though inherited from the grand father," and which are said to belong exclusively to him. Chapter I, Section 1, 21, 24, 25 et seq :

8. The Benares law does not permit alienation of a share in undivided patrimonial property by one of the coparcenary brethren without the consent of the remaining co-sharers, or unless the coparcenary brethren have entered into a compact to permit alienation. Jaynarain Sing and others v. Boshua Sing and others, 19th March 1860, S. D. N. W. P. Reports, 162; Thakur Rai and Ballest Rai v. Sakat Balle Rai and others, 21st July 1862, Ibid 47. The Bombay Courts have followed the same doctrine. See Full Bench decision in Gangubai v. Ramanna, 11th July 1866, I, Bombay High Court Reports, 65, A. C. J.; and so also the late Sadr. Court of Madras, in Ramakvila Aiyar v. Kulatturuyaian, S. A. Dec. for 1859, page 270; Kana Kashiya Pillai, v. Sesbachalu Sastri, Ibid, for 1860, page 17; and Sundra Pillai v. Tegaraja Pillai, Ibid, page 67. These decisions, however, must be held to be virtually set aside by the later decision of the High Court of Madras, in Virasrami Gramini, v. Aygas Vami Gramini, 15th, December 1863, (Scotland C. J. and littleston, J ) wherein it was laid down that a member of an undivided family might make a valid sale of his share and interest in the property, to which he would be entitled if a partition took place, and that there might also be a valid sale of such a share upon an execution in an action for tort damages for tort, I, Madras High Court Reports, 471.
Under the Mitaksara Law, a son is entitled to recover from a purchaser from his father, ancestral property improperly sold by the father, and in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding any part of the purchase money. If, however, the purchase money went to credit of the joint estate, or was applied to removing an incumbrance binding on the son, the right of the latter to recover will be subject to that of the purchaser to stand in the place of the incumbrancer.

The onus in such cases to prove the application of the purchase money, lies on the purchaser.

MADHOO DYAL SINGH (PLAINTIFF) Appellant,

Versus

GOLBAR SINGH AND OTHERS (DEFENDANTS) Respondents.

Before the High Court of Bengal.

Present:—Peacock, C. J. and Jackson, Phear, Macpherson, and Mitter, J. J.

This case was referred to the Full Bench, on the 3rd December 1867, under the following orders recorded by the Honorable Justices Wyman's Rep. F. B. Kemp and F. A. Glover:

The circumstances of this case have already been detailed in our judgment in special appeal No. 1057.

This special appeal is preferred by the plaintiff against that part of the Principal Sudder Ameen's decision, which orders him to repay the money advanced to his father, Sheokishen, (Rupees 2,900,) before he can get possession of the family property.

The Principal Sudder Ameen has decided that the plaintiff must refund, on the authority of a decision of this Court, dated September 30th, 1863, Mudden Gopaul Thakoor versus Ram Buksh Panda and others, (11 Wyman's Reporter, 81,) in which it is laid down that, in the absence of evidence to the contrary, it must be presumed that the price received by a father selling a portion of an ancestral estate, became part of the assets of the joint family; and that if a son seeks the aid of a Court to set aside the purchase, he must do equity and offer to repay the purchase money, unless he can show that no part of such purchase money, or the produce of it, ever came into his hands.

We have been unable to find any other decision of this Court in which a similar doctrine has been laid down, and we are unable to assent to it.

A long current of decisions * has fixed it as settled law that, by the Mitakshara, a father cannot alienate ancestral property without the consent of the son, unless for certain necessary purposes. In all other cases the son has an absolute veto in the sale, and must succeed in a suit to set it aside. In the present case it has been found that there was no necessity, and no acquiescence, and we do not see, therefore, why the purchaser should be entitled in equity to a refund from the son of his purchase money. The son never knew of the sale, and never agreed to it. The sale may have been of a most imprudent description, and one which no man of sense would have made.

In the present case neither the son nor the father appears to have derived any benefit, for the land was sold in order to redeem a mortgage which had still three years to run, and on which no advantage is even alleged.

But even were it not so, it appears to us that as the Mitakshara law gives a son an equal right with the father in the matter of alienation,

*Beginning with the Sudder Dewanny Adawlut Ruling in the case of Ameen-uut Misser, Sudder Dewanny Adawlut Reports, 1861, page 193, and ending with the Full Bench Ruling of the High Court in the case of Rajah Ram Zewari and others, IV, Wyman's Reporter, 28.
nition, it must give him that right absolutely, and that a son seeking to set aside imprudent or unnecessary sales made by a father, is not bound to refund to the purchasers. If it were so, he would not succeed on his right as a son, but on his power as a man of substance. A poor man would be virtually deprived of the right which the Mitakshara law undoubtedly gives him.

Cases of this sort appear to us to be those in which the maxim of caveat emptor should be strictly applied. Every purchaser in the Mithila districts, knows perfectly well the nature of a father's rights in ancestral property; and if he chooses to purchase without first securing the consent of the heir, or without assuring himself of the existence of a necessity, he has only himself to blame if the son recovers possession of what has been improperly taken from him. He appears to us to have no claim to equitable consideration.

As our opinion differs from that of the learned Judges who decided the case above referred to, we must, in accordance with the rules of practice laid down for guidance, send up this case for the orders of a Full Bench. The point on which we ask the Full Bench's decision is whether, under the Mitakshara law, a son, who recovers his ancestral estate from a purchaser from the father upon proof, that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, is bound in equity to refund the purchase money before recovering possession of the alienated property.

JUDGMENT OF THE FULL BENCH.

Peacock, C. J. (the other Judges concurring):—The question upon which the opinion of the Full Bench is asked is, under the Mitakshara law, is a son, who recovers his ancestral estate from a purchaser from the father upon proof that there was no necessity as would legalize the sale, and that he never acquiesced in the alienation, bound in equity to refund the purchase money before receiving possession of the alienated property.
There can be no doubt that, although the word "recovers" is used in this question, the meaning is whether, under the circumstances stated; a son is entitled to recover, except upon condition of refunding the purchase money. Assuming that to be the question, I think the answer should be that, in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding the purchase money, or any part of it. We express no opinion as to whether he would be entitled to recover the whole or only his share of the estate.

Having answered the question propounded, I think we ought to add that, if it is proved to the satisfaction of the Court that the purchase money was carried to the assets of the joint estate, and that the son had the benefit of his share of it, he could not recover his share of the estate without refunding his share of the purchase money: so if it should be proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate which was binding upon the son, and the purchase money was applied in freeing the estate from the incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not have compelled the immediate discharge of it, and that the decree for the recovery by the son of the ancestral property, or of his share of it, as the case might be, would be good, but should be subject to such right of the purchaser to stand in the place of the incumbrancer. It appears to me, however, that the onus lies upon the defendant to show that the purchase money was so applied. I do not concur with the decision which has been referred to from II, Wyman's Reporter, page 81, in which it is said that "in the absence of evidence to the contrary, it must be assumed that the price received by the father became a part of the assets of the joint family." If the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the onus lies on the person who contends that the son is bound to refund the purchase money, before he can recover.
the estate, to show that the son had the benefit of his share of that
purchase money. If it should appear that he consented to take
the benefit of the purchase money with a knowledge of the facts,
it would be evidence of his acquiescence in the sale.

I think the case must go back with this answer to the
Division Bench which referred the question to us, in order that
the case may be finally determined upon the merits by that Bench.

1. The above decision has authorita-
tively settled an important point which
could arise in cases of sales
by a Hindu; viz., whether the party
who seeks to set aside an invalid sale
is bound, even where there was no
necessity for the sale, to refund the pur-
chase money unless he can prove that he
never derived any benefit from it. The
Full Bench Ruling it will be seen,
throws the onus in such cases on the
purchaser to prove the application of
the consideration money on the part
of the vendor, and failing this the ven-
dee or purchaser is entitled to no relief
whatever. On the general question of
necessity it is, however, impossible to
lay down an inflexible rule, which
would govern all cases, as to whether
the purchaser has to establish by posi-
tive evidence, the fact of necessity, or
whether it is the reversioner who has
to show circumstances inconsistent
with the existence of a necessity such
as the Hindu Law would recognise.
In Honamim Per.hruiPandey v. lieu-
ster. Babooee Munraj Koonwaree, VI. M. I.
App. 393, the Privy Council laid
down that "a lender is bound to en-
quire into the necessities for the loan,
and to satisfy himself as well as he can
with reference to the parties with whom
he is dealing, that the manager is acting
in the particular instance for the benefit
of the estate. * * * 3 * * *
Their Lordships do not think that a
bona fide creditor should suffer when
he has acted honestly and with due
cautious, but unless it is the case of sale
of land. Their
Lordships, however, guarded themselves
against laying down any general rule
as to the person on whom the onus lies
in such cases, and distinctly declared
that the presumptions proper to be
made should vary with the circum-
stances and the complaint brought by and
dependent on them. But there can be no
doubt that the above passage embodies
the correct principle to be applied,
and the Courts in India would of

course be bound to carry it out as far
as possible. Thus in Mans. Bhooran
Koor and others v. Suhaydooed by the,
6th August 1866, where there was grave
suspicion that the suit to set aside the
purchase was promoted by the father;
the Court (Kemp and Markly J. J.)
held, that the purchasers were not bound
to prove actual necessity; it was suffi-
cient that they had acted
and with due caution, being reasonably
satisfied at the time of their respective
purchases of the necessity of the sales
in order to meet debts which the father
had a right to discharge. VI, Suth.
W. R. 149. In Rampershed Soookul
v. Rajander Sahooey, 26th September
1866, which was a case of sale by a
Hindu widow, Peacock C. J., said :-
"I think that the onus lay upon the
defendant to show that there was some
danger to be averted from, or some
benefit to be conferred upon, the estate
by the sale, or that the purchaser
under whom he claims, did make en-
quiries into the necessity for the sale
and satisfied himself that the widows
were acting in this particular instance
for the benefit of the infant." Ibid,
p. 265. So also in Rampershed Singh
v. Mans. Nagbungshee Koor and others,
27th April 1868, (Kemp and J. Jackson,
J. J.,) where a Hindu Widow mortgag-
ed certain landed property for the
purpose of mixing money to meet the
marriage expenses of her daughter, it
was held that "the mortgagee was not
bound to look to the appropriation of
the monies which were raised by the
mortgage. He satisfied himself that
there was a legal necessity for the loan,
and there his responsibility ceased. He
had no control over the money, or how
it was to be spent, or whether the
whole sum advanced was spent in the
marriage or not." IX Suth. W. R.
501. The mere existence of a decree
against the father, is not sufficient evi-
dence of the necessity for his selling
his son's interest in ancestral property.
Thus, where certain sales took place in execution of decrees, the decrees only showing that the father had incurred debts, and it was urged on behalf of the purchasers, that the existence of these decrees was sufficient to support their case that there was a necessity in the sales, and that they could not be required to go further behind the decrees, and to point out the exact mode in which the sums borrowed by the father were spent; the Court overruled the plea, pointing out that: "the purchaser at a sale in execution of decree purchases only the rights and interests of the person whose property is put up for sale. If his interests are limited except under certain contingencies, the purchaser must be prepared to prove those contingencies, if he is desirous to make out that under the sale any thing more than the interest of the debtors passed to him. In the present case, there is no evidence to show that the father required to raise money for any pressing necessity for the benefit of the family."

Kanto Lal v. Girdharee Lal, 16th April 1868, IX Suth. W. B. 470-471; see also the decision of the Chief Court of the Punjab in Ragunath v. Rakhim Bux and others, 27th April 1889, IV Punjab Record, page 106.
Where ancestral property is sold by the father the son is entitled to sue for a cancelment of the sale in the lifetime of the father; and the decree in such a case should be one cancelling the sale so far as it in any way obstructs the son in asserting his right to a partition of the property, but, subject to this reservation, allowing the actual possession, that may have been obtained by the purchaser, to stand good for the term of the father's life.

BABOO RAM AND OTHERS (PLAINTIFFS) Appellants,

Versus

GAJADHUR SINGH AND OTHERS (DEFENDANTS) Respondents.

Before the High Court of the N. W. P.

Present: Morgan C. J. and Ross, Edwards, Roberts, Pearson & Turner, J. J.

The question referred to us is, "whether, when a (Hindoo) father has aliened by sale ancestral property the son is entitled to sue for a declaration of right and a cancelment of the sale; or whether he ought to have a decree only declaring that the property is ancestral and that on his father's death it will pass to the heirs of his father."

We think that the son is entitled to sue for a cancelment of the sale. The decree in such a suit should not be in the terms suggested, that is to say, declaring that the property is ancestral and that on the father's death it will pass to his heirs; but a decree cancelling the sale.

In cases of this description, where the plaintiff has sued to obtain possession of the property, for himself, as well as to cancel the sale, the Courts have refused to decree possession, and where, as in the present case, the plaintiff's suit is to cancel the sale and oust the
purchaser from possession, (although the plaint does not expressly ask that the plaintiff should be put into possession,) we think the decree should be confined to the cancelment of the sale. A decree in these terms in effect declares, that the alienation by sale is invalid, and cannot have force to confer a title by purchase. But it does not interfere with or disturb the actual possession, which the alleged purchaser may have obtained.

A decree in the form suggested, postpones the son's right until after the father's death; and by implication recognizes the validity of the alienation at least for the term of the father's life. According to Hindoo law, the father's alienation of ancestral property without the consent of the son is invalid; and cannot take effect even for the life of the father. The son may, it is laid down, (and there are not wanting modern authorities to show this,) compel a partition of the estate during the lifetime and against the consent of the parent. This right cannot be taken away or diminished by a sale made by the father alone; and the purchaser although purchasing (as it is now assumed he has done) with perfect good faith, can stand in no higher position than the father. If he has bought in good faith, he is equitably entitled at least to whatever portion of the property, the father may ultimately be able to confer on him; and as against the father he is entitled to retain possession until this portion has been secured to him. The son is entitled to a decree setting aside the sale so far as it can in any way obstruct or impede him in asserting his right, and no further. The case itself, out of which this reference arose will be disposed of by the Division Bench.
ALIENATION:—(Continued).

The consent of nephews to the sale by the uncle of his share of ancestral property is requisite neither according to the Mitakshara, nor to the Hindu Law as current in Mithila. The consent of sons and grand-sons is alone necessary to the sale, by the father, of ancestral property.

The principle of the distinction is, that a son has an inchoate right in the possessions of his father from the time of his birth, whereas a nephew has no right at all in the ancestral property in the possession of his uncle until after the death of the latter.

GOPAL DUTT PANDY, (PLAINTIFF) Appellant.

Versus

GOPALLAL MISSER AND OTHERS (DEFENDANTS), Respondents.

Before the Sadr Dewani Adalat of Bengal.

Present:—C. B. Trevor, E. A. Samuellss J. J. and H. V. Bayley O. J.

These cases were admitted to special appeal on the 17th March 1859, under the following certificate by Messrs. E. A. Samuellees and G. Loch.

This suit was remanded to the Judge of Tirhoot on the 30th of May 1857, (page 934) with instructions to enquire into the bona-fides of a conditional sale on which the plaintiff relied. The Zillah Judge has laid down two issues for determination, first,—whether, according to the Shasters, it was competent to Brijalall Misser, (the person who executed the deed) to alienate his ancestral property without the consent of his heirs; and second, whether the deed was genuine. Why the latter issue was not tried first is not apparent. On the
point of law, which was raised by the first issue, the Judge has decided that Brijall Misser was not entitled to alienate his property by conditional sale, without the consent of his heirs.

The opposing heir in this case, and so far as appears the only existing heir, is a nephew; and it is contended, in special appeal, that neither according to the Hindoo Law current in Mithila, nor the Mitakshara, is the consent of a nephew necessary. It certainly does not appear that the consent of any heirs other than the sons and grand-sons has hitherto been held necessary, to render valid a sale of property in the countries governed by the Mithila Law; and we admit the special appeal to try whether the Judges' decision in this case is not consequently erroneous.

**JUDGMENT.**

In this case the special appeal has been admitted to try whether the Judge has not erroneously held that the consent of the nephew is necessary to render valid alienation of property under the Mithila Law.

We consider it quite clear from the Mitakshara, Colebrooke, page 210, para 3, and from MacNaghten's Hindu Law, Volume I, page 46, that the consent of nephews is not requisite, under either the Mithila or Mitakshara, but those whose assent is necessary are sons or grand-sons. The principle of the distinction is explained in the passage from the Mitakshara cited, viz, that the son has a right on his father's property from the time of his birth; whereas a nephew can have no right until after the death of the party from whom he inherits. The special respondents' pleader has been unable to show us any authority of Hindoo Law, or any precedent in point, opposed to this view.

We therefore decree the special appeal with costs on special respondents.
The two first pleas may be true, but they are, in our opinion, of no avail for the purpose of setting aside the Judge's decision, whether the grounds of that decision be altogether correct or not. The plaintiff took up his position in this suit mainly, if not exclusively, as the heir presumptive of his uncle on the averment, that by the act of the latter an improper alienation of ancestral property was indirectly about to be effected. For the dismissal of the claim so brought, it is sufficient to remark that a nephew is not competent by Hindoo Law to object to any alienation of ancestral property even directly made by his uncle. In so far as the plaint refers to the decree passed in a former suit, if that decree recognized the property in suit as the joint ancestral property of the plaintiff's father and the defendant, and prohibited the latter from alienating it without the consent of his co-partner, it seems sufficient to refer to the Judge's finding that the defendant's share in that property has been subsequently partitioned off.

As to third plea, we remark that the decree referred to was simply a decree for a money debt, for which no property was specially hypothecated and which may be realized from any property belonging to the judgment debtor.

We see no reason to think that the suit has been wrongly dismissed, and we accordingly dismiss the appeal with costs. Bearing interest at 6 per cent.

The above cases have been followed in a more recent decision by the Chief Court of the Punjab. Moola v. Atma, 20th March 1869. (Simpson and Boulnois, J. J.)
ALIENATION Continued:—Power of, by Widow.

I.—A childless Hindu widow and nearest heir of her deceased husband, has under the Hindu Law in the Presidencies of Madras and Bombay, and also by the Mithila Law, an absolute right over all the moveable property left by him, and can alienate it to whomsoever she pleases. A Government Promissory Note, is not a "corody," or consequently immovable.

II.—But according to the Law of Benares as well as the Law of Bengal, there is no distinction in respect to a widow's power of disposition between movable and immovable property; and such power is limited to certain purposes.

I.—(A) PRANJEVANDAS, TOOLSEYDAS, AND JUGMOHUNDASS JUMNADASS, Plaintiff.

Versus

DEWCOOVERBAEE, WIDOW OF RAMDAS, AND OTHERS, Defendants.

Before the Supreme Court of Bombay.

The point with reference to which this case is reported arose in the following manner. One Herachund Luckmichund died in the Christian year 1819, leaving four sons, Ramdas, Purshotumdas, Toolseydass, and Jumnadas. Toolseydass died intestate in 1830, leaving one son, the plaintiff Pranjeevandas Toolseydass. Jumnadas died intestate in 1832, leaving one son, the plaintiff Jugmohundas Jumnadas. Ramdas died in 1846, leaving a widow, the defendant Dewcooverbaee, and four daughters who were all married; but no male issue. In his lifetime Ramdas had executed a Gujerathi will which contained the following residuary gift:—"And whatever surplus of my funds there may remain, the same is to be expended for charitable purposes.
"in my name, with the consent or advice of my wife and my brother "Purshotumdas." The last survivor of the brothers, Purshotumdas, died in 1853, leaving a son Bhugwandas one of the defendants, and having executed a will of which the defendants Goculnath Sawucknath and Nanabhai Purbhudas were acting executors.

The plaintiffs filed their bill against the defendants, and amongst other things prayed that the residuary bequest in the will of Ramdas might be declared void and inoperative, as being so vaguely expressed as to be incapable of being carried into effect, and that it might be declared that the plaintiffs as co-heirs with Purshotumdas of Hera-chund and also of Ramdas, and as members of a joint and undivided family became entitled upon the decease of Ramdas to one-third part each of his residuary estate.

The evidence taken at the hearing was considered by the Court to show that Ramdas had separate property moveable and immoveable in respect to which his will and the residuary bequest therein contained could operate, and two questions then arose with regard to the residuary bequest—(1). Was the same a valid bequest to charity, having regard to the vagueness and generality of the Gujerathi word for charity, viz., "Dhurm" used in the will? and (2). If the bequest was void to whom did the residuary property of Ramdas, the subject of such bequest, descend? The decision of the Court with reference to the first question was that the bequest was void, and that the residue was undisposed of. The judgment of the Court on the second point was delivered on the above day by Sausse, C. J., and was in substance as follows:

The testator left a widow and daughters, and we must consider first what estate the widow took, the husband dying leaving separate property? I have felt considerable difficulty in coming to any decision, the schools being so conflicting, and it is difficult to follow the reports of the Adawlut. The books of chief authority in this part of India are three: Munoo, the Mitakshara, and the Vyuvhara Muyukhu. Mr. Colebrooke in a letter set out in the appendix to
Strange's Hindu Law * speaks of the Muyukhu as being in the West of India and particularly among the Mahrattas the greatest authority after the Mitakshara. Mr. Borredaile in his reports, also speaks of these as being the three books generally referred to in this part of the country. I had inquiries made of the Shastrees here and at Poona, and was informed that these three books have been established by usage as authorities in this part of India, and for the last 80 years have been referred to as such upon the law of inheritance in this presidency. The Dayabhaga and Daya Krama Sangraha, referred to in Sir Thomas Strange's preface, are of the Bengal school. I was induced to make these inquiries because Strange refers to Bengal authorities, and the Bengal law is on many points different from that in force in this part of India.

Then according to these three books what estate does the widow take? All the authorities both in Bengal and here are in unison as to the right of the widow to succeed where the property is separate. In Bengal she succeeds also to undivided property, but her power over it, is stated to be limited, and she is treated merely as tenant for life. On this side of India, however, a different rule is considered to prevail, and it is based on the authority of the three books I have mentioned. In Strange † it is stated that the restrictions, there mentioned on the disposing power of a widow over property inherited from her husband, seem to concern land only, whereas with regard to moveables she has a greater latitude. He cites Bengal reports of the year 1812 and I. Borredaile's Bombay Reports p. 428. I have referred to the latter, but it does not appear to support the statement. In Steele's "Summary of the Law and Custom of Hindoo castes in the Deccan" published by authority of the Bombay Government in 1827, it is laid down that the widow of a separated brother dying without male issue succeeds by inheritance to the whole of his share of the family property and acquisitions, but that she has no right to alienate immovable property without con-

sent of all the male heirs, and subsequently "females however possess a life interest only in immovable inherited property and cannot therefore alienate it without consent of the next male heirs."† He also states that in Khandeish and Sattara the widow is heiress to the husband's personal property, but holds the real property for life only and without power of alienation. In the Mitakshara‡ it is laid down as a settled rule, that a wedded wife being chaste takes the whole estate of a man who, being separated from his co-heirs, and not reunited with them, dies leaving no male issue. In the Muyukhu§ the law is laid down very much in the same way. From these authorities, it would appear that a widow takes an absolute interest in her husband's estate, but in answer to my question the Shastrees stated that as to the immovable property she is limited to the use of it for life but she has power over the whole estate for proper purposes, provided she exhaust the moveable before resorting to the immovable property, the latter being an object of care to the Hindu law with a view to preserve it for the heirs. The schools and the cases are conflicting, and I find that over the moveable the widow has according to some cases a power of disposal, but that this power is denied in respect to the immovable. In Madras it was said, that a widow might give away personal property during her life, but cannot will it.||

On the whole I think the spirit and practice of Hindu Law as recognized in Western India, will be best construed by treating the widow as having uncontrolled power over the moveable estate, but as having nothing more than a life interest in the immovable estate. The widow has, according to the text books, a number of duties thrown upon her in respect to the mode of spending money she may have inherited, but these duties are of such a character that it would be impossible for the Court to enforce the performance of

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* Para 25, page 42. † Para 72, page 69. ‡ Chapter II Sec. I, para 39.
§ Paras 100-101 of Borrodaile's translation.
|| Justadah Nani v. Jygeranath Tagore. East's Notes of Cases No. XLVII.
them. In Bengal dealings by a widow with immoveable estate are held to be legally but not morally good, but I am not aware that such a distinction has ever prevailed here. I have therefore come to the conclusion that in regard to immoveable property her estate is in the nature of that of a tenant-for-life.

The widow then not having an absolute estate in the immoveable property, it remains to determine who are entitled to the absolute interest subject to the estate taken by her. In this case there are daughters. Now according to all the authorities the daughters take next after the widow. What then is the nature of the estate they take? Here again there are differences of opinion, but dealing with the question according to the three books I have mentioned, it appears to me that the daughters take an absolute estate. We find quoted in the Muyukhu* a passage from Munoo:—"The son of a man is even as himself, and the daughter is equal to the son, how then can any other inherit his property, but a daughter who is as it were himself." With reference to this point also I consulted the Shastrées both here and at Poona, and enquired whether daughters could alienate any and what portion of the property inherited from a father who died separate? The answer was that daughters so obtaining property, could alienate it at their will and pleasure, and in this the Shastrées of both places agreed, both also referring to the above text in the Muyukhu as their authority for that position. On reviewing all accessible authorities I have come to the conclusion that daughters take the immoveable property absolutely from their father after their mother's death. I hold therefore that the plaintiffs have no locus standi to maintain this suit. The bill must be dismissed with costs as against Dewcooverbaee and the Advocate General. As to the other parties, though nominally defendants, they are virtually plaintiffs, and have been acting in concert with them, therefore as to them I think the bill should be dismissed without costs.—Bill dismissed.

* Chapter IV, Section VIII, para. 10.
I.—(a) DOORGA DAYEE AND OTHERS, (DEFENDANTS) Appellants,
Versus
POOBUN DAYEE AND OTHERS, (PLAINTIFFS) Respondents,
Before the High Court of Bengal.
Present: C. B. Trevor and E. A. Glover J. J.

This was a suit for declaration of the Plaintiff's reversionary right (as guardian of her minor son Manik Chand, the next heir) to the property, real and personal, of one Ram Kishen Doss, and to recover possession of the same, on the ground that the principal Defendant, Mustt. Doorga Dayee, the widow of the said Ram Kishen, was wasting the property to the detriment of the reversioner.

The claim extended to the recovery of possession of the real property consisting of 3 annas share in Talook Amoniah not alienated, and to reserve certain sales of Government Promissory Notes made by the widow to third parties, the defendant No. 2, Brijo Rutten Dass, and Ojoodya Dayee, defendant No. 4, and also to annul a deed of sale in respect of two houses which was alleged to have been conclusively made by Mustt. Doorga Dayee to her mother, the said Ojooda Dayee (defendant No. 4).

The defence on the part of Mustt. Doorga Dayee was that she was, by Hindoo Law, the sole heiress of her deceased husband and competent to alienate the property if she were so minded. Ojoodya Dayee pleaded that she had purchased the two houses from the representative of the original owner and mortgagor, Mohunt Doulat Geer, who had from the purchase money paid off the mortgage held by Ram Kishen Dass; that the houses no longer, therefore, belonged to Ram Kishen's estate, and that the plaintiff had no claim upon them.

Brijo Rutten alleged that he had purchased the Government Promissory Notes in the ordinary course of his business as a banker.
from the registered owners in good faith for value, Nos. 1136, 1334 and 16867, worth 30,000 rupees from Ojoodya Dayee, and the other seven notes, worth 20,000 rupees, from Doorga Dayee.

The Principal Sudder Ameen held that Musst. Doorga Dayez had no right under the provision of Hindoo Law to sell the Government Promissory Notes, and that the sale of the houses to Musst. Ojoodya was fictitious. He considered that the widow had been guilty of waste, and ordered that the plaintiff, on behalf of the reversioners, her son Manik Chund, should get possession of all the property in suit, including the personal belongings of the widow, such as ornaments, shawls, &c. With regard to the Promissory Notes, he made the defendant No. 1 first liable, adding that, if the money (50,000 rupees) were not recoverable from her, the vendee Brijo Ruttun should refund the value. He made all three defendants liable for costs proportionately to their interest in the suit. And with regard to the widow, he charged the plaintiff with her maintenance, leaving the amount apparently to the latter's discretion.

Against this decision all three defendants appealed. Musst. Doorga Dayee in No. 354, her mother, Ojoodya Dayee, in No. 355, and the banker, Brijo Ruttun, in No. 319. Their grounds of appeal are mere recapitations of their original defences to the suit.

And first, as to the objection of the widow Doorga Dayee, which, so far as the present case is concerned, may be restricted to her power of selling the Government Promissory Notes to her mother and Brijo Ruttun.

She contends that in her position as a childless Hindoo widow, and nearest heir of her deceased husband Ram Kishen, she had an absolute right over all the personality left by him, and might alienate it to whomsoever she chose. In support of the other contention, we have been referred, in the first place, to Colebrooke's Mitakshara, page 365, Section 10, para 2. Woman's property is there defined to be amongst other things, "property which she may have acquired by inheritance, purchase, partition, increase, or finding." The passage
has been the subject of frequent interpretation, and various authorities have been cited to show that, as regards moveables at least, property inherited as this was, became the absolute right of the widow.

In Strange's Hindow Law, Volume I, page 246, we find the following passage in connection with the page 2, Section II, para 2 of the Mitakshara. "With respect not only to what she may have inherited from her husband, but to its accumulated savings also, her duty (the widow's) is to regard herself as little more than a trustee for the next heirs." But the learned Commentator goes on to say, "The restrictions however, in the extent stated seem to concern land only," and again—"With regard to moveables (slaves excepted, that are considered as land), she has a greater latitude," and her "streedhun being peculiarly hers, whatever falls under this description, would seem to be not only hers, without reserve, for present use, but to be at her independent and uncontrollable disposal." And again, in page 248. "According to the Mitakshara and its followers, property which may have been acquired by inheritance is transmissible to her own heirs classing with this school as part of her streedhun."

In the Vivoda Chintamonee, pages 261, 262, there occur the following words:—"Katyayuna says as to the first of these, viz., that, on the death of the husband, his property devolves on the wife and becomes her own in default of other heirs, 'let a woman, on the death of her husband, enjoy her husband's property at her discretion.'"

"This refers to property other than immoveable."

Following this view of Hindoo Law, we have a judgement of the Calcutta Supreme Court in the case of Kashinath Bysack (Morley's Digest, Vol. II, page 198), in which it is laid down that, with regard to property which becomes the widow's for want of other pro-
ferable successor, the law declares that she may place or dispose of effects other than immoveables as she pleases. This case comes from Tirhoot, one of the districts forming the ancient province of Mithila; but the law is admittedly the same in this particular, both for Mithila and for the provinces governed by the Mitakshara.

Following this view of Hindoo Law, come to two decision of the Madras Suddur Dewanny Adawlut (reported in Morley's Digest, new Series, Vol. 1, page 180). In the first, the widow is declared, under the Mitakshara Law, to have the power to dispose of moveable property left by her husband, although she could not alienate the real estate without the consent of the next heirs. In the other (Gopalla Potter and another Versus Narain Patter, 28th September 1850,) reported in the same Volume and page, the same view is set forth still more emphatically: the widow is declared "to have absolute authority over the personal or moveable property inherited by her from her husband to consume or dispose of it at her pleasure."

In Bombay, where the Mitakshara system of law prevails, we find the High Court coming to precisely the same conclusion. In the case of Becha Bagwan (Bombay High Court Reports Volume 1, part 1, page 56) it was held that "a Hindoo widow's right, to alienate moveable property inherited from her husband, without the consent of his heirs, is absolute."

And again, in the case of Pram Jeebun Dass (reported in page 130, Volume 1, part 2, Bombay High Court Reports) the Bombay High Court held "that a widow was entitled to the moveable property left by her husband absolutely."

The same principle is indirectly laid down in a decision of this Court of the 23rd June 1865, viz., that the widow has an absolute dominion over personal property.

It is contended by the respondent's Vakeel, that all these decisions and opinions are based on the simple paragraph * of the Mitakshara.

* Para. 2, Sec. II, Chapter II, Calebrook's Mitakshara.
chara above quoted; that the meaning of that paragraph is in itself
dubious, and that there are other authorities which would prove the
intention of the law to be different.

These authorities, as the pleader admits, are "locked up in
Sanscrit," but he wished the Court to have them translated by com-
petent persons and explained by Pundits learned in Hindoo Law.
We, however, decline to adopt this course, and are content to decide
this case on expositions of the law that have received the au-
thoritative sanctions of the Highest Courts in India, and which are,
therefore, binding upon us.

To sum up.—In support of the appellant Doorga Daee's case, we
have a dictum of Hindu law from the book most valued by Hindoos,
explained by the authority of successive Commentators, and this ex-
planation supported by the current opinions of the Highest Courts of
Law, both in Madras and Bombay; whilst the respondent has not
been able to quote a single precedent of any Court, in which a con-
trary opinion has been held. And we have, therefore, no hesitation
in following what appears to us to be a just and reasonable interpreta-
tion of the 2nd para. of section 11 of the Mitakehara.

There is no question in the present case, of the appellant's hav-
ing inherited the property from her husband, and explaining
the term 'inheritance' in the sense given to it above, we declare
that, so far as regards the Government Promissory Notes, the
appellant Doorga Daee had by law an absolute right to dispose of
them to whom she pleased.

But it is further contended by the respondent's vakeel that, even
if it be admitted that the appellant had a right to alienate moveable
property, these Government Promissory Notes ought not to be con-
sidered in that light, but rather as real estate.

In support of this argument, we are referred to a passage in
'Macnaghten's Hindu Law,' * in which it is stated that Hindu law

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"classes amongst things immoveable, property which is of an opposite "nature, such as slaves and corodies or assignments on land." And a Government Promissory Note is said to be of the nature of a "corody" in the terms of the Dayabhaga. The definition of a "corody" there given (Colebrooke's Dayabhaga, Chapter II, para. 13, page 26,) is "something fixed by a promise in this form, 'I will "give that in every month of Kartick,'" and it is urged that as a Government Promissory Note covenants that interest shall be paid on it at certain specified times, it is a "corody," and, therefore, real property. There can be no doubt, we think, that the word "corody" is used solely with reference to land. Macnaghten calls it an "assignment on land"; and the passage in the Dayabhaga manifestly refers to land—it runs thus:—"The ownership of father and son is "the same in land that was acquired by the father, or in a corody, or "in chattels," and from the explanation given in the succeeding para. 14 of the word "chattels," it is clear that the intervening term "corody" refers equally with chattels (which are explained to mean slaves) to land, and to assignments upon it, so that as a Promissory Note does not refer to land, it cannot be held to be a corody, or, as a consequence, immoveable property. For these reasons, we reverse the decision of the Principal Sudder Ameen, so far as it relates to the cancelment of the sale of the Promissory Notes.

This decision will also dispose of the appeal of Brij Ruttun, the banker, No. 319.
On appeal from the late Sadr Court at Agra.

The following are the undisputed facts upon which this appeal arises:—Rae Deena Nath, a Hindoo banker of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th of June 1855, childless. He was separate in estate from his brethren if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindu law of the Benares school, were his two widows, viz., the respondent and Doola Baee since deceased. Immediately after his death however, a document, purporting to be a will, executed by him in favor of one Hunwunt Pershad, to whom, jointly with a person named Bithul Pershad, to whom it gave the management of the property was propounded. The title of Hunwunt Pershad claiming under this alleged will, or as the adopted son of Rae Deena Nath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is now pending, but it has not yet been set down for argument in consequence of the death of one of the parties; and for the purposes of this appeal, it must be assumed that Rae Deena Nath died childless and intestate, and that the claim of Hunwunt Pershad, was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the appellants Counsel have founded on the partition between the two widows, which was in some

measure caused by it, and upon the alleged collusion of the respondent with the claimant.

The first consequence of the claim was that a summary suit, under Act XIX of 1841, to determine the right to the immediate possession of the property, was instituted in the name of Doola Baee, who was then a minor, by her uncle and guardian, in which a curator was appointed under that Act. When this suit came to a hearing, the Judge pronounced against the will, and directed that the whole estate of Deena Nath should be equally divided between the widows, and that the curator should carry out that order without delay. The property was thereupon divided according to the two lists set forth at pp. 51 and 58 of the record; each widow was put in possession of her share; and Doola Baee continued in the separate enjoyment of her share up to the time of her death.

She died on the 10th of November 1857, having on the 21st of August 1857 made a will which was registered on the same day; whereby she disposed of her share of the property inherited from her husband in favour of her father (the appellant) and her infant brother Halooram, who is also represented by the appellant on this record.

Some steps seem to have been taken by the respondent and also by Hunwunt Perhad to resist the registration of this will in the lifetime of Doola Baee; and upon her death the respondent applied for an attachment of the property in dispute, being that taken by Doola Baee under the partition as specified in the list before referred to, and for the appointment of a curator under Act XIX of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Baee's will, she commenced the regular suit out of which this appeal has arisen, on the 21st of December 1857, in the Court of the Principal Sudder Ameen of Benares.

The issues settled in the suit were:
1st.—Whether there was an informality in the institution of the suit.

2nd.—Whether the plaintiff (the respondent) was legally competent to institute it.

3rd.—Whether Doola Baeo was a minor or not at the date of the alleged execution of will.

4th.—Whether the will was fraudulent or a bond fide instrument.

5th.—If a person die leaving two widows, and one of the widows subsequently die leaving a will, who is entitled to succeed according to the Shasters—the surviving widow or the legatee of the will, (supposing the husband's estate to have been divided between the widows and also supposing no such division to have been made)? And is a widow competent to make a will in favor of her brother and father under the Shasters?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favor of the appellant, and the correctness of this finding is not now impeached. Upon the other issues, the Principal Sudder Ameen found, first, that the respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcilable with the averments made by her in the suit under Act XIX of 1841, wherein she had supported the claim of Humwunt Pershad; secondly, that by reason of the partition that Doola Baeo was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the Sudder Court of Agra.

The first judgment of the Court was adverse to the finding of the Principal Sudder Ameen on the first and second issues, and held that the respondent, notwithstanding her former acts and averments,
was competent to maintain the suit. But holding that *Doola Bace* was competent to dispose of the inheritance derived from her husband when it had been distinct and divided, and had effectually done so it dismissed the appeal.

It treated her power to dispose of the moveable property as certain; her power to dispose of the immovable property, as more open to question. The respondent applied for a review of this Judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was that the case was reviewed before a Full Bench, when the Court decided that according to the Law of the Benares School, *Doola Bace* was incompetent to dispose of either the moveable or immovable property which she inherited from her husband, and made a decree in favor of the respondent. This present appeal is against that decree.

From the foregoing statement it is obvious that the principal question between the parties is the broad and general one, whether, according to the law of the Benares school, a Hindoo widow is competent to dispose, by will or deed of gift, of either moveable or immovable property inherited from her husband, to the prejudice of his next heirs.

The learned Counsel for the appellant have, however, contested the right of the respondent to have the present case decided on this issue upon various grounds. They contend:

1st.—That if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal Sudder Ameen, she has so shaped her case on the pleadings that she cannot in this suit insist on her rights, whatever they may be, as next heir of her husband in succession to *Doola Bace*.

2nd.—That it was not competent to the Sudder Court, having regard to the application for review and the proceed-
ings thereon, to review its first decision except as to the immoveable property. Two other points were taken at the bar, which it will be convenient to consider after, rather than before, the determination of the principal and general question of Hindoo law. One was raised by Mr. Leith, on behalf of the respondent, and was to the effect that as one of two Hindoo widows taking as co-heirs to their husband, she is in a more favorable position than that of a person claiming as next heir of the husband in succession to a single widow deceased. The other, which was taken by the other side, is, what was the effect of the partition, either by way of enlarging the power of Doola Bace to dispose of the property, or affecting the right of the respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the appellant they intimated that in their judgment the respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her husband against the claims of Doola Bace.

Their Lordships agree generally in that part of the first judgment of the Sudder Court which ruled that the respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable. Nor do they think that her alleged alienation of her share can be urged against her by the appellant as a bar to the present suit. It may have been an improper act: it may be one which Doola Bace, had she been the survivor of the two widows, could have questioned, or which the next heirs of Deena Nath may yet question; but the improper alienation of part of her husband's estate cannot affect the respondent's right, to recover other parts of it from those who, if her view of the law is correct, have no title to it.
And upon the argument founded on the pleadings, their Lordships have to observe that the plaint does not inaccurately state the respondent's claims to the right to succeed, on the death of Doola Bace, to that property which the latter took by inheritance from her husband. The replication and the petition of appeal from the decree of the Court of first instance are no doubt more open to the objection taken. In order to meet the case of quasi estoppel set up, they attempt to draw a distinction between the claim to the original share which the respondent took on her husband's death, and her claim to that to which she became entitled on Doola Bace's death; and make some confusion as to the character of her heirship. But this mispleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case, it would be contrary to the practice of this Committee to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is whether the decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the Sudder Court to review its prior decree with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied that the proceedings on review were not within the powers of the Sudder Court. Two objections have been taken to them, viz., first, that the respondent never petitioned for a review of Judgment, except as to the immoveable property; next, that whatever was the scope of her petition, the order of Mr. Gubbins upon it, must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think that the application for review at page 84, must, on a fair construction of it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. Plea 1 seems to be confined to the latter, but plea 2 is more general. It insists that the opinion of the Cal-
cutta Pundit ought to be accepted as correct. That opinion, which is at pages, 72 and 73, made (as he himself stated in his second opinion) no distinction between moveable and immoveable property, but denied the right of the widow to dispose of either, to the prejudice of the husband's heirs.

Again as regards the acts of the Court, the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final order contemplated by that section was the order which, in the ordinary course, would have been made by Messrs Ross and Pearson on the 15th of January 1863. (See page 86). The proceeding of Mr. Gubbins was merely his fiat for the issue of that notice to the opposite party which is required by the proviso of the section.

It may be admitted that Mr. Gubbins understood the application to be limited to the immoveable property; that he so limited the notice; and that when the parties were together in presence before Messrs Ross and Pearson, the written grounds for review “impugned the correctness of the decision so far as it related to the real property only.”

But the question still remains whether it was not competent to the Judges by whom the order allowing or rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing. And their Lordships are of opinion that Messrs. Ross and Pearson, though they might have made a final order granting or rejecting the application in toto, or in part, were not incompetent to make the qualified order which they did make, leaving in the Court, which was to review the decision, a discretion as to the extent to which the review should be carried.

They are also of opinion that even if the Court below had been wrong in its Procedure, its miscarriage ought not to prevent this
Committee from deciding the question touching the disposition of the moveable estate on its merits. There has been no surprise. The question was fully argued before the Full Bench of the Sudder Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be, to place respondent at a very unfair disadvantage.

She had a right to appeal to Her Majesty against the whole or any part of the first decree of the Sudder Court. She would not have lost that right of appeal even if she had limited her application for a review to the immovable property. She was relieved from the necessity of appealing, by obtaining a final decree in her favor as to the whole of the property, whether moveable or immovable. If this objection were to prevail, there could be no final determination of the question as to the former on its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her appeal against that portion of the first decree of the Sudder. They are of opinion that no such formality is necessary, and that it is competent to the respondent, who has been brought here on appeal, to maintain if she can, the decree, which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion that there is no obstacle to the determination on this appeal, and between these parties, of the general question involved in the judgment under appeal, will now address themselves to the consideration of that question. The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the Bywastas or opinions of Pundits, partly of decided cases, and partly of passages from ancient and modern authorities, which are accepted as authoritative in the Courts of India. It is impossible to reconcile the various opinions of the Pundits which are to be found in the record. They are divisible into three classes viz., first, that of opinions taken in other suits; secondly, that of opinions taken by parties themselves for the purposes of this suit; and, thirdly, that of
opinions given in answer to the questions put by the Sudder Court in this suit.

Of the first class are No. 10 at page 9, probably No. 11 at page 19, No. 33 at page 63, and No. 28 at page 36. Three of these are not very material. As far as they go, the two first support the contention of the respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the widow, the daughter or a nephew should succeed to the property derived from the husband; and inasmuch as the widow could not have taken the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate, and therefore to a daughter before a nephew. The fourth is strong against the right of a widow to alienate immoveable property inherited from her husband; and the case from which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta Pundit who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a widow has power to dispose of land inherited from her husband. The second class consists of No. 12 at page 19, being the opinion of thirty-seven Benares Pundits, filed by the respondent; and of No. 14 at page 49, being the opinion of twenty-one Pundits of the same place, filed by the appellant. The first ruled that the surviving widow was entitled to succeed to the share of the deceased widow, and that right could not be defeated by the disposition of the deceased widow. The other goes the length of contesting the right of one widow to succeed to another widow of her deceased husband in any case; it affirms the proposition that the property being once vested in the wives, each had an absolute interest in her share and might dispose of it as she pleased. It held also that in the case of intestacy, the father and brother of the deceased widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 at page 72, being the opinion
of Ram Nath, one of the Pandits at the Sudder Court of Agra; of No. 7 at page 73, being the opinion of four Benares Pundits, taken by the Judge of that place under orders from the Sudder Court at Agra; No. 5 at page 72, and No. 3 at page 85, being the opinions of Heerna Nund, the other Pandit at the Sudder Court of Agra; and No. 6 at page 72, and No. 2 at page 84, being the two opinions of the Calcutta Pandit. All these, except the later opinions of Heerna Nund and of the Calcutta Pandit, which were taken on the proceedings in review, were given in answer to the question put by the Sudder Court before its first judgment. The questions were prefaced by the following "Preamble" or statement:

A. dies, leaving two wives, B. and C., who inherit his property, real and personal. B. and C., make a complete partition of the property, and live separately from each other. C. dies, having as blood relations a brother and an uncle; and the questions were:—

1st. Does the property left by C. descend by inheritance to the other widow B., or to the brother or uncle of C., and 2ndly. Would C. be competent to bequeath by will to her blood relatives the share of the property which she inherited from A., (so divided), to the prejudice of B., who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two widows, and it substitutes an uncle for the father of the deceased widow. The only variation in the references to the different Pandits was that, from accident or design, that to Heerna Nund was confined to real property.

To these questions the four Benares Pandits answered: first, that the brother of C. was her foremost heir, and after him her uncle, and that while these two existed B. could not succeed; second, that any testamentary disposition by the widow of the property, which she had inherited from her husband, should be held valid, the property having been exclusively her own, and that she
was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted Pundits appear to be included amongst the twenty-one, who had previously given the opinion above referred to, at the instance of the appellant; and accordingly the two opinions are, as might he expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first, the right of the surviving widow to succeed to the share of the deceased widow in any case.

The answer of Ram Nath to the first question was that C's. share would descend by inheritance to B., because C. could not be succeeded by her brother or uncle during the existence of her husband's sopinda; and, although in his answer to the second question, he admits the power of C. to defeat this right of B., by her will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly:—

"She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answer of Heerna Nund and the Calcutta Pundit, upon which the ultimate judgment was in great measure grounded, was of course in favor of the respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the Bycastas of the Pundits. If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court Pundits would agree in holding that the respondent, as the next heir of her husband, is entitled to take by succession the share of Doola Baee; and that that right cannot be defeated, either as to moveable or immovable property, by the will of Doola Baee. Ram Nath, however, holds
that, by reason of the partition, *Doola Bacc* acquired the right of disposition. Again, the twenty one or twenty two Benares Pundits, who are in favor of the appellant's title, are opposed by the twenty seven Pundits of the same place, who have given their opinion in favor of the respondent. And the *Byvastas* given in other cases are more favorable to the respondent than they are to the appellant.

The Benares Pundits who are in favor of the appellant, refer only generally to the *Mitackshara*; but the particular passages on which they rely are probably the 1st and 11th Sections of the second Chapter, and especially the second article of the 11th Section. These passages, and the arguments, in favor of the widow's right of disposition which were deduced from them, were lately under the consideration of this Committee, in the case of Choteh Baccbe, decided on the 1st of February 1867. The following is the conclusion to which their Lordships then came (see printed Judgment, pages 10 to 13):

"The result of the authorities seems to be that, although, according to the law of the Western schools, the widows may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from alienating any immoveable property which she has so inherited; and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heir of her husband." To the authorities then cited and reviewed by their Lordships may be added Sir William Macnaghten's observations in his work on the Hindoo Law, Vol. 1, pp. 19 to 21; cases 14 and 15 in the second Volume of the same work, pp. 31 and 37; and also some of the cases which will hereafter be mentioned, which, whilst they support the doctrine of the widow's power to dispose of moveable property, admit that she cannot dispose of immoveable property inherited from her husband.

It must, then, be taken upon the authorities to be settled law, that under the law of *Benares* a Hindoo widow has not the power to dispose of immoveable property inherited from her husband to the prejudice of his next heirs; and the only question open to doubt, is whether she has any such power over moveable property.
It must be admitted that in favor of this supposed distinction there appears, at first sight to be a considerable body of positive authority. In the case of Cassimath Bynack vs. Hurrooondury Daboo, the leading case upon the rights and disabilities of a Hindoo widow in Bengal, it was at first supposed that the distinction was recognized even by that school. The first decree in that case declared the widow entitled to an interest for life in the immoveable, but an absolute interest in the moveable estate of her late husband. That was altered by the decree made on a bill of review, which declared her entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her, as widow of a Hindoo husband dying without issue, in the manner prescribed by the Hindoo law. On an appeal from that decree the whole subject was reviewed by Lord Giffard. His judgment (which is reported in the appendix to Mr. Longueville Clarke's rules and orders), whilst it establishes that, according to the law of Bengal, there is no distinction between moveable and immoveable property in respect to the widow's power of disposition over it, seems to proceed on the ground that the treatises known as the Vivada Chintamani, and the Ratnacara are overruled and qualified in this respect by the Dayabhaga and Dyatutwa, which give the law to Lower Bengal, and that where the two former treatises prevail, the distinction may exist. This judgment, therefore, affords some ground for the argument that the law of Bengal, which does not recognize the distinction, is an exception from the general Hindoo Law. Again, in Bijai Govind Singh versus Najundur Narain Rai, (2 Moore's Indian Appeals, 181), decided here in 1839, the right of the widow to dispose of moveable property inherited from her husband, and its devolution on her dying intestate, are treated as open questions under the law of the Mithila school. Of decided cases affirming the distinction, we have that in the High Court of Bengal, which was cited at the Bar from the "Indian Jurist" of the 31st of March 1866, page 128, and which appears to be a case governed by the law of the Mithila School. We have further the four cases cited in the judgment in that case, of which
two show that the distinction has been recognized by the Sudder Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognized by the High Court of Bombay as prevailing in that presidency. And lastly, we have 2 cases at page 46 of the second volume of Sir William McNaughten's Hindoo Law, in which the law which ought to have been applied, was that of the Benares School.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those provinces of Lower Bengal which are governed by the Dayabhaga, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of Calcutta, say in the judgment just referred: "This case comes from Tirhoot, one of the districts forming the ancient province of Mithila, but the law is admittedly the same in this particular, both for Mithila and for the provinces governed by the Mitackshara." Their Lordships, however, are not satisfied that this statement is correct.

The Mitackshara is, no doubt, accepted as a high authority by all the schools, even by that of Bengal, when it is not controlled by the Dayabhaga and other treatises peculiar to that school. But the other four schools have, like that of Bengal, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitackshara and give rise to the differences between those schools. In proof of this it is only necessary to refer to the "preliminary remarks" of Sir William McNaughten, pp. 21 to 23. From these it would appear that whilst the Mithila school follows implicitly the Vivada Chintamani and the Ratnacara; the South of India, the Smriti Chandrika and the Madhavya; and the Presidency of Bombay, the Vyasa-
hara Mayukha; these works are by no means held in equal estimation at Benares.

Now, it appears from the judgment of Lord Giffard that the works which were supposed to go furthest towards establishing the distinction between moveable and immoveable property, which is now under consideration, were the Vivada Chintamani and the Ratnacara. These may well be taken to establish such a distinction according to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the Mayukha is cited as an authority for the decision of the case at p. 43, of the second volume of MacNaghten, and in the judgment under appeal it is expressly stated that that treatise is not accepted as an authority by the Benares School, and consequently, that the case in question was not binding on the court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on treatises and authorities peculiar to the South of India, and not accepted at Benares. From the reports of these, at p. 117, of the Sudder Decisions for 1849; and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the Bywastas of Pundits. In the former case the authorities relied on by the Pundits are not given: but in the latter, mention is made of the books called Madhavayen and Saraswa tivilasa, as well as of the Mitackshara (then called Vijnanswarayan); and it appears from Sir William Macnaghten's remarks that the two latter works are of paramount authority in the territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that even if the above mentioned were correctly decided, they are by no means conclusive in the present question. The decision of the High Court of Calcutta, in so far as it is confirmed, the title of the purchaser of the Government Promissory Notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of Moore's
Indian Appeals, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and that at p. 46 of the second volume of McNaghten's, were decided according to the peculiar law of the Bombay Presidency, including the Mayukha; and those at Madras, according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How, then, does the law stand independently of these decisions.

The startling differences of opinion amongst the Pundits, show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitakshara, on which, as already has been shown, the appellant must mainly rely, is the second paragraph of section II of Chapter 2, which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. The words make no distinction between moveable and immoveable property: yet it is settled, beyond all question, as we have already stated, that the immoveable property which a woman inherits from her husband, cannot be disposed of by her, and does not pass as her stridhum. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband, forms part of a woman's peculium or stridhum. Sir William McNaghten indeed (Vol. 1, p. 38,) excludes from stridhum all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of stridhum, all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is prima facie to be inferred; but that the right to alienate immoveable property, whether inherited from the husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.
This argument, however, would fail to show why immoveable property inherited from a husband, should not (and all the decided cases show it does not) descend as stridhun, but passes on the widow's death to the next kin of the husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immoveable property given to her by her husband in his life time, are different from those which both restrict her power over immoveable property inherited from her husband and regulate the course of its devolution.

To the former class belong the text of Nareda, "property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land, or houses;" and the text of Katyayana—"What a woman has received as a gift from her husband, she may dispose of at pleasure after his death, if it be moveable, but as long as he lives, let her preserve it with frugality." To the second class belongs the text of Katyayana, on which the judgment under appeal so much proceeds, viz., "The childless widow, preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by Mr. Colebrooke, (3 Dig; 575 and 576.)

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the Commentators concerning the texts. The better opinion, however, seems to be that they relate to different subjects.

Again, the latter text certainly includes both moveable and immoveable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from, the husband, that the words "after her the legal heirs shall take it," can be restricted to the immoveable portions of the husband's estate. The preponderance of authority is certainly in favor of the proposition, that whether the widow has or has not this
Power to dispose of inherited moveables, they, as well as the immovable property, if not disposed of, pass on her death to the next heirs of the husband.

It is also worth remarking that the doctrine, that property inherited from her husband forms part of a woman's *stridhun*, receives no color from two of the treatises current in other schools which are supposed to recognize the widow's power to dispose of moveables so inherited. Both the *Vivada Chintamani* and the *Mayukha* confine *stridhun* within the definitions of *Menu* and *Katyayana*.

They exclude property inherited and the other acquisitions which are comprehended in the last clause of the paragraph in the *Mitackshara*, but are excluded by Sir William McNaghten.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The "*Vivada Chintamani*" expressly says (p. 262) that the text of *Katyayana* does not refer to the peculiar property of a woman; and although it cites from *Katyayana*, "let a woman on the death of her husband enjoy her husband's property at discretion," and explains that this refers to property other than immovable, it also, at page 292, quotes from the *Mahabarata*. "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth," to which it adds by way of explanation—"*Here waste means sale and gift at their own choice.*" (See *Vivada Chintamani* p. 256 and 266, and *Mayukha*, p. 84 and 78).

Another argument against including the wealth inherited from her husband in a woman's *stridhun*, as defined by the 2nd clause of the 11th section of the 2nd Chapter of the *Mitackshara*, may be derived from the clauses 11 to 25 (both inclusive) of the same Section. These declare the husband to be, in default of the issue, the heir to "the whole property as above described." This is intelligible, if the words "property which she may have acquired by inheritance" in
the second clause, are considered to be property inherited in her husband's life time, or from some persons other than him.

The reasons for the restrictions which the Hindoo Law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pundits is sufficient to show that the supposed distinction between moveable and immoveable property is anything but well established in that school. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pundits, has, in this case, ruled that the distinction does not exist. Such a judgment ought not be lightly over-ruled.

Their Lordships, therefore, have come to the conclusion that according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitackshara, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her stridhum or particular property: and the text of Katyayana, which is general in its terms, and of which the authority is undoubted, must be taken to determine, first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her husband. They have already stated the grounds on which they think that those decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions, except that in so far as they proceed, as that in the High Court of Calcutta unquestionably does in part proceed, on a different construction of the
passage in the *Mitackshara*, they cannot be supported on that particular ground.

Their Lordships have now to consider whether the effect of the so called partition was to give *Doola Bace* any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a widow having a right to an ascertained share upon a partition with co-partners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question whether her interest does not become absolute, though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta. But here the so called partition was between two widows, each having the limited interest of a Hindoo widow in her husband's estate. It does not appear that it was made at the suit or in the application of either. It was made by order of a Judge who in the particular proceeding (one under Act XIX of 1841) had no jurisdiction to determine questions of title and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her husband.

It may be said that the question here is only whether the respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and as part of that contract, to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition in invitam. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have
done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those Pundits which were given in favor of the appellant on the assumption of a complete and regular partition lose much of their power. It follows also that the case of the respondent is stronger than it would have been had she claimed merely as next heir to her husband in succession to Doola Bace. For the estate of two widows, who take their husband's property by inheritance, is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow, (2 W. Mac; Hindoo Law, page 38, note 1). They are therefore, in the strictest sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other. And, accordingly, this case might have been decided in favor of the respondent on this ground alone.

Upon the whole, their Lordships are of opinion that the decree under appeal is substantially right and ought to be affirmed. Considering, however, that what has here been decided in respect to Doola Bace's interest is equally applicable to that of respondent, and that the latter is said to have assumed a power of disposing of her own share, they think it may be well to insert in the decree a declaration that the property recovered by the respondent is to be possessed and enjoyed by her as a widow of a Hindoo husband dying without issue, in the manner prescribed by the Hindoo Law. Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the Sudder Court of Agra. The appellant must pay the costs of this appeal.
ALIENATION (Continued):—Reversioner's right to set aside.—

In a suit to set aside an improper alienation by a widow, the reversioner is only entitled to a decree declaratory that the widow's act is null and void as far as it may affect the interests of the reversioner, and for provision, if necessary, to prevent any waste of the estate, by the appointment of a receiver or manager, but not to a more extensive remedy. The reversioner may be appointed such manager, but the reversionary interest is not accelerated by the transfer. The interest of a Hindu widow to the property she inherits from her husband is not in the nature of a trust.

Where a daughter is colluding with the widow in making a transfer of divided property, the next reversioners after the daughter are competent to maintain a suit to have the transfer declared null and void.

1.—JWALA NATH AND OTHERS, Appellants,

Versus

KULLOO AND OTHERS, Respondents.

Before the High Court of the N. W. P.

Present:—Morgan, C. J. Ross, Roberts, Pearson, Turner and Spankie, J. J.

This case was referred to a Full Bench by Pearson and Turner, J. J., with the following order:—

Referring Order.—Inasmuch as the daughter takes only the limited interest of a Hindoo female in the property, and inasmuch as it is alleged that she has colluded with her mother in assenting to the improper alienation of the estate instead of protecting it, we consider that the plaintiffs as the presumptive reversioners are entitled to maintain the suit. The first plea points to a defect in the judgment of the Lower Appellate Court. It was esmal for the tise
Judge to determine whether the transfer was made for necessary purposes, and as he has omitted to do so the case must be remanded: costs of this appeal will follow the event, and in order to guide the Judge as to the form of the decree sought to be awarded to the plaintiffs, if he determines the alienation to have been improperly made for purposes not sanctioned by Hindoo Law, we refer a question to the Full Bench with reference to the Full Bench decision of the 18th September 1865.

JUDGMENT BY THE FULL BENCH.

The plaintiffs in this suit are the nephews, and grand nephews of Chirunjee Mull, the deceased husband of Mussumat Ram Dayee, the principal defendant, and they claim to annul a deed of gift, dated the 15th day of February 1864, whereby the defendant Mussumat Ram Dayee conveyed to the defendant Phoondun Lall her son-in-law a certain shop, and to recover possession of the said shop as a portion of the property of Ram Pershad, the father of Chirunjee Mull, which the defendant Mussumat Ram Dayee had no power to alienate. The defendants pleaded that the property in suit had after the death of Ram Pershad by a partition between his sons, become the separate property of Chirunjee Mull, upon whose death it passed to the widow, the defendant Mussumat Ram Dayee; that inasmuch as Mussumat Ram Dayee has a daughter Mussumat Munnia still living, the plaintiffs are not the immediate reversioners and therefore not entitled to maintain this suit, and that the alienation was made by Mussumat Ram Dayee with the consent of Mussumat Munnia in consideration of Rs. 400, required to discharge the debts of the deceased Chirunjee Mull and to defray his funeral expenses.

The Principal Sudder Ameen laid down the following issues viz.

"Is the property held in common or not? By the Shastras, does the daughter inherit from the father, or are the next of kin being males entitled to preference, and has the widow power to alienate?

The Principal Sudder Ameen held that there was no necessity to determine whether the property was divided or not, as under neither circumstances was the widow entitled to alienate, and that as the plaintiffs were within the relationship as sapinda from the common ancestor, they had a right to sue to prevent the alienation by the widow, but that they could not claim possession during her lifetime. He consequently passed a decree annulling the alienation; but dismissed the claim to possession.

An appeal was preferred to the Judge on the plea that the plaintiffs were not entitled to sue inasmuch as the property was separate property, and the daughter Mussumat Munnia was the immediate reversioner.

The Judge reversed the decree of the Principal Sudder Ameen holding that the daughter Mussumat Munnia was entitled to succeed in preference to the plaintiffs, and that it was immaterial to determine whether or not there had been a partition of the ancestral property.

A special appeal was preferred by the plaintiffs to this Court and the Division Bench before which the appeal was heard, remanded the suit for a distinct finding as to whether the property in dispute had been divided and held separately or not, holding that if the property had not been so divided and held the plaintiffs were the next reversioners and that the daughter would have no title to inherit; and that if on the other hand it were found that the property was separate, the defendant, Musummat Ram Dayee, could alienate for necessary purposes. The Judge on the rehearing of the cause decided that the property in suit had been divided and held separate, and that consequently the plaintiffs were not the next reversioners and could not maintain this suit.
A special appeal was again preferred by the plaintiffs who objected to the Judge's decision on the grounds, that he had failed to determine whether the transfer had been made for necessary purposes, and that inasmuch as the daughter was colluding with her mother, they were entitled to sue.

The Division Bench before which this second special appeal was heard, considered that regard being had to the limited interest to which the daughter is by Hindoo Law entitled, and especially if such collusion were established as is alleged, the plaintiffs, as the next revisioners after the daughter, might be entitled to maintain this suit, and that consequently it should be necessary that a determination should be made of the issue whether the transfer was made as alleged by the defendants for purposes sanctioned by the Hindoo Law; but inasmuch as in remanding the case, the Division Bench desired to instruct the Judge as to the form of decree which should be passed in the event of his finding that the alleged purpose for which the transfer was made, was a fraudulent device by the widow and Mussumat Munnia to defeat the rights of the plaintiffs, and inasmuch as doubts have been expressed as to the correctness of the late Sudder Court's ruling, dated 18th September 1865, the question as to the nature of the relief to which the plaintiffs are entitled in the event of their establishing, that the alienation has been made by the defendant Mussumat Ram Dayee in fraud of their rights, is referred to the consideration of the Full Bench.

The question submitted to us is not devoid of difficulty, for it must be admitted that among texts of Hindoo Law which have been cited, there are some which seem to warrant the conclusion of the late Sudder Court that a fraudulent alienation by a Hindoo widow of the property derived from her husband, is an act which entails the forfeiture of her interest in the property. But there is no text which clearly prescribes this penalty, and in the absence of any such clear direction we consider ourselves bound by what has been, up to the date of the decision referred to, the almost universal practice of the
Courts of this country, namely to set aside the alienation, to make provision if necessary to prevent any waste of the estate by the appointment of a receiver, but allow the widow, (or in some case her transferee) to enjoy during her lifetime the full benefit of the rents and profits of the estate. We may observe that if the very letter of the texts were to be enforced by the Courts, we should be imposing, as legal obligations, on Hindoo widows' duties in respect to the expenditure of the revenues of their husband's separate estates, which certainly are not regarded by the Hindoos themselves as having greater force than moral obligations. So long as the Hindoo widow commits no act involving the forfeiture of the right to inherit, she may expend the revenues of the estate which she inherits from her husband in any manner she pleases. Although the moral duty is inculcated that she should live temperately and sparingly, and devote the surplus, beyond the amount required for her simple wants, to religious purposes, no instance can be cited of any case in which the Courts have enforced this moral duty or interfered with widow's expenditure. Upon her civil or natural death the interest of the reversioner accrues, and it is not until that period that it can be ascertained who is the reversioner entitled to inherit. The presumptive reversioner can claim in the widow's lifetime to have his possible interest protected, but we think he ought not to have decreed to him a remedy more extensive than is requisite to protect his rights, and that his reversionary interest is not accelerated by an alienation which the widow may make in fraud of his presumptive right. He is entitled to a declaration that the widows act is null and void as far as it may affect the interest of the person entitled as reversioner, and if there were danger lest from the nature of the property, the corpus should be wasted, he may further obtain a decree for the protection of the property by the appointment of a receiver, or by such other means as the Court might deem suitable.
The question which was referred for the consideration of a Full Bench in these appeals, is whether a conveyance by a Hindoo widow, of moveable property which she takes by descent from her husband, is valid during the widow's life, if the conveyance is made for causes other than those allowed by the Hindoo Law; and if not, whether the reversionary heirs of the husband can interfere by suit to cause the property to be delivered up to themselves or to the widow.

The case has been very fully and elaborately argued on both sides. The principal authorities on the subject are collected from the Vyavastha Durpana, a very useful book on Hindoo Law, by Baboo Shama Churn Sircar.

Katayana says.—

"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy the property, restraining herself until her death. After her, let the heirs take it" (Colebrooke's Da. Bha. Chapter 11, Section I, para 56.)

Again.

"The widow is only to enjoy her husband's estate. She is not competent to make a gift, mortgage, or sale of it" (Idem). In Colebrooke's digest, Volume 3, page 465, it is said.
It fully appears that the widow’s disposal of her husband’s property at pleasure, otherwise than by the simple use of it, or by donation for the benefit of the lord, is invalid.

Sir William McNaghten, a very great authority, appears to have been of opinion that a gift or conveyance by a widow other than for allowable cause was void, not only as against the reversionary heirs of the husband, but also as against herself. (See McNaghten’s Hindoo Law Volume I, pages 18 and 20.)

In the case of *Dae dem, Bonnerjee versus Bonnerjee*, the plaintiff was nonsuited. The decision turned upon another point, and is no authority upon the question now under consideration, but it is important as containing the opinion which was delivered to East C. J., by McNaghten J., drawn up by his son, Sir William McNaghten.

The opinion was as follows:

"If a widow make a sale in perpetuity of her husband’s landed property, by a deed to that effect, the purchaser, as she had no right to make the sale, will not be benefitted by it, nor will he be entitled, in virtue of it, to the interest, which the widow has in the estate. This is founded upon the principle of the sale being without ownership, which renders it void *ab initio*, and not, as I before thought, upon the principle of a greater interest being conveyed by the deed, than the widow was competent to grant. The Pundits whom I have to-day consulted, agree in saying that, if one of four brothers make a deed of sale of the whole patrimonial property, it will hold good as far as his share is concerned, because the sale creates ownership in the purchaser, and not the deed which is only proof of the sale, and may be taken to prove it as far as will serve that purpose, though invalid. With respect to the conveyance of the property of the other brothers, it is valid against himself and is proof of his intention. Not so in a deed made by a widow. *She has no unlimited proprietary right over any part of her husband’s property, but merely a general usufructuary right over the whole indiscriminately.* It is clear, there-
fore, that she cannot convey the whole in perpetuity, but the deed by
which she conveys it is void ab initio, as to the sale; nor can it con-
vey the interest which she possessed, which (independently of its
not being transferable) is an interest of a totally different nature
from that of proprietary right" (2nd Morley's Digest, page 155).

The opinion that the purchaser would not be entitled during the
widow's life, was founded upon the principle that she had no pro-
prietary right over any part of her husband's property, but merely a
general usufructuary right over the whole indiscriminately, and that the
sale being without ownership was void ab initio by the Hindoo Law.

The opinion of Sir William McNaghten was founded upon the same
principle upon which he also gave his opinion in the same case,
that the sale of a father's property by a son during the father's
lifetime, was void, ab initio, upon the ground that it was a sale
without ownership and was, therefore, not binding after the
father's death upon the son who succeeded to the property as his
father's heir. Sir William McNaghten appears to have considered
that the widow had no greater right in the estate which she takes
by descent from her husband, than a son has in the estate of his
father during his father's lifetime. This however is not the case.

In Goluck Monee Dabee v. Digumber Dey, (Sup. Ct., November
1852), the Court said:

"No part of the entire interest, when the widow takes by
inheritance, is in suspense, or abeyance in any way, nor is there
a reversion, on a life estate, but the whole interest is in the widow.

When she takes as heir under the Hindoo Law, she is ranked in all
treatises as heir. Sir Francis McNaghten treats her estate rightly
as anomalous, and other writers treat it as coming to her as heir;
therefore, when they term it also a life estate, they mean that ex-
pression in a sense different from that of a pure and mere life-estate."

The Court goes on to say:

"It has been invariably considered for many years that the
widow fully represents the estate; and it is also the settled law that adverse possession which bars her, bars the heirs also after her, which would not be the case if she were a mere tenant for life as known to the English law” (Idem, page 27).

See also the case of Kasheenath Bysack and another v. Huru Soondery Dossee and another, in the Privy Council, 24th June 1826, (Clarko's Reports, page 91, and Montrio's Cases in Hindoo Law, page 495), from which it would seem that the widow takes more than a life estate. See also Judomoney Dabee v. Saroda Prosunno Mookerjee, I Boulnois' Reports, page 129; Macpherson on Mortgages, 3rd edition, page 28. In 6 Moore's Indian Appeals, page 433, Huree Dass Dutt v. Sremutty Uppoorva Dossee, it was held that the title of a widow to her husband's property, though a restricted one, was not in the nature of a trust.

There are some decisions in the Sudder Court in which it has been held, that the conveyance does not operate as against the widow during her life-time. There are others in which the conveyance has been allowed to operate against her during her life-time.

In Hum Chunder Mazoomdar v. Tara Monee (18th December 1811, S. D. A., Rep., Volume I, page 359), it was declared by the decree that a deed executed by the widow should not after her death operate to preclude the right of the surviving heirs, leaving it to operate during her life-time.

In Kishna Gobind Sein v. Gunga Narain Sircar, the Supreme Court declared a decided opinion that a widow had no right, other than for allowable causes, to make any grant of her interest in the estate which could endure beyond her own life. (Sir F. McNaghten's Cons: Hindoo Law, page 19).

In the case of Ramanunda Mukhopadhya v. Ram Kishna Dutt (Idem, pages 19 and 20), it was admitted by all the judges of the Supreme Court that the grant which was made by a widow, of pro-
perty inherited from her husband, and which it clearly appeared was not made for the benefit of the husband's soul, was good for her life.

In Kasheenath Bysack and another versus Harasoodery Dossee and another, in the Privy Council, to which we have already referred, Lord Gifford, after reviewing the opinions of the different Pundits, observes:—

"The result as it appears to me, of these different opinions, is this; that they all agree, as I have already stated, that the widow Harasoodery Dossee is entitled to absolute possession; that she has for certain purposes, a clear authority to dispose of her husband's property, she may do it for religious purposes, including dowry to a daughter, and making gifts and donations to the husband's family; but they differ in this. The Court Pundits say that if she alienates the property for other purposes, without the consent of the husband's relations, it would be invalid; the others say that she would incur moral blame if applied for purposes not allowed, yet the act would be valid as against the relations of the husband; in that respect the four Pundits differ from the Pundits of the Court, founding their opinions upon the doctrines contained in the Ratna Kara and Chinta Mani which were not over-ruled by the Dayabhaga and Dayatatawa," (Vyavastha Darpana, page 133).

It appears also from the same Judgment that two other Pundits were examined, and were asked whether they agreed with, or differed from, the opinions of the Court Pundits. Their answer was:—

"We agree upon all points with the opinions given by the Court Pundits yesterday, with this exception. They yesterday stated that gifts of moveable and immoveable property made by a widow, for other than allowable causes, were not valid against herself or the next heir of her husband. We agree with them that such gifts are not valid as against the next heir of her husband; but we say that they are valid as against the widow who could not
reclaim them, whereas the heir is entitled to do so." (Idem). In Fulton's Reports, page 73, Kalla Chund Dutt versus Moore and others Ryan, C. J. says:—"that a grant made by a widow for her own life is good, has been decided in this Court."

Upon the whole, after considering all the cases upon the subject, we are of opinion that a conveyance by a Hindoo widow, for other than allowable causes, of property which has descended to her from her husband, is not an act of waste which destroys the widow's estate and vests the property in the reversionary heirs, and that the conveyance is binding during the widow's life. The reversionary heirs are not after her death, bound by the conveyance; but they are not entitled during her lifetime, to recover the property either for their own use, or for the use of the widow, or to compel the restoration of it to her. If the widow in any case be imposed upon and induced to execute a conveyance by fraud, the conveyance will, in such case, as in all other cases of fraud, be void.

It has been urged that the reversionary heirs may be prejudiced if they cannot sue for the property during the widow's life, for after her death it may be difficult to procure the necessary evidence to show that the conveyance was executed for causes not allowable; and that in the case of moveable property, such as money or valuable securities, irreparable injury may be done to the reversionary heirs by the grantees making away with the property during the widow's life, or in the case of immovable property, by committing waste. But our decision will not preclude the reversionary heirs, even during the lifetime of the widow, fromcommencing a suit to declare that the conveyance was executed for causes not allowable, and is therefore not binding beyond the widow's life. Nor will it deprive the reversionary heirs, during the life of the widow, of their remedy against the grantee to prevent waste or destruction of the property, whether moveable or immovable, in the event of their making out a sufficient cause to justify the interference of the Court.

Our opinion will be reported to the Division Court, by which the question was referred to us, for their information and guidance.
III.—MUSSUMMAT MAHARANI Appellant,

Versus

NANDA LAL MISSEB Respondent.

Before the High Court of Bengal.

Present:—Loch and Glover, J. J.

Plaintiff, a Hindoo reversioner, sued for possession of the estate, alleging and proving waste on the part of the widow, who was heiress in possession. He further prayed that maintenance at a rate specified should be assigned to her. Both the lower Courts decreed in favour of the plaintiff. In Special Appeal, the one point urged was that under no circumstances of waste, could the reversioner obtain possession during the lifetime of the widow.

Moulvie Syud Murhamut Hossein and Baboo Ramanath Bose, for appellants.

Mr. R. E. Twidale, for respondent.

The judgment of the Court was delivered by

Loch J. Waste on the part of the widow has been proved, and the Lower Courts have given the reversioner possession, and directed that his name be registered as a joint proprietor with the widow. We think the order is wrong. The Court should not have converted the reversioner into an actual proprietor, it should have appointed a manager accountable to the Court for all his acts in respect to the estate, who should be required to render accounts periodically, and be put in possession. Leases which have been given by her cannot be interfered with, as laid down in the Full Bench Ruling Gobind Mani Das versus Sham Lal Byak, Kali Kamur Chowdry versus Ram Das Shaha, Gaur Hari Gui versus Peari Dasi, and Machooram Sen versus Gaur Hari Gui (1), unless the lessees be making waste; and if the charge be proved, then the Court can take measures to preserve the property given in lease. There is nothing to prevent the Court appointing the reversioner to be manager, if he be a fit person for the appointment. We modify the orders of the Lower Court accordingly. Parties to pay their own costs in these appeals.

24th June 1868,
I. B. L. R. 27, A. C.

(1) Reported ante.
1. The above cases have decided beyond all controversy that alienations made by a life tenant cannot be disturbed, except where waste is being committed, during the lifetime of the alienor. It is quite immaterial whether there was necessity for the sale or transfer, or not. See also Chutter Dharec Singb versus Massamal Harcoomaree, 2nd August 1865, Hay's Rep. 107; Eas Bunsee Koovan versus Moheswar Koovan, 17th December 1864, I Suth. W. B. 338; Kanth Narain Singh v. Prem Lal Paunry, 22nd June 1865, II Suth. W. R. 102; Oodoy Chandija v. Dhan Monee Debia, 7th August 1865, Ibid., 183; Beguoo Jha versus Lalal Dass, 21st June 1866, VI Suth. W. R. 36; Haradhan Naug versus Issur Chunder Bose, 14th September 1866, Ib. 222; Chunnun Mahtoom and others v. Rajendra Suhai and others, 2nd Feb. 1867, III Wyman's Rep. page 106; Narain Das v. Mukham, 14th March 1866, I. P. R. 29. The Madras cases laying down the same doctrine, are—Bhagavatamma v. Pampanna Gaud and others, 18th May 1865, II Madras H. C. Reports 393, and Kamadadhani Venkata Subbaiyav. Joyea Narasingappa, 26th June 1866, II, Madras H. C. Reps. 116. Where, however, a widow mortgaged immovable property to one person, and afterwards gave it in absolute gift to another, it was held by the Bombay High Court that the deed of gift did not convey to the donee the widow's equity of redemption. Jiganatha Bhaloo and others v. Apaji Vishnu, 12th October 1868, V. Bombay H. C. Reps. 217; a. c. j.

2. If a reversioner can show that a wilful default of revenue is about to be made by the life-tenant, in order to bring the estate to sale, he is entitled to ask such relief from the Court as will prevent the apprehended occurrence. Sarbo Chunder Sein v. Multooress Nath Puddoik, 27th March 1867, III Wyman's Reps. 206. But where the life-tenant has under pressure of a legal necessity, sold more than was absolutely necessary to raise the amount required, a reversioner is not entitled to ask the Court to declare that, on the death of the widow, the heirs to the estate might set aside the sale by paying what the life-tenant had a right to raise; because of the uncertainty as to who would be heirs at her death; nor can he sue to set aside the sale at all, except by paying that amount with interest. Full Chand Lal v. Rughoobum Sahaay, 10th January 1868, V. Wyman's Reps. 61. In the same case it was declared to be doubtful whether a widow, or life-tenant, is bound to mortgage instead of selling. "My impression is," said the learned judge who delivered judgment, "that if a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly. It must be remarked that if a widow were bound to mortgage, the interest of the money raised by mortgage, must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs."
ALIENATION Continued.—Limitation in actions to set aside.

Where limitation has begun to run no subsequent devolution of the estate can give a fresh starting point to the heir who succeeds, or create a new cause of action from which limitation would count. Thus when a childless Hindoo Widow is the heiress and legal representative of her husband, the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion; and they are also bound by limitation by which she, without fraud or collusion, is bound.

1.—NOBIN CHUNDER CHUCKERBUTTY, Appellant.

Versus

ISSUR CHUNDER CHUCKERBUTTY AND OTHERS, Respondents.

Before the High Court of Bengal.

Present:—Peacock O. J., Seton-Karr, S. Jackson, Phear, and A. G. Macpherson, JJ.

This case was referred to a Full Bench on the 25th September 1867, under the following orders, recorded by Bayley and Mitter J J.

Mitter J.—The first point raised before us in special appeal is that the Lower Appellate Court has committed an error in law in holding that the claim of the special appellants to the property in suit is barred by the statute of limitation, when their cause of action did not accrue till after the death of Dhone Mala, which took place 1266 B. S. We think that this objection is a valid one. We are of opinion that limitation cannot run against a reversionary heir under the Hindoo Law until after the death of the female heir who succeeded to the estate of the deceased proprietor. There can be no
doubt that the special appellants could not have maintained an action for the possession of the lands in dispute during the lifetime of Dhone Mala. Their right to such possession only accrued after Dhone Mala's death, and it would be contrary to the very principle upon which the statute of limitation is founded, to hold this right barred for a supposed neglect on their part to sue within a period during which they were not in a position to sue at all. In defining the status of a Hindoo widow, their lordships in the Privy Council remarked in the case at page 527, of Sutherland's Privy Council Judgments.

"The same principle which has prevailed in this country as to tenants-in-tail representing the inheritance would seem to apply to the case of a Hindoo widow." But it does not follow from this (as has been contended) that the reversionary heir is bound by the laches of the widow. On the other hand, we find it laid down in page 446 of Angell on Limitation, that adverse possession for any length of time cannot affect the title of a claimant who had no right of entry during that time, and in support of this position, a case is quoted by the author in the same page, in which it was distinctly held that limitation does not run against a remainder-man until after the demise of the last tenant-in-tail without issue. It has been held by the Privy Council in the case already referred to, that a decree obtained against a widow in connection with the estate of her husband will bind the heirs of the husband claiming in succession to her, but it has been held at the same time, that the latter can always impugn the correctness of the decree upon special grounds. We think that the negligence of the widow is one of the special grounds contemplated by their Lordships.

Several cases of this Court have been quoted by the pleaders on both sides in support of their respective views. The appellant relied upon the following cases.

The respondent, on the other hand, relied upon a judgment of this Court (not printed) in special appeal No. 551 of 1867, decided on the 26th July 1867, and quoted from Macpherson on Mortgages, p. 19, in which it is laid down as a settled proposition of law, that adverse possession that would bar the widow would bar the reversioner also.

As, therefore, there is a conflict of authority on the point, we refer the case to a Full Bench for final adjudication.

The Judgments of the Full Bench were delivered as follows:—

Peacock, C. J. (Seton-Kerr, J. concurring). Randoollub Chuchurbatty died leaving two sons, two daughters, and a widow. The two sons died without issue in the life-time of the widow, and upon their death their respective estates descended to the widow as heir. The two daughters each had a son or sons who on the death of the widow, succeeded to the estate of their uncle. After the death of the sons, a stranger entered, and the widow never took possession. The widow died in 1266. The question is, whether the sons of the daughter had a fresh cause of action upon the death of the widow.

The question of law which is raised for our opinion is, whether, if a person dies leaving a female as his heir-at-law, the reversionary heirs have a fresh cause of action in regard to the estate of the ancestor at the time of the death of the female heir, or whether they are barred by limitation if the female heir would have been barred.

The question is a very important one, and depends upon the proper construction of the Statute of Limitation having regard to the nature of the respective estates under the Hindoo Law of a female heir and of the reversionary heirs.

There are several conflicting decisions upon the point in this Court, and it is upon the ground of those decisions that we have to determine the question.

The arguments adduced by the Judges in support of their several views are of considerable weight, and they have been substantially incorporated in the argument of the Vakeels before us.
A case was cited upon Fulton's Reports, page 329, for the purpose of shewing the opinion of the late Supreme Court upon the subject; but it is not very clear what are the grounds upon which that case turned. The female heir in that case had entered into possession. Sir John Grant, who delivered the judgment, did not state whether his opinion was founded upon the point of limitation simply, or upon the ground that a grant by the female heir might be presumed, and if so, that it would not be binding beyond her own life. He says:—"I think that if we were to presume a grant it would not be binding beyond the widow's life." It is unnecessary for us to determine in this case when the cause of action of the reversionary heirs would accrue if the female heir were to sell the estate without lawful cause. In that case, the purchaser entering into possession would not be a wrong-doer during the life of the female heir. No cause of action would accrue to the female heir against him for entering under her grant, although it would not be binding as against the reversionary heirs, and possibly might not be so against creditors of the ancestor.

In this case, a cause of action did accrue to the female heir, and the question is, whether the reversionary heirs upon her death acquired a new and independent cause of action within the meaning of the Statute of Limitation, or merely succeeded to the same cause of action which was vested in the female heir in her life-time.

Whatever might have been the date of the decision in the case cited from Fulton's Reports, it must have been before the decision of the late Supreme Court in Goluck Monee Dabee v. Degumber Dey, decided on the 15th of November 1852, which is set out in Mr. Justice Macpherson's book on Mortgages, 2nd edition, page 20. Sir Lawrence Peel in that case says:—"It has invariably been considered for many years that the widow" (speaking of the widow succeeding as heir) "fully represents the estate, and it is also the settled Law that adverse possession which bars her, bars the heirs also after her, which would not be the case if she were a mere tenant for life, as known to the English Law." It was also held by the Privy Council in the Shiva Gunga
case,* 9th Moore’s Indian Appeals page 539, that in the absence of fraud or collusion a decision against a widow, with regard to her deceased husband’s estate, would be binding upon the reversionary heirs. In the 8th Moore's Indian Appeals, page 550, it was said that comparing a Hindoo widow to a tenant for life was calculated to mislead. In the Shiva Gunga case, the widow was compared to a tenant-in-tail; but the heirs in that case were not likened to remainder-men, and must, therefore, have been in the position of tenants-in-tail. Such heirs would be bound, if the tenant-in-tail was barred, though the remainder-man might not be. If then in the Shiva Gunga case, the widow was like a tenant-in-tail, and the reversionary heirs were like the issue-in-tail, and the same likeness exists in the present case, the reversionary heirs would be barred by limitation which ran against the female heir. If the female heir in the present case had sued the wrong-doer, and, without fraud or collusion had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir.

For instance, if the female heir had sued the wrong-doer, and he had set up a purchase from the ancestor, and had succeeded in that defence at the suit of the female heir, the reversionary heirs would be barred by the decision in the absence of fraud or collusion.

The Law of Limitation is passed for the benefit of defendants, partly upon the ground that after length of time they may have lost the evidence in support of their right; and it would be anomalous to hold that a female heir was barred by limitation, lest the defendant should have lost his evidence to prove his right against her, and to hold that the reversionary heirs, who would have been barred by a decision against the widow, if she had brought her suit in time, are not barred by limitation against her.

Possibly if we could trace the Hindoo Law to its origin, we should find that a widow did not succeed to her husband’s estate as

his heir. It was doubtful at one time whether she did so. It was
supposed that she took, because she was part of the husband. In the
Dayabhaga, clause II, section 1, verse 2, it is said:—

"In regard to the wealth of a deceased person who leaves no
male issue, authors disagree in consequence of finding contradictory
passages of law. Thus Vrihaspati says:—"In scripture and in the
Code of law, as well as in popular practice, a wife is declared by the
wise to be half the body of her husband, equally sharing the fruit of
pure and impure acts. Of him whose wife is not deceased, half the
body survives. How, then, should another take his property while
half his person is alive? Let the wife of a deceased man who left
no issue take a share, notwithstanding kinsmen, a father, a mother
or uterine brother be present." This would account for the rule
which says that the reversionary heirs of the husband are those who
would have been his heirs if he had lived up to the time of the death
of his wife.

It is difficult to reconcile the above principle with the fact of
sons and grandsons taking during the life of the widow. I have
never been able to find the principle accurately defined by which
sons take in preference to a widow. The Dayabhaga rests the rights
of the sons upon the doctrine that succession is grounded solely up-
on the benefits conferred (Dayabhaga, Clause II, Section I, paras. 32,
33, and 31); but probably the right of sons in preference to that of
the widow depends upon the doctrine, that a son, or other descendant
is consubstantial with the father or other ancestor. Menu says:—

"The husband after conception by his wife, becomes himself an
embryo, and is born a second time here below. (See also Colebrooke's
Hindoo Law, Volume ? page 459, Viavastha Durpama, 1st Edition
Volume I, page 33 Note.)

However this may be, it is settled that the wife does take as heir
to her husband in default of issue, and that upon her death those
persons succeed as reversionary heirs who would have been the heirs
of the husband if he had died at that time. It is a very anomalous position that a person should take as heir, and that his right to take as heir should be determined according to a state of facts not existing at the time of the death of the ancestor, but caused by events which may have occurred many years after his death.

These considerations lead me to the conclusion that a reversionary heir, who is bound by a decision against a widow respecting the subject matter of inheritance, is also barred by limitation, if, without fraud or collusion, the widow is barred by limitation.

It has been contended that as the widow cannot absolutely convey away her husband's estate without sufficient cause so as to be binding upon the reversionary heirs, they ought not to be barred by limitation against the widow; otherwise she will be able, if she lived a sufficient time, to do indirectly, by allowing adverse possession to be held against her, that which she could not do directly, by a sale without sufficient cause.

But reversionary heirs presumptive have a right, although they may never succeed in the estate, to prevent the widow from committing waste; and I have no doubt that if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor, by suit against the widow and the adverse holder, to have the estate reduced into possession, so as to prevent their rights from becoming barred by limitation.

In the case of moveable property, such as Government paper, a Hindoo, although he is not bound to do so, may obtain probate, or letters of administration.

Adverse possession or wrongful detention of Government paper, or the like, would give a cause of action to the heirs, or in case of probate, or letters of administration, to the executor or administrator. If an executor or administrator should fail to sue, to recover the Government paper within the time limited by law, he would be barred by limitation, but I have no doubt that a suit could
be maintained against him and the wrong-doer, by legatees or creditors of the deceased owner, or by the heirs, who are in the same position as the next of kin would be in England, to compel the recovery of the Government paper, and the application of it in due course of law. The cause of action of the executor or administrator would arise from the time of the wrongful detention of the paper from him. But suppose he should die after the paper had been detained against him for 5 years and the next person in succession should take out letters of administration with the will annexed, or if there were no will, simple letters of administration of the property not administered by the deceased executor or administrator, the cause of action of the administrator de nonis non would not accrue at the time of the death of the former executor or administrator, but he would merely succeed to the cause of action which was vested in the former executor, and limitation would date as against him from the same period as it would have dated if the former executor or administrator had lived.

It has been held in England that an executor of an executor or an administrator de bonis non has a right to sue if he commences his suit within a year after the death of the preceding executor or administrator, notwithstanding that period may exceed the period of limitation which the former executor or administrator had.

It is unnecessary to say whether a similar law would apply here. I mention it merely because I think it is an argument to show that in the case of representatives, where one is substituted for another in consequence of death or other cause, the substituted representative has only the same cause of action as the representative for whom he is substituted.

Now according to the Hindoo Law, it appears to me that the widow, although she has a beneficial interest in the property is still only to some extent a representative, and holds the property not merely for her own benefit, but for the benefit of the deceased.
It is said that the reversionary heirs could not sue during the lifetime of the widow, and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation by which she, without fraud or collusion, is barred.

When, therefore, we construe the words "cause of action" in the Statute of Limitation, we must consider them as referring, not to a new cause of action accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased.

This is not the only instance in which a person may be barred by time which has elapsed before he has a right to sue. If an ancestor is dispossessed, the cause of action of his heirs accrues, not at the time when the ancestor dies, and when he could sue, but at the time when the ancestor was dispossessed, and ought himself to have sued; and there is no more reason why a reversionary heir should have a fresh cause of action from the death of the widow, because he could not sue during her lifetime, than that an immediate heir should have a fresh cause of action commencing at the date of the ancestor's death because he could not sue during the lifetime of the ancestor.

A reversionary heir cannot sue during the lifetime of the widow, because during her life the estate of the deceased is represented by her as the heir-at-law. I have spoken of a widow in many parts of this judgment, but the remarks which I have made apply equally to other female heirs, such as mothers, daughters, and the like. It appears to me that this case ought to go back to the Division Bench which referred it, with the expression of our opinion that the period of limitation against a reversionary heir is not to be reckoned from the time at which he succeeded, viz.; from the date of the death of the
female heir, but from the date at which it would have been reckoned had the female heir lived and brought the suit.

Jackson, J.—I entirely concur in the opinion of the Chief Justice that the plaintiff was barred in the present case. We sit here unquestionably to administer the Hindoo Law in those cases to which that law applies, and on all points not decided we are clearly bound to refer to the original sources of that law, and to interpret them to the best of our ability; but where any point having already arisen has been decided by the authority of the highest Court which takes cognizance of the questions of Hindoo Law, we are, I think, as clearly bound implicitly to guide ourselves by the decisions of that tribunal. It has been distinctly held by the Privy Council in the Shiva Gunga case that a decision fairly arrived at without fraud or collusion in the presence of a Hindoo widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the case to which his Lordship the Chief Justice has referred.

It was an argument of the pleader for the plaintiff in this case that a widow who is incompetent, except in certain cases, to alienate the estate left by her husband, ought not to be allowed indirectly to do that which she cannot do directly. It appears to me incorrect to say that in such a case as this, the widow has done anything in the nature of an alienation indirectly or directly. If, indeed, it could be shown that she had colluded with the persons holding adverse possession, so that in fact a case of fraud could be made out, then no doubt she might be held to have done indirectly, that which the Hindoo Law forbids her doing directly. But in such a case as this, undoubtedly, a reversioner aggrieved by such frauds, would be entitled to bring his action.
I state very shortly the principal reasons upon which my own conclusions are founded, because, although I am very far from dissenting from any observations contained in the elaborate judgment which we have just heard, I am not at this moment prepared unreservedly to assent to the whole of them.

Phæar, J.—I too desire to avoid pledging myself to all the illustrations, which have fallen from the Chief Justice; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson.

I will add that it seems to me that when a reversionary heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though, doubtless, she was fettered in a way that he is not, with regard to the dealings with the property, viz., her alienations are often liable to be avoided by him when he succeeds to the right of succession. If, then, that proprietary right was invaded while in her hands, the cause of action accruing from the act of invasion can be none other when it comes to be pursued by the reversionary heir than it was when the female heir herself was the person to do so. Both the right which is infringed, and the act complained of as the infringement, are the same, whether it is he or she who sues. It follows that if the reversionary heir brings a suit founded upon that act of invasion of the proprietary right, the time prescribed in the Statute of Limitations runs against him from the date of the act. Of course, it may be that the possession of a third party, which is no trespass on the proprietary right when in the hands of a female heir, may, if persisted in, become so when that proprietary right passes to the reversionary heir. In such a case, the infringement of the proprietary right first commences on death of the female heir, and with it the cause of action arises. This is so when the female heir conveys under such circumstances that her alienation can be questioned by the reversionary heir.
With these views, I entirely agree in the answer which the Chief Justice proposes to send to the Division Bench.

Macpherson, J.—I also concur in the proposed answer. But a very great difference exists between the case immediately before us, and the case in which a mother (or other Hindu female having an estate similar to that of a childless widow) has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother at all, having been throughout held adversely to her, the cause of action accrued in the mother's lifetime; and, therefore, a suit to recover possession by whomsoever it may be brought, is barred, unless instituted within twelve years from the commencement of the adverse possession.

1. In the case of an alienation by the life-tenant, the reversioner has two distinct remedies open to him; he can either sue in the lifetime of the alienor for a declaration of the invalidity of the sale or transfer, or he can defer taking any action until his or her (i.e., the alienor's) death, when his own title would accrue. In the former case, he must sue within 12 years from the sale or transfer complained of. Mohendro Nath Bose, versus Munshi Syed Amir Ali, II Suth. W. B. 271. In the latter case, within 12 years from the death of the alienor. Judonath Pandey versus Haryalal Misser, 11th July 1861, S. D. N. W. P. Reps, 554; Chanderkanth Roy, versus Pray Mohun Roy, 30th July 1882. Hay's Reps: 60; Anand Mohun Roy, versus Chunder Monee Doss, 15th June 1863, Ibid, volume II, 648; Wooma Churn Bannerjee versus Haradhan Mojoondar, 21st December 1864, I Suth. W. B. 317; and Gopal Mullick versus Onoop Chunder Roy, 1st March 1869, XI. Suth. W. R. 183.

2. Where, however, as in the case reported in the text, the immediate heir, without any fraud or collusion, has failed to contest the alienation, no fresh cause of action can arise to the next heir, who will be bound by the limitation which has already expired. So also by Section II of Act XIV of 1857 where a cause of action has once arisen no time will be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him. Thus where a plaintiff sued as representative of his father upon a cause of action which had accrued during the father's lifetime, it was held that no deduction could be made on the ground of the plaintiff's minority. Nusesram Roy versus Shrikee Bhoskha Roy, 21st March 1866, V. Suth. W. R. 169.
ANCESTRAL DEBTS.—Extent of creditor's right against heirs.

The creditor of a deceased Hindu does not on the death of his debtor obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's life-time; and consequently, when the estate has by the death of the ancestor passed to his heirs, the creditor of the deceased may, so long as the estate remains in their hands, have recourse to it for the satisfaction of his debt; but if, instead of using due diligence, he stands by and allows the heirs to dispose of the estate to a BONA FIDE purchaser, he cannot follow it in the hands of the purchaser, but possesses only a right to bring a suit against the heirs personally, who are responsible to him to the extent of the assets they received.

ZUBURDUST KHAN (DEFENDANT) Appellant,

Versus

INDURMCN (PLAINTIFF) Respondent.

Before the High Court of the N. W. P.

Present:—Morgan, C. J. and Ross, Edwards, Roberts, Pearson and Turner, JJ.

This case was referred to a Full Bench by C. A. Turner and N. Spankie, JJ., with the following order:—

Referring Order.—In this case Khomanee died leaving sons and certain landed estate the subject of this suit. In 1859, the heirs of Khomanee pledged the estate to Indurmcn, the respondent, by a Tum-mussook, upon which he (we presume for the purpose of improving his security) forthwith brought a suit against the heirs of Khomanee
and obtained a decree by confession of judgment. In 1858, Zuburdust Khan, the appellant, brought a suit against the heirs of Khomancee for a debt which he alleged to be due to him from Khomancee on a bond dated 22nd August 1852; and obtained a decree on 29th December 1858, of which he took out execution; and on the 25th March 1865, the landed estate of Khomancee, then in the possession of his heirs, was sold in satisfaction of this last mentioned decree. Subsequently to this sale the plaintiff, Indurmun, applied for a sale of the estate in satisfaction of his Tumussook and decree. An objection was preferred by Zuburdust Khan, which was admitted. The plaintiff thereupon brought the present action claiming the sale of the estate as pledged to him by the heirs. The question as to the validity of the plaintiff's bond was raised in the Lower Court, and decided in the plaintiff's favor; as also was the legal issue which is now the question before this Court, viz., has a creditor of a deceased person a lien on the estate of the deceased debtor preferential to that of a person, who has taken pledge of the estate from the heirs of deceased for sums advanced to them. Sir Thomas Strange in his work on the Hindoo Law distinctly lays it down; that debts are a charge on the inheritance, and that they "follow the assets into whosoever hands they come." To a similar effect is the opinion of Mr. Colebrooke set out in the appendix to Strange's work, page 282, citing Nareda Jugunnath's Dig. B. 1, Chapter LXXII, "assets are to be pursued into whatever hands." In the Vyavahara Mayukha translated by Stokes, p. 122, a quotation from Katyayana appears to this effect." "If any debt "exist against the father, his son shall not take possession of his "effects. They must be given to his creditors; if he die without "wealth still his son must pay his debts." It is true that the last part of this text has been construed by our Courts reading it with other texts as constituting no more than a moral and not a legal obligation; but it is contended on the part of the appellant that the first part of it indicates the nature of the estate taken by the heirs, namely, an estate in the residue after payment of debts.

* Volume I, page 166.
A case decided by the *Sudder Dewanny Adawlut* of Madras is mentioned in Morley's Dig, Volume 1, (Edt. 1850,) page 452, as follows:—"Where A., in consideration of a loan, mortgaged to B. certain "lands, which under a judgment previously obtained against the "estate of A.'s father, were liable to be sold in satisfaction of a debt "due to C.; it was held, that such mortgage was invalid and could "not prevail against the claim of C., whether B., the mortgagee, did or "did not know of such previous judgment; and, though it appeared "that the mortgage by A. was made for the purpose of defeating "the claim of C. under the judgment, that such attempt at fraud "would not be allowed to succeed in favor of B., the mortgagee, "whether B. were or were not privy to the fraud." *Teloonacoola Aroonachelly Chetty and another, v. Palagherry Fencatchelliah. Case 8 of 1825, 1 Madras Dec. 513. Grant, Cochrane, and Oliver.*

This case seems precisely in point. The appellant, *Zuburdust Khan*, obtained his decree against the estate of *Khomanee* in December 1858, and in February 1859, the heirs of *Khomanee* executed the bond hypothecating the estate of *Khomanee* to the respondent. If the Madras decision above quoted is to be followed, that hypothecation could not inure to the prejudice of the appellant's rights. A case has however recently been decided in the Calcutta High Court* by Loch and Glover JJ. in which it has been held, that there is nothing in Hindoo Law to show, that the property of a deceased person is so hypothecated for his debts as to prevent his heir from disposing of them to a third party, who has purchased in good faith and for a good consideration. The learned Judges cite no authority for their ruling, and expressly state that no authority has been produced for ruling, that the property must be considered so hypothecated. As we consider that the effect of the latter decision cited may be taken as impugning the Madras decision, and as this case is one of considerable importance and it is desirable that a prece-

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* 11 W R. 296.
dent should be established for the guidance of the Courts, we have referred the case for decision by a Full Bench.

JUDGMENT BY THE FULL BENCH.

In this appeal it is contended on behalf of the appellant that a creditor of a deceased Hindoo, although his debt may not have been secured by any mortgage or hypothecation, obtains on the death of his debtor such interest in or charge upon the deceased debtor's estate that it can only be aliened by the heirs subject to such interests or charges; in effect it is contended, that the heirs cannot alienate even to a bonâ fide purchaser for value, so as to confer upon him a clear title; and that notwithstanding such alienation a creditor of the deceased may have recourse to the estate for the satisfaction of his debt. The main grounds of this contention are set out in the reference of the Division Bench. In the course of the argument before us the appellant's pleader has cited two precedents of the late Sudder Court. N. W. P. of 14th February 1859, and 30th November 1865. He has also argued that under the Mahomedan Law, creditors have been held entitled to such a lien, as is claimed by his client; and that on this point the provisions of Hindoo and Mahomedan Law are identical: and he has referred in proof of the existence of such a lien to the power of a Hindoo widow to alienate for the payment of her husband's debts, which power he contends arises out of the interest in the estate possessed by the creditor.

In our judgment the real test to be applied in deciding the issue of law raised is to be found in the answer to the question, to whom does the property pass on the death of the deceased? Does it pass immediately and entirely to his heirs; or is the normal devolution interrupted; so that the whole or a portion of the estate

sufficient to discharge his debts vests as if by hypothecation in the creditors, and does only the residue pass to the heir?

We can find no authority for the latter proposition, nor has any other text been cited in support of it, than that from Katyayana referred to by the Division Bench. Although Sir T. Strange enumerates debts among the "charges on the inheritance," he nowhere expresses himself to the effect, that any interest in the inheritance vests in the creditor; on the contrary the language used by him rather shows, that the whole estate of the deceased ancestor passes to his heirs affecting them with a liability for the debts of the ancestor to the extent of the assets received by them. The heirs may, if they please, avoid this liability by disclaiming the estate, but into the hands of whatever volunteer it comes, the liability attaches on him; and so long as the estate remains in the hands of the heirs or any other volunteers, so long does it constitute a fund, to which the creditor is entitled to have resort for the satisfaction of his claim. This is in our opinion the correct interpretation of the dictum that "debts follow the assets into whatsoever hands they come." We have examined the authorities referred to by Sir T. Strange on this point; and can find nothing in them which warrants any stronger position in favor of creditors than that which we have expressed above. The text of Katyayana may at first sight seem to justify the contention that the whole estate of a deceased ancestor does not pass directly to the heirs; but that there vests in them only the residue after satisfaction of the debts. But this text must be read in connection with other texts of writers of high authority on Hindoo Law; and so reading it we are of opinion, that the proper construction of it is to hold, that it declares that the resulting benefit to the heirs from the succession cannot be greater than the surplus of assets over liabilities; not that the estate does not altogether and absolutely vest in the heirs. Numerous texts may be referred to, which indicate a power in the heirs to deal with the whole estate before satisfaction of the debts. The very fact that they may sell it to satisfy debts shows an ability to make a good title to the whole of it.
The construction of the text of *Katyayana* in the sense contended for on behalf of the appellant is therefore untenable.

We have not before us a full report of the case decided by the *Sudder Dewanny Adawlut* of Madras: and it is not clear from the meagre statement of it, which we possess, whether the judgment of the Court proceeded on the ground of Hindoo Law, or of fraud. In the cases cited as decided by the *Sudder Dewanny Adawlut* N. W. P., no reference is made to any text or authority in support of the judgments of the Court; and it is to be noticed that in one of those cases the alienation was made by the heirs *pendente lite*, which raises a presumption of fraud.

The Hindoo Law and Mahomedan Law are systems of law based on such different principles, that it is at all times dangerous to accept the interpretation of the one as an authority for the interpretation of the other; and in no respect is this difference more essential than in those rules, which regulate the devolution of estates. Without therefore expressing any opinion on the propriety of the decision cited on the Mahomedan Law, we are not prepared to admit it as an authority, which should control our judgment in the interpretation of Hindoo Law. On the best consideration we can give to the question before us, we are of opinion, that the creditor of a deceased Hindoo does not on the death of his debtor obtain any better position as against the debtor's estate, than that which he enjoyed during the debtor's lifetime. Had the debtor in his lifetime aliened the estate to a *bonâ fide* purchaser, the creditor could not have claimed to bring the estate to sale in satisfaction of a decree obtained in respect of his debt, unless the alienation had been made after an attachment had issued. In like manner when the estate has by the death of the ancestor passed to his heirs, the creditors of the deceased may so long as the estate remains in their hands have recourse to it for the satisfaction of his debt, but if, instead of using due diligence, he stands by and allows the heirs to dispose of the estate to a *bonâ fide* purchaser, he cannot follow it in
the hands of the purchaser, but possesses only a right to bring a suit against the heirs personally, who are responsible to him to the extent of the assets, they received.

The judgments of the Lower Courts are confirmed and the appeal dismissed with costs.

Interest at six per cent after decree.

See note at page 318.
ANCESTRAL DEBTS, continued.

Under the Mitacchora Law the sale of the rights and interests of a father in ancestral property in payment of a debt incurred for the benefit of the family extinguishes the contingent interests of his sons in the property, and gives the auction purchaser a right to the possession of the entire property sold. But if the debt was not contracted for the benefit of the family, then the sons can recover their respective shares.

BALMOKUND AND SALIGRAM, (DEFENDANTS) Appellants.

Versus

JHOONA LALL, (PLAINTIFF) Respondent.

Before the Sadr Dewani Adalut North Western Provinces.


A special appeal was admitted to try whether, under the Hindoo Law as current in these Provinces, an enforced sale of ancestral property belonging to a Hindoo family during the lifetime of its head, in satisfaction of a debt incurred by him, extinguishes the contingent interests of his sons, who were residing at the time of the sale in the property sold.

To assist us in determining the point referred for the consideration of the Court at large in the certificate of special appeal we proposed the following question to the Hindoo Law Officer of the Court. “A decree having issued against a Hindoo father on account of debt incurred by him, the rights and interests of the judgment debtor in a hereditary tenement were put up and sold in satisfaction of the amount. The auction purchaser now claims possession of the entire tenement, but is opposed by the two sons of
the judgment debtor, who plead that according to the Hindoo Law, he has no right to their hereditary shares in the property sold. The auction purchaser, on the other hand, contends that the father's rights and interests having been sold at auction, the sons, according to the law rested upon by them, have no longer any rights remaining in the property. The question is whether, after the public sale of the rights and interests of the father under the circumstances above stated, the sons can be considered to have any rights in the property, and whether, supposing the father to have been in possession of the property at the time of the sale, it will in any way effect the answer to the question." The following is a translation of the Pundit's reply. "It is an established axiom that a father and his sons have equal proprietary rights in ancestral or hereditary, &c. According to the dictum of Jagibulk in the Mitackshara, both the sons have equal rights with the father in the hereditary tenement under litigation; therefore the two sons can recover their respective shares of the property sold at auction on account of their father's debts, because their shares are their special property. Provided always that the father did not contract the debt on account of which the sale took place for the benefit of the family, for a debt incurred in behalf of the family ought to be paid by the family. It makes no difference if at the time of the sale, the property was in the possession of the father, because he and his two sons are entitled to equal shares in it."

JUDGMENT.

We do not find it to be disputed that the debt, in satisfaction of which the property in suit was put up and sold, was a just debt, nor has any attempt been made to shew that it was not incurred for the benefit of the family. The contrary indeed is apparent, and as the genuineness of the decree, in execution of which the sale took place, has never been called in question, we consider that under the terms of the proviso contained in the Vyavastha of the Court's Hindoo Law Officer, we are justified in holding that the sale extended to the entire property, the whole of which was undoubtedly responsible for the amount of the debt incurred for the common benefit, and that the
rights and interests of the appellants, equally with those of their father, having become extinguished by the sale, they have no *locus standi* in Court, and can have no right to oppose the delivery of possession to the auction purchaser of the whole house. Much stress is laid by the Vakeel of the appellants upon the omission from the decree in satisfaction of which the sale was made, and from the order of sale, of the name of the elder son, Balmokund, while the name of the younger son, Saligram, was associated with that of his father, both in the decree and in the order of sale, and he contends that the omission of Balmokund's name requires that an exception should be made in his favor at least in the decision of the present case; but the circumstance of the union of the younger son's name alone with that of the father, appears to us to be satisfactorily accounted for by the fact that the firm, which contracted the debt, and of which the father is the sole proprietor, was carried on in the joint names of Esahur Dass and Saligram, that is, of the father and younger son, though the latter had no more interest in the concern than his elder brother.

We attach no importance, therefore, to this plea, and seeing no ground for our interference with the decision of the Lower Appellate Court on the question of Hindoo Law raised in special appeal, we dismiss the appeal with costs.

1. It is said that debts are a charge on the inheritance, and that they follow the assets into whatever hands they come. 1, Strange's H. L page 166; but, as a general proposition there can be no doubt that this *dictum* is incorrect, for in the case of ancestral property in which, under the Mitakshara law, the property of father and son is equal, it could hardly be contended that a reckless or extravagant father could charge the hereditary estate after his death with heavy liabilities, when in his lifetime he would have been incapable of making any disposition or transfer beyond his own life interest. The whole policy of the Mitakshara law is to preserve the ancestral estate for the benefit of the family, and it seems obvious that a creditor can obtain no greater benefit after the father's death than he could have enforced in his lifetime. Indeed this doctrine has been substantially laid down in the recent decision by a Full Bench of the Agra High Court in the case of Zuburdust Khan v. Indurmun. I Full Bench Rulings page 77 reported ante, p. 309, in which it was also held that a creditor has no lien preferential to him who takes the estate from the heirs; and although the learned Judges stated that in the event of the heirs alienating the estate prior to the creditors suing out execution, they would then be personally liable to the extent of the assets they had received, it would by no means be safe to conclude from this that their Lordships intended to lay down the broad doctrine that irrespective of the nature of the debts, and whether or not the estate was ancestral or acquired, the heir would be responsible for their due payment to the extent at least
of the assets inherited. To have declared such a doctrine would not only have been to decide in opposition to the Hindu Law prevailing in the North Western Provinces, but would have been directly contrary to the Full Bench Decision of the late Sadr Court reported in the text, which was based on the opinion of the Court's Pandit to the effect that the sons could recover their shares of the ancestral property sold on account of their father's debts provided the latter were not contracted for the benefit of the family. See also Kantoo Lall versus Girdharies Lall 16th April 1868 IX Suth. W. R. 470-471.

2. This principle has also been affirmed in a very recent case tried on the Original side of the Chief Court of the Punjab, in which it was argued on behalf of the creditors that under para 3 Sec. IX, and para 1 Sec. XI, of the Punjáb Civil Code, the father's debts whether contracted from necessity or otherwise were a proper charge on the ancestral estate held by the father; but the learned Judges over-ruled this contention and held that, as under Hindu Law, a son had inchoate rights distinct from those of his father, the rights of the son were not saleable in execution of a decree against his father, unless the debts for which the decrees were made, were incurred for necessary purposes, such as would be sufficient to justify alienation by a father without the consent of a son under Hindu Law. Bugonath, by his mother, versus Ruheem Bux and others, 27th April 1869, IV. P. R. 106.

3. It must be remembered, however, that the above remarks are confined to the liability of ancestral immovable property for personal debts of the father, as distinguished from family debts, in provinces governed by the Mitaksara law only; for in Bengal, where a father's power of alienation is absolute, the proposition that "debts follow the estate" would strictly apply; because since a creditor could bring the entire property, ancestral or acquired of his debtor to sale in the lifetime of the latter, he could by parity of reasoning, exercise a similar power against the heirs after the debtor's death. The same may be said of acquired property under the Mitaksara law. Such property would no doubt pass to the heirs subject to the debts of the father.

4. It has been held by a Division Bench of the Calcutta High Court that since, under the Mitaksara system, sons can at their pleasure force a father however reluctant to divide with them property obtained from a paternal grand father, they have a vested and not a contingent interest in such property; and that their interest is therefore saleable at any time in satisfaction of claims against them. Goor Sams Dass versus Ram Sams Bhusut 30th January 1866. V. Suth. W. R. 54. But on a subsequent hearing of the same case it was held that the rights of a son to succeed by survivorship to his father's specific share of property, cannot be sold in execution of decree, such right being too remote. 25th July 1867, VIII Suth. W. R. 253.
ANCIENTAL PROPERTY.

Profitsof an ancestral estate are patrimony, and properties acquired with them become the joint estate of father and sons, not of the father exclusively.

SUDANUND MAHAPATTUR (PLAINTIFF) Appellant.

Versus

BONOMALEE DASS MOHAPATTUR AND OTHERS (DEFENDANTS)

Respondents.

Before the High Court of Bengal.

Present:—O. B. Trevor, C. Steer, and E. Jackson, JJ.

Jackson, J.—This is a suit brought by Shudanund Mohapattur, plaintiff, as the adopted son of one Chuckerdhur Dass, to set aside certain petitions alleged to contain the will of Chuckerdhur Dass, and to recover possession of the whole landed estate of his father against the defendant Bonomalee Dass, who had also been adopted by Chuckerdhur Dass, but whose adoption was set aside as invalid by a final decision of this Court in Regular Appeal No. 181 of 1860, dated 28th February 1863, reported in Marshall's Reports, page 317. The Principal Sudder Ameen of Cuttack has decreed to the plaintiff his claim as far as it relates to the ancestral property of the deceased, but has dismissed it as far as it relates to the self-acquired property, being of opinion that the judgment of the High Court above alluded to finally decided that under the will of Chuckerdhur Dass, the defendant Bonomalee had under those petitions been declared entitled to the self-acquired property. Mr. Doyne on behalf of the plaintiff, appellant to this Court, has contended. First.—That the previous judgment of the High Court did not declare that the
said petitions contained the will of Chuckerdhur Dass; that there was one distinct will made by him, and that as regards the self-acquired landed estate devised by that will, his client is not in a position to raise any objections, but that several subsequent petitions are now put forward as forming a part of that will, under which it is alleged that estate obtained after the will was made was devised to Bonomalee; that these petitions are not, either in the terms in which they are recorded or in the mode in which they were executed, wills; that subsequently, as regards the self-acquired estate said to be devised by them, the plaintiff, as heir at law, is entitled to obtain possession; that although there may be a passage in the former judgment of the High Court, which declared that these petitions had some connection with the will, still that the effect of these petitions, as devising property, to Bonomalee, was then not a question at issue before the Court; that even then, if any decision was come to upon that point, it must be considered to be ultra vires, and a mere obiter opinion which cannot have judicial effect in this case; that the former suit solely related to the Plaintiff, Shudanund Mohapattur, having been disinherited by his father, and that Shudanund in that suit sought to set aside the wills and petitions solely as far as they disinherited him; and that no question then arose as to their effect in favor of Bonomalee. Secondly, Mr. Doyne urged that the onus of proving what was the self-acquired property of the deceased Chuckerdhur Dass, was upon Bonomalee; that all landed estate, purchased with the annual proceeds of the ancestral estate, was ancestral property within the legal definition of those words; that although this question also had apparently been determined by the former judgment of this Court, still that decision was altogether obiter as there was no question as to any particular property raised in that suit.

For the respondent it was contended that the question now raised had already been finally ruled in favor of defendant by the former decision of this Court, but that even if they had not, the judgment which the learned Judges then recorded was correct; that the petitions in the most public manner devised the whole of
the self-acquired estate of the testator, Bonomalee, and that under the Hindoo law, the proceeds of the ancestral estate belonged to Chuckerdhur Dass while he lived, and all landed estate purchased with those proceeds was like the money with which it was purchased, his self-acquired property.

It appears that Chuckerdhur Dass was a very wealthy man, possessed of large estates which he had inherited from his father, and to which he added during his life-time. He adopted in the first place, the plaintiff, Shudanund Mohapattur, as his son, and again at a later period of his life, he adopted the defendant, Bonomalee, as a second son. He then made a will, to which he obtained the consent of both these adopted sons, and under which he devised to them his whole landed estate, both ancestral and self-acquired then existing, in the shares of 9 annas and 7 annas respectively, giving the first adopted son the larger share. This will was executed in 1849. Chuckurdhur Dass had reason afterwards to be displeased with the plaintiff Shudanund; and in the year 1857, he presented a petition to the official authorities of his district; in which it is admitted that he disinherited Shudanand, and in which it is asserted for Bonomalee, though denied by Shudanand, that he devised the whole of his estate to Bonomalee. Shudanand presented petitions to the same authorities questioning Chuckerdhur Dass' right to disinherit him, and asserting that Chuckerdhur Dass was not in his right senses. Upon this Chuckerdhur Dass appeared personally before these authorities in January 1858, and presented further petitions to the same effect as those he had first presented, and alleging that he was in his perfect senses, and had deliberately and purposely acted as stated in the petitions. The authorities record that they were personally acquainted with Chuckerdhur Dass; that they held a conversation with him to ascertain if he was in his senses, and if he really meant to act as stated in the petitions; and finding that this was the case, they admitted the petitions, and allowed them to remain as requested with the will.

First, then, I have to determine whether in the former suit be-
tween these parties, the learned Judges ruled that these two petitions were a portion of Chuckerzhur Dass's will. In one portion of their judgment, they set aside so much of the will as professes to deprive the plaintiff Shudanand of his right to succeed to the whole ancestral immovable property held by Chuckerzhur Dass. They go on to say:

"But as regards all other property, seeing that Chuckerzhur Dass was 'entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the plaintiff. There is "not the least doubt that by the petitions presented by Chuckerzhur Dass, he unmistakeably published his will, and desired to deprive "plaintiff of all rights to the property so far as he could deprive him, "and to give it to Bonomalee." I think this sentence contains a distinct decision that the petitions were a part of the will, that in those petitions he published his will and gave what he could to Bonomalee."

Secondly, it has to be determined whether this decision was beyond the points then at issue before the Court and therefore obiter, or whether it is a binding judgment in this case. It is admitted that the parties in that suit were the same as in this; it is admitted that the plaintiff then sought to set aside these petitions as insufficient and inoperative; but it is said that the relief was demanded only as far as those petitions set aside the plaintiff's adoption, and so disinherit the plaintiff, and that it did not refer to any question as regards the property. There seems to be no doubt that the plaintiff did seek to set aside those petitions as well as the will so far as they disposed of any of the ancestral estate. The will divided the ancestral estate between the sons with their consent. The petition declared that Shudanund was no longer a son, but had been deprived by his father's act of that status, and that Bonomalee was now the sole son and heir. Shudanund, when he preferred the suit, had an interest in the ancestral property. Regarding his father's disposal of that, he could prefer a suit even in his father's lifetime and against his father. But he did not then, and he does not now, question his father's right to dispose of his self-acquired property, and it is therefore difficult to see how he could in his
father's lifetime have brought any suit regarding his father's self-acquired property, with which it is admitted on all hands the father was able to act as he pleased. It may be then that the portion of the judgment above quoted was not a Judicial determination as to what was really willed away to Bonomalee, and as to whether the petitions contained as well as the will, a devise of any self-acquired property, but only an expression of the opinion of the Court acquiesced in probably at the time by the Counsel on both sides, to the effect that Chuckerdhur Dass had in those disputed petitions published his will and desired to leave all he could to Bonomalee. In this case the contents of these petitions are in contest, and it is put in issue not only what Chuckerdhur Dass desired to do with his self-acquired estate, but what he actually did with it. I have the less hesitation in coming to the conclusion that the opinion given by the Judges in the former suit is not a binding judgment, because I find that the reasons upon which that opinion was arrived at are not recorded as they would have been, had there been any real contest upon it at the time; and, secondly, because I concur in the opinion then given.

It is then, thirdly, to be determined whether these petitions of July 1857 and January 1858 contain a devise to Bonomalee Dass of all the self-acquired estate of Chuckerdhur Dass over which he had the power of disposal.

Mr. Doyne argues against that view, that the petitions are not even signed by Chuckerdhur Dass, that they are signed by his Mooktear, that they are not declared in any way to be wills, that they are put into Court in a hasty fit of anger at his first adopted son. There is no doubt that they are not regularly executed wills in the English formal view of a will. But it may be that they contain a sufficient disposition of his property by a Hindoo. Mr. Doyne admits that the determination of the question must not rest on the forms which attended the preparation and publication of these papers, but on the whole of the evidence as proving that Chuckerdhur Dass did by those petitions make a testamentary disposition of his property.
If those petitions contain a testamentary bequest, I think that it is proved that they were the deliberate act of Chuckerdhur Dass, even though they were not signed by him. Had only the first petition been presented, there might have been some doubt how far the act and signature of his Mooktcar was the act of Chuckerdhur Dass. But the second petition was presented by Chuckerdhur Dass in person, and it is recorded upon it that Chuckerdhur Dass personally attended and stated to the public authorities of the District that that petition was his deliberate act and performed by him in the full possession of his senses, and with a full knowledge of what he was doing; and even if this was wanting, there is his answer in the suit preferred by Shudanand in which Chuckerdhur Dass not only admits that he had given in these petitions, but attempts to support their legality. Mr. Doyne however then argues that the petitions, though they may have been intended to sustain a testamentary bequest, virtually sustain no such bequest, that the first petition merely confirms the original will, and points out that the present plaintiff had, according to a clause in that will, forfeited his rights under it, and having ceased to be a son at all, that Bonomalee as the only son will inherit, and that it goes on distinctly to record that, as respects all property which is not devised by the will, Chuckerdhur Dass retains in his own hands the full power of disposal. My own impression, after a very careful examination of the will and of both the petitions, is that Chuckerdhur Dass did intend by them to declare that Bonomalee was his heir as regards his whole estate. The words are not so precise as they might be. In the first petition however Chuckerdhur Dass is distinctly alluding to a disposition of his property after his death, as he states that "he considers that Bonomalee as now being his only son" (according to his opinion) "will perform his funeral ceremonies, and after him be owner and heir of everything." Mr. Doyne argues that there is a distinction between Chuckerdhur Dass considering that Bonomalee will now be his sole heir, and his declaring that fact. I would not make that distinction, but would give full effect to what was the testator's intention in recording that petition, and that I consider to be formally to declare to the public
authorities that Bonomalee was his heir. As to the concluding words of the petition upon which so much stress has been laid, I think they are redundant, and that they do not in any way limit the bequest to Bonomalee. They contain a proviso that notwithstanding the will, Chuckerdhur Dass retains in his own hands the power of acting with his estates while he lived. They were mere surplusage, the words of an ignorant man who feared that, by making his will, he deprived himself of the power of taking action with his estate during his own lifetime. It is pointed out that this proviso extends only to property not mentioned in the will. But this is very doubtful. The words are "Waseutnarnak Sewai," whatever moveable and immovable property I have acquired or shall acquire, I retain the power of sale or gift over. Sewai certainly, as a general rule, has an exclusive signification, but it also has an inclusive meaning much in the same way as our word besides, and it is the latter meaning that I would put upon it in this sentence of the petition. If there was any doubt, however, as to the wording of this petition of July 1857, it is, I think, completely removed by that of the second petition of January 1858, in which Chuckerdhur Dass, distinctly referring to the first petition, states that he has made Bonomalee the Malick of all his estates and of all that he possesses both that mentioned in the will, and of everything that he acquires subsequently, and that his elder adopted son Shudanand shall have no right or title to any portion of it. Here, again, it might be said that the word Malick is indefinite, but it is evident from the context alluding to funeral ceremonies that he meant by Malick to mean heir. I would then hold that Chuckerdhur Dass did bequeath all his estate, as he could bequeath it, to Bonomalee, who is consequently entitled to all his adoptive father's self-acquired estate whether mentioned in the will or not.

The fourth question at issue on this appeal is whether the opinion of the Judge in the former suit that landed estate purchased out of the proceeds of ancestral estate is to be considered as self-acquired estate is a binding judgment. The Judges say, it is a question which fairly arose in the contention then before them,
and it is evident that there must have been some argument upon it, and reference to the authorities, though the decision is very short, and does not enter into the grounds upon which it is arrived at.

As a general rule, it is much to be deprecated that a Court should, when a decision has been already clearly given, by a former Court, reopen the same question between the same parties, and hold the former decision to be obiter. But the facts of this case are peculiar. The plaintiff brought the former action against his father, and while the case was pending in appeal, his father died. The case was still carried on by the second adopted son Bonomalee, the present defendant, who had also been from the first a party to the suit. But, on the father’s death, the state of affairs became changed. Many more issues then arose between the two sons than would have arisen between the first adopted son and the father had he lived. The bequest to Bonomalee, except as to the ancestral property, was not in my view of the case contested while the father was alive. The declaration which the father had made in his will that certain estate was his self-acquired estate, was certainly not contested in the former plaint. It was acquiesced in. It is a point which has only arisen and been prominently brought to the plaintiff’s notice—when Bonomalee took possession of the property, that is, when the father died. I do not say that it might not have been raised by the plaintiff in his plaint, but it certainly was not raised, and no issue was declared upon it by the first Court. Looking, then, to all these circumstances, I think the opinion expressed in the former judgment is not binding upon the parties, and I proceed to discuss the question.

I do so with less hesitation, as here also I concur with the former Judges. It is admitted that the law which is to guide us is the Mitakshara. It is admitted that, in a partition between a Hindu joint undivided family composed of brothers, all acquisitions made by the manager of that family out of the profits of the joint property belong to the joint estate, and therefore that if we were now considering the question as between brothers, there would be no question that all landed estate purchased with the profits of the joint
estate, would also be joint. It is also admitted that, as respect ancestral immovable property, a Hindoo father and sons are under the Mitakshara Law a joint family at least to that extent that the father cannot alienate such ancestral property, except for special purposes. But there seems to be a great doubt as to the extent of interest which a son possesses in such immovable ancestral estate while a father lives. It appears to have been lately* ruled by the learned Judges of the High Court at Madras against the opinion of such learned commentators on the Hindoo Law as Sir Thomas Strange and Sir William Macnaghten, that a son's interest extends to that point; that he can compel an unwilling father to transfer to him a share of the ancestral immovable estate. It appears, again, on the other hand to be admitted that, although a son has a joint interest in the ancestral immovable estate with his father, call upon his father for an account of his management of the profits of that estate, that he for instance could not sue his father for mesne profits for years during which it was under his father's management. If so it would follow that the son's interest did not extend to the annual profits received from the ancestral immovable estate while it remained joint, and even though it may reach to the estate itself to the extent of being able to force a separation, and thereby to enjoy the profits of his share after separation it would not necessarily follow that his interest would be the same even before his share was separate from the estate.

It appears to me that it would be carrying the joint interest of a son to an unprecedented extent to hold that he could call upon his father to account for his management of the ancestral estate as regards all profits received from it. Such a law would be contrary to public policy. Still if that law was distinctly laid down, it might be acted upon. But although the Madras decision very nearly reaches that point, it does not altogether do so, and the law itself is silent upon it, and in some passages, looking upon the profits as moveable

* Stoke's Reports Volume I, page 977.
property directly against that view, Para 27, Section 1, Chapter 1, Mitakshara.

There is still, however, another question for consideration. It may be that, even, if the father as manager is entitled to expend the profits received in his life-time from the ancestral immovable estate, still if he expends that money in purchasing other immovable estate, such estate thereby becomes ancestral.

It is not contended that immovable estate acquired by the father out of any profits, but those of the ancestral estate, are not self-acquired property and at his disposal. The Mitakshara says (Chapter 1, Section 4) that all immovable estate acquired or recovered with the use of the patrimony, must be considered ancestral. But it is a question whether in a joint Hindoo family, the profits from ancestral estate are patrimony. They are not, I think, patrimony within the meaning of the words "descended from the father." The ancestral immovable estate alone is patrimony. The profits of that estate can be used and expended by the father without detriment to the estate. If any of the estate itself is sold or used in any way, what is acquired or recovered with such use takes the place of the patrimony, and is viewed by the law as patrimony. The son's interest in a joint family of father and sons extends only to the patrimony. A son may, by compelling the father to divide that estate and give him a share, obtain an additional interest in it. But as long as it remains joint, the father alone is absolute master of all the profits derivable from the patrimony. He is at liberty to expend them as he pleases, and is not accountable to his son for such expenditure. He must maintain his son, but beyond what is necessary for maintenance, he may give what he pleases to any one. Such profits do not, therefore, in my opinion constitute ancestral property, and immovable estate purchased with such profits is, therefore, in my opinion also not ancestral property. Indeed, it appears to me that, even in a joint family of brothers, such profits would not be their patrimony, but their own property acquired by themselves, and to which such brothers would be entitled.
as such to a share, and for which the manager would be liable to give an account to each brother. The difference between a joint family of a father and sons, and of a joint family of brothers, as regards their rights in the profits of ancestral immovable property, is that in the former the father is sole unaccountable owner, and in the latter all the brothers are joint owners. In the former, the son's interest extends only to the undivided estate. In the latter, the brother's interest extends to the profits as their acquired property, as well as to the estate as their patrimony.

Holding the above view of the different questions raised in this appeal, I would dismiss it with costs.

Steer J.—My colleague thinks that the petitions of the deceased Chuckerdur Dass referred to by him was declared by this Court in its judgment of the 28th February 1863, to be parts of the will of the said Chuckerdur. At the same time, he thinks that the decision of the Judges to that effect was obiter, and not therefore binding.

I agree with my colleague in thinking that, if the Judges intended to declare their opinion that the petitions were in their nature and design testamentary instruments, their opinion is obiter, for there was no issue to try the questions of the character of those documents, and no reasons are given why those papers are to be regarded as wills.

But I disagree with my colleague in thinking that the Judges intended to declare that in their opinion the petitions referred to were wills. In their remarks they seem to me to refer to one will only, and they regard the petitions as so many separate publications of that will.

Every petition was a separate and distinct publication of his will. In every one he announced the forfeiture of the inheritance of his first adopted son the plaintiff, and as a consequence of the civil death of that son, the right of the defendant, the second adopted son, to the rights of an only son. As far, then, as these petitions professed to deprive the plaintiff of the estates which came to his
father from his ancestors, the Court declared those petitions as in-
officious and inoperative, and that, I think, was the light in which
the Court regarded those petitions. There is no part of their judg-
ment in which it can be gathered that, besides the one admitted will
all those several subsequent petitions were wills also. Nor can I
think, as my colleague has done, that it is right to regard these
petitions as wills, or as it were codicils to the original will. Their
scope and design were to declare simply that, by reason of the plain-
tiff's forfeiture of his status as a son, Bonomalee was henceforth to be
regarded as an only son; and as such he would be entitled, whether
Chuckerdhur had said so or not, to be regarded as his sole heir.
I do not think that Chuckerdhur meant in any of these petitions
to say that he then and there made a bequest to Bonomalee of all
his property. All he intended by the petitions was to remove all
doubt as to the effect which his repudiation of his son, the plain-
tiff, would have in the future devolution of the property. He may
be taken to say in these, "Shudanand is no longer my son, he no
longer stands in the way of Bonomalee as my heir."

And indeed, if as Chuckerdhur clearly thought he could dis-
inherit the plaintiff, what reason is there to regard these petitions
as wills, for they were useless as wills. If plaintiff was not a son
and had no rights of a son, the whole inheritance was Bonomalee's
without any express devise. Chuckerdhur thought he could deprive
plaintiff of the status of a son. If plaintiff were deprived, then
Bonomalee succeeded to every thing. Where Bonomalee would, as
of right, succeed, how can we suppose that Chuckerdhur meant to
make a devise in his favor?

The theory of a devise can only be sustained by supposing that
Chuckerdhur was in doubt, as to his power to deprive the plaintiff of
his status, and his rights as a son; but there is no ground for suppor-
ing that he entertained any doubt upon the point, and if he did not
entertain any doubt, then, in his view, Bonomalee was his sole succes-
sor, and he is not likely to have made a devise in his favor of what would devolve upon him in natural course.

I think then that the petitions cannot be regarded as in the light of wills. Another point on which I cannot agree with my colleague is as to what we are to regard as the ancestral property of the late Chuckerdhur Dass. There seems to be no question that in his life-time Chuckerdhur made acquisitions to landed property. It does not seem to be disputed that he made these out of the profits of the landed estates which he acquired from his father. Now the question is, are these subsequent acquisitions made professedly out of the assets and profits of a joint ancestral estate to be regarded as also ancestral?

Now there are numerous decisions in which it has been held that, where it is presumed that property has been bought out of the assets of ancestral property, it is itself ancestral. It seems to me, therefore, that it is too late in the day to question the applicability of this principle of law to the case of any joint Hindoo family.

I can see no distinction as regards right of property between the law in respect to one joint family and another. A family consisting of father and son, is as much under the rules which govern right of property in joint families, as a family of brothers. If one brother of a joint family cannot, by the use of joint funds (and all funds are joint till there is a separation from a joint state) acquire property for his separate use, no more can a father. In parts of the country, and in families governed by the Mitakshara Law, the father and son are joint proprietors. The father, it is true, is the sole manager, and as such he has the control of the expenditure of the whole of the family; but I take it, whatever he expends, he must be considered to spend for the family, and whatever he acquires, he acquires for the family; for they have a common interest with him in the expenditure and in the acquisitions. I can never concede the theory that in a joint Hindoo family where the landed property is managed by the father, he is at liberty to spend the surplus income of the family
estate in the purchase of a private estate for himself. The income is not his, but the family’s; and though he cannot be controlled while he is manager in the purchase of such property as he thinks fit to buy out of the income of the family estate, the estate he does so buy must be considered the property of the family.

In this view I would decree to the plaintiff all the landed property sued for, with all the costs of suit.

_Trevor J._—This case was referred to a third judge, in consequence of a difference of opinion upon two points between the Judges who heard the case.

These points were:—_1st_, whether the petitions presented by Chuckerdhur Dass amount to a testamentary act or not; and if they do, what is the effect of them? and _2nd_, whether property purchased by a father, in possession of ancestral property as manager for himself and sons from the profits of such ancestral property is itself ancestral property or self-acquired. On the _first_ point I have no hesitation in agreeing with Mr. Justice Elphinstone Jackson. Considering that the testator was a Hindoo, that no particular form is necessary amongst them for making a testamentary disposition, that it is equally valid whether it was in writing or orally published provided that the intention is clear, it appears to me that these petitions acknowledged by Chuckerdhur Dass were in the nature of codicils to the will executed by him, and that they had the effect of disinheriting Shudanand of everything that had been left to him by the will which the father could will away, and of a bequest in favor of Bdomalee Dass of all that property.

On the _second_ point I am clearly of opinion with Mr. Justice Steer that, as the father and son or sons are co-owners in the ancestral property, so they are co-owners in that which issues from it, _viz._ the profits of that joint estate, and that consequently any estate purchased by these joint funds follows the character of the fund of which it is the representative.

The decree in the case should, therefore, be drawn up in conformity with the opinion of the majority of the Court on these points.
1. It will be seen that the learned Judges in the above case differed in their opinions as to whether profits derived from an ancestral estate were also to be considered as part of the patrimony, and although the majority of the Bench decided in the affirmative, the fact that in the previous case between the same parties, (reported in Hay's Reports for 1863, p. 252) two other Judges of the High Court, one of whom was the late Judge Sunkhounath, whose specialty of course was the Hindoo Law, decided in the negative, the point can scarcely be said to be authoritatively settled. A good deal can undoubtedly be said on either view of the question, and it is a pity that when there was a difference of opinion between two judges and a previous division Bench had passed a contrary decision, that the point was not referred to the Court at large for a ruling which would have settled the law once and for all. If I might be permitted to give my own opinion, without at all implying that it be presumptuous, I would say that the view taken by Judges Steer and Trevor is the one most in accordance with the spirit of the Hindoo Law. The whole of Section IV of Chapter I of the Mitakshara shows that whatever is acquired at the expense of the ancestral wealth, "must be shared with the whole of the brethren; and with the father;" and surely if, as regards brethren in a joint family, acquisitions of the kind in question are regarded as joint, they ought a fortiori to be likewise so regarded between father and sons, who, under the Mitakshara system at least, are essentially joint proprietors. It is argued by those who hold the negative doctrine that the income of the estate is at the disposal of the father during his lifetime, and he can therefore spend it as he likes, without being accountable to his sons; but I think that the law in allowing the father such control, did so with the limited object of thus enabling him to provide for his family: and although he may be the sole judge of what expenditure is necessary for the support of his family, it is by no means fair to deduce from this that he can acquire a large estate for himself from the surplus income he has kept from his family. In short I do not think that the Hindu law anywhere permits a father to build up an acquired estate, which he can dispose of as his will and pleasure out of the proceeds of ancestral property, which is specially entailed for the support alike of those "who are born, and those who are still in the womb." Mit. Chapter I Sec. 1 para 27.

2. In the case of Rajmohan Gossain versus Gourmohan Gossain, VIII. M. I. A. page 91, the Lords of the Privy Council cast aside the "ancestral property" in the sense of "paternal" and held it to mean property derived from the father, in whatsoever manner or by whatsoever title the father had acquired it. But Westropp J. is reported to have said, in a case decided in 1866, partly on the strength of a passage in the judgment of the Privy Council in the great case of Kalama Nathiar versus Rajah of Shiravanga, 9. M. I. A. 609, (which established the position that "when property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property,") that "there is no distinction between property thus acquired by partition of family property, and self-acquired property, either in point of descent or of alienability." Narottam Jagirian versus Narandas Hariyandas, 18th October 1866, III Bombay H. C. Rep. 343, (which decided in the affirmative, the fact that in the previous case between the same parties, one of whom was the late Pun Bench, which under the Mitakshara system at least, is a remote kinsman of the testator, and separate property, either by testamentary disposition; that in fact it should be limited to a state of facts similar to those in the case then before him, where the party denying the power of testamentary disposition was a remote kinman of the testator, and separate property belonging in common to a united Hindu family has been divided, the divided shares go in the general course of descent of separate property,") that "the Privy Council in the the Rajah of Shiravanga's case, quoted in the judgment of the Division Court, that the divided shares go in the general course of descent of separate property, and that the same power of alienation by gift, or disposal by will, as in the case of separate property. In the case before Mr. Justice Westropp, also quoted, the person disputing the will was a remote kinman, and the opinion that there is in all cases the same power of disposition over separate property, as over self-acquired property, must be considered as extra judicial. "We cannot give the same effect to it
"as we should if it were an express
decision upon the point in dispute
in that case, though, when this ques-
tion has to be determined, it must
receive all the consideration which
the learning and experience of the
learned Judge entitles it to. The
opinion we now express is likewise
extra judicial, and we only give it in
order that we may not be supposed
from our silence to concur in this
part of the judgment of the Division
Court." V, Bombay H. C. Reports,
page 135, 136, O. C. J. The Calcutta
High Court has also laid it down in
a well considered judgment by Norman
and E. Jackson J.J., that "according
to the Mitackshara, landed property
acquired by a grandfather and dis-
tributed by him amongst his sons,
does not by such gift become the self-
acquired property of the sons so as
to enable them to dispose of it by gift
or sale without the consent, and to
the prejudice, of the grand sons,"
Muddum Gopal Thakoor versus Ram
Buksh Pandey, reported ante page 232.
BAIRAGIS:—Right to inherit.

A Hindu becoming a Bairagi, if he chooses to retain possession of, or to assert his right to property to which he is entitled, may be doing an act which is morally wrong, but in which he will not be restrained by the Courts. He is not in fact excluded from inheritance.

TEELUK CHUNDER (PLAINTIFF) Appellant.

Versus

SHAMA CHURN PROKASH AND OTHERS (DEFENDANTS) Respondents.

Before the High Court of Bengal.

Present:—E. B. Kemp and F. A. Glover, JJ.


Three points require consideration in this appeal.

1st. Are the special respondents excluded from all right of inheritance from the circumstance of their being Byraghees.

2nd. If they are not excluded, is the special appellant entitled at all to a decree for his own share of the ancestral property.

3rd. Was the Lower Appellate Court right in decreeing the appeal in favor of parties who had not joined in the appeal.

On the first point we concur with the Court below. The special respondents are not ascetics who have given up all worldly cares and transactions. They still buy, and sell, marry, and have children. They have not left the "household order." See page 300, Vivada Chintamonee. Their "Kriyak" or title may be Byraghee; but that they still pursue secular employments, is very clear.
They are consequently not excluded from their right of inheritance.

On the second point, we find that the plaintiff (Special Appellant) sued for the whole of the paternal estate on the ground that he alone was entitled to succeed, inasmuch as his brethren were excluded on account of their being Byraghees. The plaintiff did not state that he was not in possession of his own share of the property, or that he had been deprived of the same. We therefore deem it unnecessary to pass any decree with reference to the extent of this share, as that was not the issue in this case. It is sufficient to say that this decision will not prejudice his title.

The third is not raised in the grounds of special appeal.

The appeal is dismissed with costs and interest.

In the recent case of Jagannath Pal versus Bidyanand, 16th July 1868, 1 B. L. R. 114 A. C. J., the learned Judges (Jackson and Dwarakarnath Mitter) said:— "It appears to us indisputable that a Hindu becoming a Bairagi, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, does an act which may be morally wrong, but in which he will not be restrained by the Courts." 2.

2. The distinction between Bairagis and other avowed devotees, such as Yatis or Sanyasis (ascetics), Vanaprastha (or hermit), and Brahmachari (professed students of theology), as regards exclusion from inheritance, is sufficiently explained in the case given in the text; and in a case reported in Fulton's Reports (volume 1, page 217) it was held that a "Byragi is not necessarily such a religious devotee that his goods are inherited by his pupil in the event of intestacy." Gobind Dass versus Ramsahaya Jamadar and others, 3rd Augt. 1843. So also in Madhoobun Dass versus Harry Kishen Bhanj where the deceased (Sreekur Bunj), who was a Bairagee and the superior of a monastery, carried on worldly affairs, communicated with his family, and drew from Government a pension of Rs. 8,000 a year as raja, it was held (by Jackson, Mytton, and Sir R. Barlow J.J.) that he could not be considered to have become a religious recluse to such an extent as to exclude his legal heirs from succeeding to his property, or incapacitate him from adopting a son. "To become a religious ascetic," said the learned Judges Jackson and Mytton, "and exclude his heirs from succession to property subsequently acquired, he must bona fide retire from all worldly affairs, and in fact become, as it were, dead to the world, leaving all the property then vested in him to the legal heirs, who succeed to it at once." S. D. A. C. Decs, for 1852, page 1069. It appears, however, that Bairagees of the pure class are required to renounce the world, and are incapable of holding property. They are as it were born again, and are treated as civititer mortuus in respect to property previously acquired, and the next heir at once succeeds. In practice it is otherwise, for in the present age they hold property and trade largely. See evidence of Baboo Prosuno Coomar Tagore, in Doe. Dem. Sita Ram, August 1859. Vyasavatha Darpana page 330—334, 2nd edition.

3. But as regards Sanyasis the Pundits of the Sadar Dewani Adalat of Bengal declared the right of succession to devolve on the Chela, or adopted pupil, Gunas Gir versus Amrao Gir 9th November 1807, 1 Select Reports page 291 new edition; but the pupil must be virtuous (Sat-shishya), assidu-
ous in the study of theology, in retaining the holy science, and in practising its ordinances, *Mitacshara*, Chapter II, Section VIII para 4; *Vyavastha Darpana*, pages 312, 331. In the case of a hermit (*Vanaprasta*), a spiritual brother and associate in holiness, that is, one belonging to the same hermitage, takes his goods; and in that of a professed student (*Brahmachari*), the preceptor is heir, but the mother and the rest of the natural heirs take the property of a temporary student. *Mitacshara*, Chapter II Section VIII, paras 5 and 3. *Vyavastha Darpana*, pages 312, 313, 2nd edition.

In *Mohunt Rumun Dass versus Mohunt Ashbul Doss* it was contended by the plaintiff that under the practice of *Mithila*, an ascetic may keep women and have sons, and that those sons by virtue of their sonship succeed to the property, and that the *chettaship* follows the sonship; but the Court (Trevor and Campbell, JJ.) held that an ascetic, a mere life-tenant, could not alter the succession to an endowment belonging to ascetics, by an act of his own in connection with the status under which he originally acquired the trust, and accordingly dismissed the plaintiff's case. 21st September 1864. I. Suth. W. R. 160.
BASTARDS, see ILLEGITIMACY.

BROTHERS AND THEIR ISSUE.

A brother succeeds to his brother, leaving neither widow, father, mother, nor issue, to the exclusion of his nephews, the sons of an elder brother.

(In the case of landed property devolving on a widow by the death of her husband, the right of the husband's heirs begins to accrue on the death of the widow, not from the date of the death of the husband.)

ROODER CHUNDER CHOWDRI, Appellant,
Versus
SUMBHOO CHUNDER CHOWDRI, Respondent.

Before the Sudder Dewani Adawlut of Bengal.

Present:—S. T. Goad, and W. Dorin, JJ.

The respondent brought this action against the appellant on the 8th February 1819, in the Dacca Court of Appeal, to recover possession of a 13 gundah, 1 cowrie, 1 krant share of a Zemindaree situated in Pergunnahs Mymensingh and Zaffer Shahee, the triennial assessment of which was stated to be 15,210 rupees. The following was a statement of the case:—Lukhinarain, the proprietor of a 4 anna share of the property in dispute, died leaving three sons, Sham Chunder, Govind Chunder, and Rooder Chunder; Govind Chunder, the second brother, died in the Bengal year 1190, childless, but leaving his widow. His two brothers took possession of his share of the estate, alleging that he had made a gift of it to them, but his widow Radhamunee sued them and ultimately obtained a decree in her favour in the Court of Sudder Dewani Adawlut, (a), and she got possession of the portion enjoyed by her husband during his lifetime. Sham Chunder, the eldest brother, and father of the plaintiff, Sumbhoo Chunder, died in 1819.

(a)—For an account of this case, see printed Reports, No. 41, of Causes adjudged previously to the year 1805.
and Radhamunee, the widow of Govind Chunder, died in 1821. The claim of the plaintiff was for half the property left by Radhamunee, to which she had succeeded on the death of her husband by a decree of the Court of Sudder Dewani Adawlut. It was alleged on behalf of the plaintiff, that his father and the defendant had entered into an agreement, to the effect that, on the death of Radhamunee, they should equally divide between them the property held by her, and that in the event of either dying before Radhamunee, the representative of the deceased brother should share equally with the survivor. It was urged in reply that no such agreement as that alleged by the plaintiff had ever been executed, and that according to the Hindoo law, the plaintiff had no legal claim to any portion of the property left by Radhamunee, his father having died during her lifetime. The third judge of the Dacca Court, without reference to the authenticity or otherwise of the agreement alleged to have been entered into by the parties, considering the decision of the case to turn chiefly on a point of Hindoo law, put the following question to the Pundits. On the death of a Hindoo widow, who had a life interest in her husband's estate, the claimants to such estate are her husband's brother, and the son of a deceased brother of her husband. Under these circumstances which of these two claimants is entitled to inherit the property? The Pundit of the Dacca Court replied, stating that they were entitled to participate equally; but the Judges having some doubt as to the accuracy of this exposition of the law, the case was referred to the Court of Sudder Dewani Adawlut, with a request that the opinion might be reported on by the law officers of this Court. The Law Officers, Sobha Bai Shastree and Bamtunoo Serma, having accordingly perused the question and reply, verified the exposition delivered in the Court below, stating that the plaintiff was, in this case, entitled to his share; as a son whose father is dead is entitled to share the inheritance with his uncles, agreeably to the following text of Catuyayuna, cited in the Daya Bhaga:—"Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grand father."
On the receipt of the above verification of the opinion of the Pundit of his own Court, and considering it established that an agreement was entered into as stated by the plaintiff, the third judge of the Dacca Court of appeal gave judgment in favour of the plaintiff, directing the Collector to separate the share obtained by him from the rest of the estate, conformably to the 5th Section of Regulation 19, 1814.

Reader Chunder Chowdri being dissatisfied with this decision appealed to the Court of Sudder Dewani Adawlut, and the cause came to a hearing on the 16th, 17th, 18th, and 19th of July 1821, before the Officiating Judge (W. Dorin,) who recorded his opinion to the following effect. This claim appears to have been instituted for the recovery of half the estate which was held by Govind Chunder Chowdri, and which, on his death, devolved on his widow Raihamunee. A decree has been passed by the Court below in favour of the respondent, partly on the ground of an alleged special agreement, and partly on the general law of inheritance; but with reference to the question of law it appears necessary to investigate the matter more fully. From the English version of the Daya Bhaga, of the Daya Orana Sangraha, and of the Vivada Bhunyarnuba, compiled by Jugunnatha Turkapanunama, and translated by Mr. Colebrooke, as well as from the Vyuvusothas declared by the Pundits of this Court, in the case of Booder Chunder Singh, petitioner, in the case of Srinarai Rai and others versus Bhya Jha, and from the opinion delivered by the Pundits in this case, agreeably to the requisition of the Dacca Court of Appeal, it appears to be an established maxim of law, that in the case of landed property devolving on a woman by the death of her husband, the right of her husband's heirs begins to accrue from the date of the death of the widow, not from the date of the death of her husband,—consequently, of the husband's heirs, they only can be entitled to the inheritance who are living at the time of the widow's death. The right of him who dies during her lifetime is entirely forfeited, and cannot devolve on his son. This doctrine has been established by former legal expositions. Although
here is some difference between the Hindoo Law, as current in Purneah and the rest of Bengal, yet there is no difference of opinion on this point, all agreeing that a widow succeeds in default of a son, grandson, and great grandson; and although the widow is restricted from transferring the property, yet she is clearly an heir, and has an indefeasible right of succession. With regard to the opinion furnished by the Pundits of this Court at the requisition of the Dacca Court of Appeal, it is certain either that the question was not stated correctly, or that the purport of it was not clearly understood by the Law Officers. They must have concluded that the question was put presuming the right of Govind Chunder's brothers to have accrued immediately on his death. Had this been the case there could not have existed a doubt on the subject, but the widow had the right during her lifetime, agreeably to the decree of this Court without detriment however to the brother's reversionary interest. The authority quoted is not applicable to the case in question, and the law, as hitherto expounded, is that on the death of a childless widow on whom her husband's property had devolved, her husband's brother is heir, to the exclusion of her husband's brother's son. It is fit, however, that the Pundits should have an opportunity of explaining their meaning, and that the same question should again be proposed to them in the following terms:—There are three brothers joint proprietors of an estate, of which they have equal shares. The second brother, by name Govind Chunder, dies childless, leaving a widow named Radhamunee, who by the law of inheritance succeeds to portion of the estate, and enjoys it during her lifetime. Previously to her death the eldest brother dies leaving a son. Under these circumstances, on whom does the property devolve on the death of Radhamunee conformably to the law of inheritance, does it go to the younger brother of her husband who was living at the time of her death, or to the son of her deceased elder brother? In other words, the second brother dying childless, and his widow taking his share of the estate by inheritance, and holding it during her lifetime subject to the reversionary interests of her husband's heirs, from what date does the right of such heirs begin to accrue, from the death of the widow or
from the death of her husband? The Pundits were further desired, if they adhered to their former opinion, to reconcile it with the doctrine they had forwarded on former and similar occasions: and they were directed, should they entertain the slightest doubt as to the intent and meaning of the question propounded, to apply to the Court for a solution of such doubt. On the 8th of August the cause came on again before the third and Officiating Judges (S. T. Goad and W. Dorin), the Pundits having delivered an amended reply to the following effect. Under the circumstances now stated, the widow's husband's younger brother will succeed to the property which had devolved on her, and the son of his elder brother will not be entitled to any portion of it; because the property of a man which had devolved on his widow will, if at her death he had neither daughter nor daughter's son nor parents, go to his brother to the exclusion of his brother's son; the right of a brother's son being subordinate to that of a brother. The right of the husband's heirs does not accrue on his death, but on the death of his widow; because the following is the prescribed order of succession to the estate of a person leaving no male issue:—First, the widow succeeds, then the daughter, next the daughter's son, then the father, next the mother, then the brother, then the brother's son, and so forth. The right of these individuals accrue consecutively, and therefore as long as one holding the prior right exists, the right of the heir whose claim is posterior cannot come into operation. This is the case in the present instance with the widow, the husband's brother, and the brother's son. The former reply was given under a supposition that the widow's tenure in this case, was of a peculiar nature, and qualified or limited by some special circumstances. Now as it has been explained that the widow succeeded absolutely and by the ordinary law of inheritance to her husband's property; a suitable reply has been given conformably to the doctrine contained in the Daya Bhaga, the Daya Orama Sungraha, the Vivada Bhungarnuba and other authorities current in Bengal.

Authorities,—Yajnyawaleya, cited in the Daya Bhaga and other law tracts; a wife, daughters, both parents, brothers, their sons,
kinsmen sprung from the same original stock, distant kindred, a pupil and fellow student in theology. On failure of the first of these, the next in order shares the estate of him who has gone to heaven leaving no male issue; this law extends to all classes. Jimuta Vahana, in the Daya Bhaga, treating of the succession of brothers proceeds to state, if there be none, the property goes to the brother's son.

Vishnu, cited in the Daya Bhaga and other works:—The wealth of him who leaves no male issue goes to his wife; on failure of her to his daughter; if she be dead to the son of a daughter; if there be no such grandson, to the father; in his default to the mother; on failure of her to the brother; if he be dead to the brother's sons; in default of this to remoter kinsmen, &c. Vriddha Menu, cited in the Daya Bhaga, &c.:—a widow, who has no male issue, who keeps the bed of her lord inviolate, and who strictly performs the duties of widowhood, shall alone offer the cake at his obsequies, and succeed to his whole share.

Vrihaspati, cited in the Daya Bhaga, &c.:—In scripture, in law, in sacred ordinances, in popular usage, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased half the body survives; how should another take the property while half of the body of the owner lives? Although distant kinsmen, although his father and mother, although uterine brothers, be living, the wife of him who dies leaving no male issue succeeds to his share. Since she was previously espoused in due form, she must support the consecrated fire and after the death of her husband, the widow, faithful to her lord, shall take his wealth; this is a primeval law. Taking his effects moveable and immoveable, the precious and base metals, the grain, liquids and clothes, let her cause the several Sraddhas to be offered in each month, in the sixth, and at the close of the year. After citing the text of Vrihaspati in the Daya Bhaga, Jimuta Vahana proceeds to state, that while the widow survives, the succession of parents, brethren, and the other heirs, is extremely remote.
After a perusal of the above exposition, and of the other documents connected with the case, the Third and Officiating Judges recorded their opinion, that the younger brother of the deceased Govind Chunder, who was alive at the time of the widow’s death, was alone entitled to the property which had devolved on her. They were further of opinion that the authenticity of the alleged agreement had by no means been proved, and consequently, that the claim of the respondent, whether founded on that document or on the law of inheritance, must fall to the ground. The decree therefore of the Court below was reversed, and judgment was given in favour of the appellant, awarding him possession of the property in dispute with mesne profits. Costs of both Courts were made payable by the respondent. (a)

In Musammat Jynunee Debia versus Ramjoy Chowdri, 6th January 1824, III 365, new edition, a brother was held, as in the above case, to exclude nephews, and this doctrine is firmly established. The principle of the Hindu Law of Inheritance is, that the heirs inherit successively according to their consanguinity with the deceased, whereas under the Muhammadan Law they inherit simultaneously. It was also held in Musammat Jynunee’s case that the widow of another brother is not recognised as a legal heir under any circumstances.

(a.) The Pundit (Soka Shastree) who gave the opinion in the first instance was subsequently charged with extortion, and absconded during the investigation of the charge.
Under the Hindu Law a united brother takes in preference to the separated brother who does not inherit; and the son of a united brother in like manner excludes the son of a separated brother.

JAUDUBCHUNDER GHOSE AND OTHERS, Plaintiffs,

Versus

BENODEHARRY GHOSE, Defendant.

Before the High Court of Bengal.

Present:—Sir Mordaunt Lawson Wells, J.

This suit was heard and disposed of by me on the 1st of April in the present year, and my judgment was then given in favour of the defendant.

Mr. Bell, on behalf of the plaintiffs made an application under the 346th Section of Act VIII of 1859, for a review of judgment, on the ground that the suit raised an important question of Hindoo Law and one deserving further consideration. I granted a review, and the case came on again for hearing on the 21st July.

This is a suit for a partition of a certain portion of a house and land at Sunker Ghose's lane, in Calcutta. It appears that one Siboopersaud Ghose, late of Sunker Ghose's lane, died many years ago, leaving four sons, Prawnkissen, Moheschunder, Chundercaunt, and Rajkissen. Seven years after the death of Siboopersaud, Prawnkissen separated himself from his three brothers, and a partition of the ancestral property, consisting of land, houses, and moveable property, took place. The house and land, the subject matter of this suit, was formerly the joint family dwelling house of the four brothers. Chundercaunt died six years after the partition leaving one son, the present defendant, and a widow. Three years after the death of Chundercaunt Prawnkissen died, leaving three sons, the present plaintiffs. In the year 1853 Rajkissen died, leaving only a widow. Moheschunder died intestate in 1857, without issue.
Prawnkissen lived with his family, entirely separate in food and worship from his three brothers, who lived together up to the time of their death as an undivided family. The defendant as the son of one of three brothers who lived joint in food and worship, claims to be the sole male representative of his father, Chundercaunt, and of his uncles, Moheschunder and Rajkissen; and the plaintiffs, as the sons of Prawnkissen, claim to participate in their uncle Moheschunder's share of the estate.

The following issue was settled. Whether the partition of 1853 was a partition between all the four brothers, or a partition in respect of Prawnkissen alone?

On behalf of the plaintiffs the chief point made by Mr. Bell was that under the circumstances of this case, according to Hindoo Law in Bengal, the plaintiffs were entitled to some share in the property left by Moheschunder. I will now consider the authorities bearing upon the subject. At page 26, Volume 1, of Sir F. Macnaghten's Hindoo Law, the general law is thus stated. "In default of father and mother, brothers inherit—first, the uterine associated brothers; next the unassociated brothers of the whole blood; thirdly, the associated brothers of the half blood, and fourthly, the unassociated brothers of the whole blood." At page 195 of Shamachurn Sircar's valuable Digest of the Hindoo Law, it is clearly and distinctly stated that among the whole brothers' sons, reunited and not reunited, the succession devolves on the reunited one. Several authorities are cited as illustrative of or bearing on this principle. The same work contains the following legal opinion, examined and approved of by Sir W. Macnaghten. "The brothers having separated, if one of them die without heirs, his estate shall be equally shared by his brothers, provided there be no particular evidence of a reunion having taken place between the deceased and the brother with whom he resided till his death": see Vyavastha Durpana, page 303.
The authorities for the doctrine are laid down in the Dayabhaga. If there be evidence of an express and distinct re-union, and one of the re-united brothers die, the associated brother is alone entitled to the succession, to the entire exclusion of the unassociated brother. See Macnaghten's Hindoo Law vol. 2, chapter 5, pages 173-74. How re-union is effected is shown by Vrihaspati in the following text:—

"He who being once separated, again through affection dwells together with his father, brother or paternal uncle, is termed re-united." He thus shows that persons who by birth have common rights in the estate acquired by the father and grand father, as father and son, brothers uncle and nephew, are re-united, when after having made a partition, they live together through mutual affection, as inhabitants of the same house, annulling the previous partition. See Vyavastha Durpna page 207. And it would seem that according to Hindoo Law, if only one brother out of four separates entirely, it is a virtual separation of all; and though the remaining three brothers continue still joint, they are to be supposed to have re-united.

I have had an opportunity of consulting my learned colleague Mr. Justice Shumbhoonath Pundit, on the general question of Hindoo Law involved in the consideration of the present case, and the learned Judge is of opinion that the defendant is entitled exclusively to succeed to the estate of his uncle. I have come to the conclusion that the plaintiffs are not entitled to any portion of Moheschunder's share, and affirm the decree made at the original hearing. The plaintiffs are to pay the costs occasioned by the rehearing, such costs to be taxed under scale No. 2.

1. The above decision has been followed in the very recent case of Keshub Ram Mohaputter versus Nund Kishore Mohaputter 5th April 1869, XI Suth. W. R. 308. Mr. Justice Jackson in delivering judgment said:—"The only question raised in special appeal is whether the Lower Appellate Court was right in excluding the plaintiff from participation in the share of a deceased brother, on the ground that the plaintiff had been separated from that brother, while the defendant was in union with him at the time of his death. It is contended that the Hindoo Law gives a preference only to brothers who are re-united, and does not otherwise distinguish between the
case of brothers united or separated. Upon this distinction, the 10th, 36th 38th and 39th verses of section 5, Chapter IX of the Dayabhaga, are cited. It is sufficient to say that a case upon this very point was decided by Wells, J. on the original side of this Court which is quoted in the 2nd Edition of the Vyasasuta Durpana, pages 222 and 223, in which the same view was taken of the Hindoo Law as has been taken by the Lower Appellate Court. The learned Judge in that case appears to have based his decision in some degree upon the view that the separation of one of four brothers virtually involves the separation of the whole, and that, consequently, the three brothers who afterwards continued in union must be looked upon as having been re-united. I do not think it necessary to consider here whether this is the view or principle on which the united brother took in preference to the separated, or whether it is on a principle inherent in the theory of joint families. I am content to follow the authority of Mr. Justice Wells, and I think the special appeal must be dismissed with costs."

Mr. Justice Markby added:—

"I am of the same opinion. If, in order to meet the passages from the Dayabhaga which have been quoted in support of this special appeal, it were necessary to resort to the hypothesis that the separation of one is the separation of the whole, there would be no difficulty in doing it in this case, but the very passages quoted appear to me to be every one of them based upon this supposition.—that a separated brother does not inherit." See also Tara Chand Ghose versus Padam Lochan Ghose, 5 Suth. W. Rep. 249.

2. As to what constitutes re-union Vrihaspati, in a text quoted in the Mitacchara, Chapter II Section IX, para. 3, declares:—"He, who, being once separated, dwells again through affection with his father, brother, or paternal uncle, is termed re-united"; and the Mitacchara, Dayabhaga (Chapter XII, 4) and Daya-Krama Sangrana (Chapter V, 3 and 4) have interpreted this as restricting the re-union to the persons specially named, while the Vya- nakara Mayukha (Chapter IV, Section IX, 1) considers that it may take place with "a wife, a paternal grandfather, a brother's grandson, a paternal uncle's son, and the rest also." This question was carefully considered by the Bombay High Court in the case of Vishwanath Gangadhar versus Krishnaji Ga-nesh, 19th December 1866, III Bombay H. C. Rep. 69, A. C. J., and Chief Justice Couch in delivering judgment said:—"It appears to us that the meaning of the passage from Vrihaspati which is the foundation of the Law is, that the re-union must be made by the parties, or some of them, who made the separation. If any of their descendants think fit to unite, they may do so; but such a union is not re-union in the sense of the Hindu Law, and does not affect the inheritance."
In cases of a divided and un-reunited Hindu family, the brothers of the whole blood have a preferential right to brothers of the half blood; but where the property is undivided and immoveable, uterine and half brothers succeed equally. When the succession devolves on nephews, however, those of the whole blood in every case peremptorily exclude those of the half blood.

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I.—GOLAB SINGH AND OTHERS (DEFENDANTS), Appellants,

Versus

NEHAL SINGH AND OTHERS (PLAINTIFFS), Respondents.

Before the Chief Court of the Punjab.

Present:—Boulnois and Simson, JJ.

Appeal from Additional Commissioner Ambala.

G. Plowden for Appellants.

Dwarkanath Banerjee for Respondents.

Claim—26 beegas and 4 biswas of land.

Judgment of Chief Court.—This was a suit to establish the plaintiff’s right to inherit and obtain possession of 26 beegas, 4 biswas, out of 45 beegas, 17 biswas, of land left by one Deep Singh in Mouza Rajwara Kulan, District Loodhiana. Deep Singh died childless before the settlement which took place in 1852; and his widow, Mussumat, Hookma, succeeded to the whole land on a life tenure. At Hookma’s death, on the 5th June 1867, the defendants took possession as heirs and the plaintiffs then brought this suit to establish their title to half the inheritance.
The defense was that the defendants are the sole heirs of Deep Singh.

The Tehseeldar dismissed the suit, on the ground that the defendants, as uterine brothers of Deep Singh, had a preferential right of succession to the plaintiffs, who were only half-brothers (by a different mother) of Deep Singh.

In appeal the Deputy Commissioner considered the question to be one of pugvund* and choondavund; and as it was clearly shown that the custom of pugvund prevailed in the family, he held that the plaintiffs had an equal right with the defendants to inherit, and gave the former a decree.

On a second appeal being preferred, the Additional Commissioner maintained this order. He says—"This suit is for the inheritance of Deep Singh's land in which the life interest of his widow lapsed 11 months ago; plaintiffs are brothers of Deep Singh on the father's side, and defendants are brothers by both parents". He goes on to say—"The ordinary rule of Hindus is that sons inherit in equal shares. That rule has to be maintained unless a custom to the contrary having the force of law is proved. The onus probandi was therefore upon the defendants. In some Sikh Jut families choondavund undoubtedly prevails, but it is equally certain that it does not do so in all. This Court agrees with the Deputy Commissioner that, in this family the prevalence of pugvund is proved, and that all the brothers share alike."

The defendants have now appealed to this Court; and it is contended for them that the Commissioner's decision is wrong, being founded partly on a patent error of fact in regard to the exact

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* That is per capita, literally, division among turbans.

† Equal division between the issue of each wife.
degree of relationship which the parties to the suit respectively bear to Deep Singh, and partly on an error in regard to the Hindoo Law of Inheritance. It is said that the plaintiffs are not brothers of Deep Singh on the father's side, but one of them, Deedar Singh is a nephew, and the others grand-nephews or great-grand-nephews, and that according to the Hindoo Law the sons of a uterine brother have a preferential right of succession the son of a half brother, and a fortiori to relatives of still lower degree.

For the plaintiffs it is admitted that uterine brothers would have a preferential right under the Hindoo Law to half brothers, but it is denied that the preference extends also to the uterine brother's sons. It is further alleged that another nephew, Jewa Singh besides Deedar Singh, was alive at Hookma's death, and that although he has died since the institution of this suit his heirs have an equal right to succeed with the other nephews.

It is admitted that Deep Singh inherited the whole 45 beegas, 17 biswas from his father Bhag Singh; and the following genealogical tree, the correctness of which is also admitted, shows the degrees of relationship of the parties to Deep Singh:
BHAG SINGH.

Choohur Singh.


1. Nchel Singh.
3. Muthra, plaintiff.
4. Chutra.

Widow, Munsumat Hookma, deceased S. P. the right of inheriting whose property is in dispute.
It is also admitted that Bhag Singh had three wives, Mussumat Sookhoo, Bhugwan and Futhoo, and that the fathers of defendants and Deep Singh were the sons of Futhoo, and plaintiffs are descendants of the sons of the other two wives.

It is further admitted that at Hooksma's death there were only two of the sons of these other two wives alive, viz. the plaintiff Deedar Singh, son of Dulal Singh; and Jewa Singh, son of Kala Singh and father of the plaintiff Prem Singh.

From this it is clear that the Commissioner was quite wrong in saying "that the plaintiffs are brothers of Deep Singh on the father's side, and defendants are brothers by both parents;" and that in fact none of Deep Singh's brothers were alive at Hooksma's death, and that this suit was brought by two of the sons of Deep Singh's half brothers and by others who are the sons of Deep Singh's half brother's sons.

It is further apparent that the custom of pugvund and choondavund does not govern the case, the defence being based on the order of the succession of agnates by the Hindoo Law of Inheritance quite independently of the custom of choondavund.

It is admitted that at Bhag Singh's death his land was divided into 9 equal shares, of which one was given to each of his 8 sons and an additional share to his son Huree Singh by way of Sirdaree. It is also admitted that the sons of their descendants have held their respective shares in severalty ever since. The effect of association therefore does not enter into the case.

Further, there can be no doubt that, according to Hindoo Law, without regard to any rule concerning agnates of the whole and half blood, nephews are entitled to succeed before the sons of nephews, and that the circumstance of Jewa Singh's having survived Mussumat Hookma has transmitted an equal right of succession to his sons. The respondent's pleader admits this and on these
The sole question remaining for determination in the present case, therefore, is whether the sons of an uterine brother have a right to succeed before the sons of a half brother (a brother by the same father but a different mother.)

On this point the Hindoo law in our opinion is very plain. In Colebrooke's *Mitakshara*, paras. 5, 6, and 7, Chapter 2, Section 4, the order of succession is thus laid down:

"5. Among brothers, such as are of the whole blood take the inheritance in the first instance under the text before cited. To the nearest sapinda the inheritance next belongs. Since those of the half-blood are remote through the difference of the mothers.

"6. If there be no uterine (or whole) brothers, those by different mothers inherit the estate."

"7. On failure of brothers also then sons share the heritage in the order of their respective fathers."

And any doubt as to the meaning of the words of para. 7 is removed by the further explanation of the Commentator Balum Bhutta, quoted in the foot note, viz. "in their order as brothers of the whole blood and of the half blood."

We find the rule stated in nearly the same words in *Macnaghten's Hindoo Law*, page 27 (Bapt. Miss. Pressed. 1829).

Again, in page 254, Volume 2 of *Strange's Hindoo Law* (Ed. London. 1830) in the extract from Colebrooke's translation of the *Mitakshara*, it is said that—"In default of brothers, a brother's son is the successor." "Here also a nephew of the whole blood inherits in the first instance, and on failure of such, the nephew of the half blood."
It follows that the Tehseldar was right in holding that the defendants had a right to succeed to Deep Singh's estate before the plaintiffs and accordingly the appeal is decreed, and the suit is dismissed with costs throughout.

II.—KYLAISH CHANDER SIRCAR, (PLAINTIFF) Appellant,
Versus
GOOROO CHURN SIRCAR AND OTHERS (DEFENDANTS), Respondents.

GOOROO CHURN SIRCAR AND OTHERS (DEFENDANTS), Respondents.
Versus
KYLAISH CHANDER SIRCAR (PLAINTIFF), Appellant.

Before the High Court of Bengal.

Present: E. Jackson and F. A. Glover JJ.


The accompanying genealogical table will assist the consideration of these cases.

GOBIND PERSHAD.

1st wife. 2nd wife.


Gobind Pershad had two wives. By the first, he left a son named Nundea Chand, who in his turn, had two sons Greesh Chander and Gooroo Churn, the present special appellants. By his second wife he had two sons, Nimaye Chand and Nityanund. Nityanund died childless in 1255 B. S., and the present suit was brought by Goluck Monee
as mother and guardian of Kylash Chander, the son of Nimaye Chand, for possession of the entire property left by Nityanand as nearest of kin.

Both Lower Courts found that the plaintiff Kylash Chander was a minor at the time the suit was instituted, and that his mother and guardian rightly brought the suit, and that, according to Hindoo Law, the uterine brother had a preferential right to succeed over the brother of the half blood, and pari passu the son of such uterine brother. With regard to the share of a house, and of certain monies claimed by the plaintiff, the Judge held the suit not to be proved.

Both sides appeal specially, the plaintiff under section 3&8 of the Civil Procedure Code, the defendants in the regular course.

We will consider the grounds of appeal urged by the defendants first. They are (1.)—That the question of the plaintiff's majority has been wrongly decided, and (2.)—That, according to Hindoo Law, the brothers of the half blood would take equally with the brothers of the full blood any property left by one of their number; and that the same principle would apply to nephews.

The first objection may be disposed of very shortly. The Judge found as a fact, on the evidence, that the plaintiff was not of full age when his mother instituted the suit in his behalf; and besides, whatever Goluck Monoo's laches may have been in regard of time, her son has now obtained majority, and has taken his mother's place, and the present suit has been regularly tried in his presence. Moreover, limitation would not be counted against a minor, because his guardian, either from neglect or ignorance, omitted to bring a suit within time during his minority. He would still, when arrived at majority, be entitled to bring a suit on his own account. In no point of view, therefore, are the defendant's, special appellant's, objections on this head tenable.

In support of the second objection, the special appellants have produced a number of extracts from the works of Hindoo Com-
mentators, which it will be as well to go through *seriatim*, joining with them those authorities relied on by the special respondent, and thus bringing into juxta-position all that is advanced by either side. The point involved is one of very great importance and the grounds on which its decision rests should be distinctly referable to authority, which no Hindoo can repudiate.

In support of the claim of brothers of the half blood, to succeed equally with uterine brothers to the property of a deceased brother, in all cases where the estate is joint and undivided—and in the present suit it is admitted on all hands, that, when Nityanund died in 1255 B.S., the family was joint and undivided, separation not having taken place till 1258 B.S.,—the following authorities are quoted:

*Vyavastha Durpuna*, page 187.

Colebrooke’s *Dyabakara*, Chapter XI, Section V, para I. “On failure of her (i.e.,) the mother it (viz., the inheritance) goes to the brothers.”

And para 10 holds that the term ‘brothers’ is applicable both to the whole and to the half blood, thus—“The text of *Yajeya Walcaya* also shows that the term ‘brother’ is applicable both to the whole and to the half blood; else if it intended only the uterine and of course, whole brother, the author would not have specified that the “uterine brother should retain or deliver the allotment of his uterine relation:” for the whole blood would be signified by the single term “brother.”

“Therefore, the succession of brothers, whether of the whole or of the half blood, is declared by the passage before cited.”

Again, *Yama*, one of the most ancient Commentators, says—“The whole of the *undivided immovable* estate appertains to all the brethren, but divided immovable must, on no account, be taken by the half brother.”
"All the brethren" is explained in the next paragraph (para. 36 Dyabhaga, Chapter XI) to mean all "whether of the whole blood or of the half blood."

And the text is similarly explained in Colebrooke's Digest, Volume III, page 518, thus. "The meaning is that, if any immoveable property of divided heirs, common to brothers by different mothers, have remained undivided being held in co-parcenary, the half brothers should have equal shares with the rest, but the uterine brother has the sole right to the divided property, moveable or immoveable."

Following this is a case quoted in Volume II, Maenaghten's Hindoo Law, page 66, wherein it is laid down as prevailing law, that, where the property is undivided, half brothers share equally with whole brothers.

For the other side, it is contended that the weight of authority is in favor of the uterine brother's preferential right, and the following precedents are quoted:—


"In default of father and mother, brothers inherit:—first, the uterine associated brethren, next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half blood; and fourthly, the unassociated brethren of the half blood."

Elberling's Treatise on Inheritance, page 78, in which precisely the same words are used.

Daya Krama Sangraha, page 15, para 5—"Where uterine and half brothers compete, and both were associated with the deceased, the associated whole brother exclusively takes the inheritance." Special respondent also refers to page 187 of the Vyavasta Durpana, and quotes Dyatotuca, page 54. "The uterine brother is, however, first to inherit: for, although brothers of the whole and half blood are begotten by the same father, yet, as the uterine brother offers
oblation cakes to six ancestors of the deceased, the succession first devolves on him exclusively, and not on the brother of the half blood who offers oblation cakes to three ancestors only."

In these quotations there is, no doubt, a great *prima facie* conflict of authority. But a careful examination of the texts adduced by the special respondent shows, we think, that the preferential right to succession by the brothers of the whole blood, depends altogether on the nature of the estate; and that, as there is no specific mention in those texts that the estate, the succession of which is in question, is an *undivided immovable* one, it is only a fair deduction that as other texts of superior authority distinctly limit the uterine brother's preferential right to property divided and moveable, to hold that the authors of the Dyatotwa and Dya Krama Sangrahā refer to that description of estate, and do not claim for uterine brothers a larger right than for brothers of the half blood, when the property is undivided and immovable. And this interpretation is consonant with reason and natural law. The property being ancestral and undivided, the deceased brother's share represents something that descended to him from his father, and was not acquired by any exertions of his own. It was emphatically the father's property, and as all the brother's both uterine and of the half blood, stood in the same degree of relationship to the original owner of the property, it is but reasonable that any part of that property, which circumstances may cause to be divided, should be apportioned equally amongst all the sons.

But were the difficulty of reconciling the apparently contradictory texts above quoted insuperable, the question would still remain as to the relative weight of authority. Now the Dyabhāga is the leading Law Commentary of Bengal, its authority is supreme, and no Hindoo of the lower provinces would venture to call it in question. Again the text of Yama is entitled to every respect. He was one of the twenty sages who composed the Sanhitās from which the "Dhurma Shastrā," or general body of the Law was compiled. These sages were and are believed by the Hindoos to have been divinely inspired, and their ex-
pounding of the Law is held everywhere where the Bengal Law prevails, to be indisputable.

So that, even if the authorities quoted on the other side do refer to cases of undivided immovable estates of which there is no proof, still, as they are opposed to the texts of much higher authority, they would have to be put aside.

In a word, therefore, as the highest authorities on ancient Hindoo Law expressly state that both uterine and half brothers succeed equally to a deceased brother's share, when the estate is undivided and immovable, and as the other authorities quoted to prove the contrary do not mention the description of estate to which the brothers of the whole blood would have the preferential right to succeed, we are of opinion that the latter texts refer to estates which are not undivided and immovable, or to cases where all the brothers were not associated and that, therefore, the brother of the half blood of Nityanund, Nuddea Chand, would, had he survived, have been entitled to succeed equally with the uterine brother Nimaye Chand.

There remains the question touching the inheritance of the brother's sons. Admitting that uterine and half brothers succeed equally to undivided immovable estate, do their sons stand in the same category, or has one a preferential right over the other?

On this point all the Commentators seem to agree and we have been unable to find, nor has the special appellant's pleader been able to show us, any authority for extending to sons of half brothers equal rights with those of brothers of the whole blood.

In support of the preferential right of sons of brother of the whole blood, we find in the Dyabhaga the following passage:

"Among these (i.e., the nephews) the succession devolves first on the son of a uterine brother; but, if there be none, it passes to the son of the half brother, for the text expresses 'an uterine brother shall retain or deliver the allotment of his uterine relation'. Indeed, the son of the half brother being a giver of oblations to the father
of the late proprietor, together with his own grand mother, to the
exclusion of the mother of the deceased owner, is inferior to the
son of a whole brother who is a giver of oblations to the grand father
in conjunction with the mother of the deceased." (Dyabhaga, Section
6, para 2, page 212—13.) So also the Dya Krama Sangraha, Section
8, page 15:—

"In default of brothers, the brother's son of the whole blood is
the successor, and not a nephew of the half blood who confers less
benefits compared with the brother's son of the whole blood, since
the mother and grand mother of the deceased owner do not participate
in the oblations presented by the nephew of the half blood to the
father and grand father."

Para 6 is even stronger on the same point:—"Where two nephews
were either associated or unassociated with the deceased, one
of the whole, the other of the half blood, then in both instances,
the succession devolves on the nephew of the whole blood."

Again, Colebrooke, in his Digest, Vol. III, page 524, remarks:—

"In respect of immovable undivided property, no author has
said that nephews of the whole and half blood have equal claims by
parity of reasoning as in the case of brothers, and the text of the
Legislator is not explicit on this point."

It would appear from those authorities—authorities which have
not been controverted that there is, under Hindoo Law, no analogy
between whole and half brothers and their respective sons; and that
whilst there are some authorities which might, at first sight, seem to
make the whole brothers succeed in preference to those of the half
blood, all are agreed that, when the succession devolves on nephews,
those of the whole blood peremptorily exclude those of the half
blood.

Taking this view of the case, we might have contented ourselves
with citing the authorities in support of the whole blood's succes-
sion. But as in the course of the argument, exception was taken to
a decision of this Court (reported in Sutherland's Weekly Reporter, Vol. II, page 41) which affirmed the principle that uterine and half brothers succeed equally to the undivided immoveable estate of the deceased brother, we have thought it right, as the question is one of considerable importance, to go into the authorities and explain the Law of the case more at length than in that decision.

We are of opinion, therefore, that in cases of property undivided and immoveable, which is the case disclosed by the pleadings in this special appeal, uterine and half brothers succeed equally to the estate; but that where there are no brothers living, the nephews of the whole blood have preferential right of succession over those of the half blood.

On this view of the Law, Kylash Chander, the special respondent, is entitled to succeed to his uncle's estate; and we accordingly confirm the order of the Judge, and dismiss this special appeal with costs.

With regard to the cross appeal filed by Kylash Chander, we observe that the finding of the Judge was one of fact on the evidence, and with this there is no interference possible in special appeal.

There remains the special appeal of Kylash Chander, and in this point we think that the Judge was clearly wrong. He threw out a certain portion of the claim on the ground that it ought to have been included in the original suit brought by Goluck Monee; and that, as it was not so included, Kylash the son was barred by Section 7, of Act VIII of 1859 from prefering it.

On this we observe that, when Goluck Monee instituted the suit on behalf of Kylash, the latter was a minor; and there is no Law that prevents a minor when he comes of age, suing in his own name for anything that his guardian, either through ignorance or negligence, has omitted to prosecute. If this were the Law, no minor would be safe; and we do not see how Kylash, when he attained majority, was debarred from claiming, and that in the suit originally instituted by his guardian, such property as that guardian had omitted in the schedule of plaint.
On this objection, the case must be remanded in order that the Judge may try the question of Kylash's right to the extra property claimed, subject, of course, to the remarks on the nature of property claimable by nephews of the whole blood preferentially to those of the half blood noted in the body of our Judgment in the appeal of Grees Chander.

1. It will be observed from the above decisions that the preferential right of a full brother over a half brother, depends on whether the property is divided; but in case of nephews those of the whole blood preempitously exclude those of the half blood. The latter case (Gooroo Charn Sircar versus Kylash Chander) was reargued in review, and Mr. Justice Jackson upheld the original judgment. 16th July 1866, VI, Suth. W. R. 93. In Beerchander Subraj versus Neel Kishore Takoor, 26th September 1864, I Suth. W. R. page 177, which was a case as to the succession to the Tipperah Raj. Norman O. C. J. and Kemp J. held that the whole brother had a preferable title to the half brother; and in Issar Chander Chowdri versus Bhayrub Chander Chowdri, 9th January 1866, V. Suth. W. R. 21, Kemp and Seton-Karr JJ. held that as the step brother had failed to prove the deed of partition on which he relied, the ordinary rule of Hindu Law in favor of the uterine brother would apply.

2. Tilok Chander Roy versus Ram Lulki Dossae, 12th January 1865, II Suth. W. R. 41, was a case relating to undivided immovable property, and consequently the uterine and half brothers shared equally. In the Punjab Civil Code no distinction is expressly stated between brothers of the whole and those of the half blood, para. 4 Section 4, simply laying down that "after parents brothers and their issue" inherit, Sakiba versus Amee Chand and others, 8th August 1866, I Punjab Record 130. It may be questioned, however, how far Section 4 of the Punjab Civil Code intended to lay down a special law for the province; indeed the language used in para 2 of that Section would seem to indicate that the intention of the compiler was rather to give a summary of what he considered the Hindu Law of inheritance to be, than to prescribe any special rules of inheritance in accordance with the ascertained customs of the province. The recent decision of the Chief Court in Goolab Singh's case, reported in the text, is also admittedly based on the general Hindu Law, which certainly shows that the learned Judges did not regard the provisions of Section 4 in any other light than: as the compiler's exposition of that law, which may or may not be correct. In an earlier case likewise, where the dispute was between a sister's son and a collateral male relative, Mr. Justice Roberts, (Boulnois, J. concurring) accepted the law as laid down by the Agra Sadar Court in Mussummat Thakurain and another versus Mohus Lall, 18th April 1863, which decided that lineal male descendants within the fourteenth degree excluded a sister's son, although the Punjab Civil Code distinctly places sisters and their issue after brothers and their issue. Gooroomkhor versus Gomasses, 6th April 1866, I Punjab Record page 45; Moomoo Ram versus Mohunna Ram, Ibid, page 50. Moreover the Commentary to the Code seems conclusively to bear out the above opinion, for it expressly states the sources from which the provisions of the Code have been derived, and adds that collateral and other remote heirs have not been provided for: in fact that a mere epitome of the Hindu and Mahomedan Law has only been attempted.

3. The right of representation which attaches to a son's son, in the estate of a grandfather, does not exist in the case of property left by a brother, "the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the latter." Mac. H. L. page 29 Wilson's editions. See also Mit. para 8, section IV. Sakibs versus Amir Chand and others, I. Punjab Record 130, and Brigorajkiskhore Dossae versus Sneenath Bose, 14th April 1865, IX. Suth. W. R. 465.
According to Hindu Law a brother's daughter's son, is no heir.

1. HURREEMADHUB ROY AND ANOTHER, (DEFENDANTS,) Appellants;
   Versus
   GOOBOOGOBINDO CHOWDRI, (PLAINTIFF) Respondent.
   Before the High Court of Bengal.
   Present:—W. Seton-Karr and G. Campbell JJ.

We have considered this case carefully, because it seemed necessary not only to weigh the authority of opposing authors, who gave lists of the orders of succession, in which variety occurs, but also to try to discover the principles and rules involved.

This was the more necessary, because the conclusion at which the Judge of the Court below has arrived, is at variance with the English printed books on the subject. Analysing then the lists of the Dayacrumashangraha and Dayabhaga, we find the main difference (up to the point which concerns the present case) to be, that in each generation, the Dayacrumashangraha admits the rights to succession of the brother's daughter's son, while the Dayabhaga entirely passes over the relations in that degree.

Thus the Dayacrumashangraha places in their respective orders among the heirs:

The brother's daughter's son.
Father's brother's daughter's son.
Grand father's brother's daughter's son.

While the Dayabhaga, in each generation, stops at the sister's son, and omits the three relations above mentioned. There is therefore, a systematic variance. The Defendant in this suit is the more distant generation, but as the more distant relationship must less frequently occur, we thought the case would be best tested by ascertaining whether in practice the corresponding relation of the nearest degree, viz., the brother's daughter's son, had been permitted to succeed. We therefore gave the appellant's pleader time to find such cases. He has only found two cases recorded in the Persian,
and which, never having been produced or translated, have escaped criticism, and cannot be treated as conclusive precedents.

In the absence then of any thing to show clearly appellant's right, or the recognition of analogous rights, we remember, that in the Hindu Shasters, the succession by or through females is altogether the exception. The Hindu, like the old Roman family, is agnatic and not cognatic. The succession of the daughter or daughter's son is an anomaly, and the orthodox Benares School stopping there, does not like the Bengal School, admit the father's daughter's son (i.e., sister's son), and corresponding relations, in the higher generations. When then the authorities of the Bengal School differ, and one would admit a still more distant relation through a female, while the other excludes the same relation, we think that the *prima facie* presumption is against the person claiming through a female. Most relations through females are excluded. It is for the person claiming through a female, to show either an over-whelming preponderance of authority, or established practice in his favor. This the appellants in the present case have, in our opinion, failed to do. We, therefore, think that their claim is bad, and we confirm the decree of the Lower Court.

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**A paternal uncle's daughter's son cannot inherit according to Hindu Law.**

1—GOBINDO HURREEKAR (DEFENDANT,) Appellant,

Versus

WOOMESH CHUNDER ROY (PLAINTIFF,) Respondent,

Before the High Court of Bengal.

Present:—J. P. Norman, O. C. J. and Kemp and Shumboonath Pundit, JJ.

The plaintiff in this case, claiming as heir in reversion sued to set aside first a deed of conveyance executed by the widow of his maternal uncle, Thakoormonooe DOSSEE. The Sudder Ameen, found that this

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* The question of the right of a sister's son to inherit according to the Benares Law will be discussed in the second volume in the proper place.
deed was a collusive document. He says that, under the Hindoo Law, she could not dispose of the whole of her late husband's property, even though it was for the performance of his funeral rites; and that her statement that she did so is a falsehood. For this he gave reasons at length, and accordingly decreed that the sale should be set aside. On appeal, the Judge affirmed the decree because, as he says, the grounds on which the Sudder Ameen has declared the kubalaha pleading by the defendant to be untrustworthy documents, are very good and tangible.

We think that we cannot disturb this decision on special appeal, because, though the language of the judgment might be and ought to have been a little more precise, it is clear that the Judge means to adopt the finding of fact of the Sudder Ameen, that the sale was not for the purpose of providing or paying for the Gya Shrad of the deceased, which was the necessity alleged to justify it.

We, therefore, affirm the decision of the Court below, as regards the property comprised in the conveyance executed by Thakoormonee.

Secondly.—The plaintiff claiming as heir in reversion of one Muddun Mohun, sues to set aside a sale said to have been made by Chander Moonee, the childless widow of Muddun Mohun. He obtained a decree in the Court of the Sudder Ameen which was affirmed by the Judge; and from that decree the defendant now appeals, and contends that the plaintiff, not being an heir, cannot question the defendant's title.

The plaintiff (respondent) stands to Muddun Mohun in the relation of father's brother's daughter's son, and the point raised before us is, whether, according to Hindu Law, he could under any circumstances, inherit, as heir of Muddun Mohun. The appellant's vakeel showed us that according to the text of Dayabhaga, a father's brother's daughter's son is not enumerated in the order of heirs, and referred us to a Judgment of Mr. Justice Seton-Karr and Mr. Justice Campbell, dated the 31st March 1863.
Haree Madhub Roy versus Gooroo Gobind Chowdri, affirming a decision of Mr. Justice L. S. Jackson, when Judge of Rajshahye, to the effect that such a person is not an heir, and to the opinion of the Pundit in a case which is to be found in Macnaghten's Hindu Law page 77.

Baboo Debendro Narain Bose for the respondent referred us to a great number of authorities directly affecting the respondents title as heir, viz:—The text of the Dya Krama Sangraha as translated by Winch, pp. 19, 22, 23, the opinion of Jugunnatha Turkapunchanan, Colebrooke's Digest, Volume IV, page 230, Macnaghten's Hindoo Law Volume I page 148, Volume II, page 253, Elberling on Inheritance page 80. He showed that in the Vyavastha Durpana of Shama Churn Sircar, Volume 1, page 265, 275, and the table of succession published by Baboo Prosunno Goonar Tagore there referred to, the order of heirs in Winch's edition of the Dya Krama Sangraha is adopted, that a reason for allowing the brother's daughter's son a place in the heir of inheritance, viz., that he offers two oblation cakes in which the deceased owner participates, is given in the Dya Krama Sangraha, and that reason is relied on in the latest work on the subject by Shama Churn Sircar. He also referred us to Macnaghten's Hindu Law Volume II, page 96, Section 4, and the Dyabhaya page 218, as showing the importance of the offering oblation cakes in determining questions of heirship. Indeed Shama Churn Sircar in the Vyavastha Durpana Volume I, page 315, says that the law as current in Bengal ordains that, that relation who, by presentation of oblations confers the greatest benefit on the deceased proprietor, is entitled to inherit the estate.

Looking at these numerous authorities and the fact that the decision of Mr. Justice Seton-Kerr and Mr. Justice Campbell, is at variance with two prior Persian decisions of the late Sudder Court, referred to in their Judgment; and feeling it to be of very great importance not to disturb the established course of descent, whatever that might be, we thought it desirable that the case might be further argued, and called in our learned brother Shumboonauth.
Pundit to sit with us on the second hearing. Baboo Dwakernauth Mitter, in a very able argument, contended that the passage declaring the right of a brother's daughter's son to succeed as heir does not exist in many of the copies of the Dya Krama Sangraha (see the statement of the Pundit, 2 Macnaghten's Hindu Law, page 77); that the internal evidence of the text itself shows that that passage in question is an interpolation, inasmuch as the argument and text in the passage which immediately follows is inconsistent with it, and shows that the paternal grandfather immediately succeeds the father's daughter's son. He proceeded to show that the copy of the Dya Krama Sangraha possessed by Colebrooke could not have contained the disputed passage. Mr. Colebrooke in his two treatises, on the Law of Inheritance, note to the Dyabhaga page 226, says that "amidst this disagreement of authors, I should be inclined to give the preference to the Sreekishna's Krama Sangraha; because the order of succession as there stated follows the analogy of the rule of inheritance on the father's side;" and he showed that this should not be the case, if the disputed passage were genuine. This note of Mr. Colebrooke was published in 1810, and Mr. Winch's translation of the Dya Krama Sangraha not till 1818. He then showed that the Dya Krama Sangraha is, as its name indicates, a mere digest, or compilation; and he argued that, if the author had intended to express an opinion at variance with the texts and authorities he was digesting, he would have stated that the opinion was from which he differed, and given a reason or cited an authority for the opinion adopted by him, more particularly as it is at variance with his own opinion in the Commentary on the Dyabhaga.

On examination of the Sanskrit text of the Dya Krama Sangraha, it appeared that it is not in verse or divided into numbered passages like the English translation, so that the insertion of an additional paragraph would not at once fix the attention of the reader.

He next argued that the reason adduced by the author of the disputed passage and by Shama Churn, for inserting a brother's
daughter's son in the list of heirs, is not of itself sufficient to determine the question. He showed that a man offers three oblations to ancestors on his father's side, and three to ancestors on his mother's side, that a son's daughter's son, or grand son's daughter's son, or great grandson's daughter's son, or nephew's daughter's son, or grand nephew's daughter's son, and a paternal uncle's daughter's son can all offer oblation cakes, and in fact some of them confer greater benefits than a brother's daughter's son, yet they are nowhere enumerated in the list of heirs, and he stated that, as such persons succeeded to the obligation of offering a cake without taking the inheritance, the person who succeeds to the estate is considered bound in morality to give them some assistance. He also showed us that the order of succession in the Dyatatwa is the same as that in the Dyabhaga and omits relations of the class under discussion.

These arguments appear to us to show to demonstration, that the disputed passage is an interpolation and no part of the original text of Sreekrishna; and the whole current of authority cited for the respondent flows from this corrupt source; that Mr. Colebrooke really condemned the opinion of Juggunatha Turkapanrana which he is supposed to have adopted; that the reason relied on by Shama Churn is insufficient in the absence of authority to support his position. We, therefore, agree with Mr. Justice Seton-Karr and Mr. Justice Campbell, in thinking that a father's brother's daughter's son cannot under any circumstances inherit according to Hindu Law; and we reverse the decision of the Court below on this point with costs and interest in proportion. It is undoubtedly unfortunate that those who are not only near relations, but capable of conferring the benefits which the owner of an estate, according to Hindu ideas, expects from his heirs, should be excluded from inheritance. But the remedy, if any is desired, must be sought from the Legislature and not from the Courts, who can only expound and administer the law as they find it.
A brother's son's daughters are not heirs according to the Hindu Law.

1. RADHA PEAREE DASSEE AND ANOTHER, (PLAINTIFFS) Appellants.

Versus

DOORGA MONEE DASSIA AND OTHERS (DEFENDANTS) Respondents.

Before the High Court of Bengal.

Present:—J. P. Norman and G. Campbell JJ.

This suit is brought by Radha Pearee Dasssee and Motee Monee Dassia, plaintiffs (Appellants), for declaration of their reversionary title to, and possession of, real and personal estate, against Binode Monee Dassia, widow of one Hookoom Chand Suttyer, on the ground that Binode Monee, being in possession, is wasting the estate. The plaintiffs are daughters of the son of Oodoy Churn Suttyer, the brother of Hookoom Chand.

The Defendant's deceased husband's brother's son's daughters are not heirs according to Hindu Law. The Plaintiffs have, therefore, no right of action; and this suit, as regards Binode Monee, must be dismissed.

It appears to us that the action, as far as Doorga Monee is concerned, is merely brought collusively. The appeal is, therefore, dismissed with costs and interest.

6th March 1866
V. Suth. W. B. 131.
INDEX OF SUBJECTS.

ADOPTION.

Inheritance by

1. An adopted son inherits collaterally as well as lineally,
   PAGE.

2. Doubts which formerly existed on this subject, to what attributable, ...
   1-7
   ...
   ...
   ...

3. Kritima son does not inherit collaterally, ...
   ib.

4. Immediately on the adoption of a son, by a widow, under authority of her husband, the estate to which she succeeded becomes the property of the adopted son,
   8

5. But where no authority was given, the adopted son has no claim to property of adoptive mother, until her death, ...
   13
   ...
   ...
   ...

6. A son adopted by widow under permission of husband has the same rights as a posthumous son, and can contest her acts, ...
   14 (note), 25 (2)
   ...
   ...
   ...

7. Under Mithila law a person adopted by the husband does not become the adopted son of the wife, unless she joined in the adoption, and vice versa. But if husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to both, ...
   15
   ...
   ...
   ...

8. Adopted son has all rights and privileges of a son born, ...
   18, 21, 24, (note.)
   ...
   ...
   ...

9. He succeeds to property given at the time of nuptials to his adoptive mother, in the absence of daughters, 18

10. In the case of any other description of Stridhan, he succeeds together with daughters, ...
    25 (5)

11. But property which has descended to the adoptive mother from her father, reverts on her death, to the father's heir, ...
    18, 22
    ...
    ...
    ...

12. The relatives of the adoptive mother inherit the property of the adopted son, in default of heirs of adoptive father, ...
    24 (note.) & 26

   &
ADOPTION.—(Continued.)

Inheritance by.—(Continued.)

13. He succeeds to his paternal grandfather's estate if adopted by widow duly authorised, ... 25 (2 & 3)
14. He cannot be disinherited simply on the ground of misconduct or insubordination, ... 25 (4), 133, 205
15. He cannot succeed to his adoptive paternal grandfather's estate when there are collateral male heirs, ... 31
16. According to the Mitacshara law he takes $\frac{1}{4}$ of the estate with a subsequently begotten natural son, ... 39
17. But according to the Madras and Bombay schools he only takes $\frac{1}{2}$ of what the natural son receives, ... 40 (1)
18. According to Bengal School he takes a third share, ... 39 (1)
19. According to same school in a division with two or more sons, the adopted son takes $\frac{1}{3}$ of a natural son's share, ... 40 (3)
20. But only $\frac{1}{2}$ according to the Benares School, ... ib.
21. Among Sudras adopted and natural sons share equally, ... ib.
22. An adopted son shares equally with heirs other than the legitimately begotten sons of the adoptive father, ... 40 (4)
23. He is excluded from inheritance in his natural family, 41, 44 (note.)
24. Members of his natural family cannot inherit his property, ... 42
25. In the Dwyamushyana form he inherits from, and performs obsequies of both, fathers, ... 44 (note.)
26. So also in the Kritima form, ... 45, 49, (1)
27. Consent of person adopted in this form is essential, 49 (2)
28. Natural rights of adopted son remain unaffected when the adoption is invalid, ... 50

Right of adoption as regards giver and receiver.

1. According to Bengal and Benares Schools, adoption by widow, without authority from her husband, illegal, ... 54 81 (1 & 2)
2. But in South of India the authority of husband's kindred, is sufficient, ... 61, 81 (3)
ADDITION.—(Continued.)

Right of adoption as regards giver and receiver.—(Continued.)

3. In Bombay a widow can adopt, without injunction of her husband, the son of her husband’s brother, but not in any other case, ... 81 (3)
4. No authority is necessary in the Mithila country, ... 81 (4)
5. Verbal permission in general sufficient, ... 81 (5)
6. Whether delay on widow’s part forfeits her right to adopt, ... 82 (6)
7. Widow may give a minor son in adoption without authority, in case of distress or necessity, ... 82 (7)
8. Mitacshara Law on this point, ... ib. (8)
9. A widow cannot on death of one adopted son, adopt another without previous special permission of her husband, ... 83
10. If duly authorised she may adopt although herself a minor, ... ... 85
11. Query, if a minor himself can adopt, and with what effect, ... ... 85 (1-2) 86 (3 & 4)
12. No restrictions in Hindu Law confining selection to the family of deceased husband, a stranger may be adopted, ... ... 87, 88 & 89 (note.)
13. The adoption of a second son, in lifetime of the first, is wholly illegal, ... ... 90, 132 & 133 (note.)
14. Twin adoption also illegal, ... ... ibid.
15. Nor can any change of circumstance, such as death of the first adopted son, render the second or twin adoption valid, ... ... 132 (note.)
16. Adoption only permitted for a man destitute of male issue, ... ... 118-119
17. All reasonable probability of having a natural son must be gone, ... ... 120
18. Adoption during pregnancy of wife illegal, ... 132 (note.)
19. Essential intention of adoption is to provide for deliverance from Hell, ... ... 119
20. Husband cannot confer on wife larger power of adoption than he himself possesses, ... ... 126
ADOPTION.—(Continued.)

Right of adoption as regards giver and receiver.—(Continued.)

21. It is competent for husband to confer on each wife a conditional power of adoption on the death of a specified individual, ... ... ... 127
22. An adoption by a widower is valid, ... ... ... 134
23. A leper may give his son in adoption, ... ... ... 136
24. He may also adopt a son after performance of prescribed penance, ... ... ... 136, 137

Qualification and right to adopt.

1. Adoption of an only son is valid according to decisions of Supreme Court of Calcutta, High Courts of Bombay and Madras, and Chief Court of the Punjab, 138, 149, 152 (note.)
2. But invalid according to recent decision of High Court of Bengal, ... ... ... 146
3. In practice such adoptions are common and generally upheld, ... ... ... 150 (note 2.)
4. Adoption of elder of two or more sons is valid, ... ibid (1)
5. A brother cannot be adopted by a brother, ... 153
6. Nor can one brother give another brother away in adoption, ... ... ... 155 (2)
7. The same rule applies in the case of an uncle, ... ibid
8. In Bombay the adoption of a sister's son of the Vaishya caste is valid ... ... ... 156
9. But query, whether this is correct according to the principle that a person cannot adopt one with whose mother he could have carnal knowledge, ... 160 (1)
10. A Brahmin cannot make such an adoption, ... 156
11. Custom generally in favor of adoption of daughter's or sister's son, ... ... ... 160 (2)
12. A Brahmin widow cannot adopt her uncle's son as she could not be his mother un incestuously, ... 161 (3)
13. Adoption of wife's brother is valid, ... 161 (4)
14. So also of a wife's sister's son, ... ... ... ib.
A D O P T I O N . — ( C o n t i n u e d . )

Q u a l i f i c a t i o n a n d r i g h t t o a d o p t . — ( C o n t i n u e d . )

15. A sister's daughter cannot become an appointed daughter, or her son a putrika putra; nor is the adoption of a putrika putra valid in the present day,... 162

16. The adoption of a paluk putro is also invalid, ... 168

17. Except the Dattaka and Kritima no other forms of adoption are now recognised, ... 166

18. An orphan cannot be adopted, ... 170

19. The adoption of a boy above 5 years old, though the selection be not laudable, is valid, ... 171

20. An adoption at the age of nine years in the case of a Surougee held to be valid, ... 174 (note.)

21. The fact of tonsure having been performed in natural family raises no bar to a valid adoption, ... ibid, 176

22. But one initiated in Upanayana is incapable of adoption, ... 175 (note.)

23. In the Punjab the strict rules of Hindu Law as regards age are disregarded, ... ibid

24. Sudras may be adopted at any age previous to marriage, ... ibid

F o r m t o b e o b s e r v e d i n —

1. The non-performance of the sacrifice of fire, and other ceremonies does not invalidate an adoption; the operative part of the ceremony of adoption being the giving and receiving, ... 176

2. But the giving and receiving must be actual and not only constructive by execution of deeds, ... 203 (2)

3. Want of permission of ruling power, non-convention of kin, fact of adoption having taken place at other than place of residence of parties, are insufficient to invalidate an adoption, ... ib.

4. Correct rule is, that where an adoption is otherwise valid, strict observance of religious ceremonies is not essential,... ... ib.

5. Same rule applies in case of a kritima adoption, ... ib.

6. But the agreement of both parties is essential, ... ib.
ADOPTION.—(Continued.)

Form to be observed in.—(Continued.)

7. In the case of dancing girls recognition as daughter suffices to constitute adoption without any formal act, ... ... ... ... ib. (4)

8. In the Punjab great laxity allowed, ... ... 204

9. Conditional adoption invalid, ... ... 208

Limitation, in actions regarding—

1. A suit to set aside adoption must be brought within 12 years from cause of action, ... ... 208

2. Period to be reckoned from date of widow’s assent, or from time when there was distinct knowledge and admission of the adoption, ... ... ib. 211

3. The acknowledgment of adoption by a daughter before the birth of her infant son, will not bar the latter’s right to contest adoption on attaining majority, ... ... ... ... 212 (1)

4. Where a widow had been dispossessed before adoption, it was held that her possession previous to that date was not that of a trustee, and the adopted son was bound by the same limitation as the widow ... 212 (3)

Effect of previous decisions on questions of—

1. A previous decision on a question of adoption, legitimacy, or that a Hindu family is joint, and such like, in an action in personam, is not a judgment in rem, nor binding upon strangers, nor even admissible as evidence against strangers, ... 213

ALIENATION.

Power of—by father.

1. Under the Mitacshara a father can dispose of acquired property at his pleasure, but the consent of sons, or the existence of a necessity, is required in case of any alienation of ancestral immovable, ... 232

2. Doctrine of Madras Sadr Court as to alienation of immovable property, ... ... ... ... 238 (1)
ALIENATION. — (Continued.)

Power of — by father. — (Continued.)

3. Doctrine of Agra High Court that "a Hindu has not power of disposal by gift in his lifetime as to enable him to give it all to one son or grand son in exclusion of the rest", considered, ib. (foot note.)

4. The Benares law allows the father control over gems, pearls, and other moveables though inherited from the grandfather, 240 (8)

6. The Mithila law corresponds with the Mitacshara and restricts the father's power over ancestral immoveables, ib. (4)

Power of — by widow.

1. A Hindu widow in the Presidencies of Madras and Bombay, and also in Mithila, has an absolute right over all the moveable property left by her husband, 252

2. But she has no such power according to the Benares and Bengal Schools, ib.

See also as to what constitutes necessity.

Power of — by co-sharers in undivided property.

1. The Benares law does not allow one of the co-parcenary brethren in a joint family to alienate his share without the consent of the remaining co-sharers, or unless the co-parcenary brethren have entered into a compact to permit alienation, 240 (9)

2. The same doctrine affirmed by the Bombay High Court, ib.

3. But in Madras a member of an undivided family may make a valid alienation of his share and interest, and such share may also be sold in execution of decree, ib.

Son's right to set aside —

1. A son is entitled to sue in the lifetime of his father for a cancelment of the sale by the father of ancestral immoveable property, but the purchaser is entitled to retain possession during the father's lifetime. 247
ALIENATION.—(Continued.)

Son's right to set aside.—(Continued.)

2. He is entitled at the father's death to recover such property improperly sold; and unless the purchase money went to credit of the joint estate, or was applied to removing any incumbrance binding on the son, the purchaser cannot claim a refund of the purchase money from the son, ... 241

Nephew's right to set aside—

1. The consent of nephews to the sale by the uncle of his divided share of ancestral property is not requisite, ... 249

2. The principle of distinction is, that a son or grandson has an inchoate right in the possessions of his father from the time of his birth, whereas a nephew has no right at all in the ancestral property in possession of his uncle until after the death of the latter, ... ib.

Reversioner's right in cases of—by widow.

1. A reversioner is only entitled to a decree declaratory that the widow's act of alienation is null and void as far as it affects the interests of the reversioner, and for provision, if necessary, to prevent waste by the appointment of a receiver, or manager, ... 284

2. Where a daughter is colluding with the widow in making a transfer of divided property, the next reversioners after the daughter are competent to maintain a suit to have the transfer declared illegal, ib.

3. If a reversioner can show that a wilful default of revenue is about to be made by the life tenant in order to bring the estate to sale, he is entitled to ask such relief from the Courts as will prevent the apprehended occurrence, ... 296

4. But where the widow has under pressure sold more than was absolutely necessary to raise the amount required, a reversioner is not entitled to ask the Court to declare that, on the death of the widow, the heirs to the estate might set aside the sale by paying what the widow had a right to raise; nor can he sue to set aside the sale at all, except by paying that amount with interest, ... ib.
ALIENATION—(Continued.)

Reversioner's right in cases of—by widow.—(Continued.)

5. Query, whether a widow is bound to mortgage instead of selling? ... ... ... ib.

See also Limitation in actions to set aside, (2)

What constitutes necessity to justify—

1. No general rule can be laid down, ... ... ... 239 (5)

2. The fact of decrees being in execution against the father, and the latter being in confinement under a criminal prosecution, held to justify alienation, 239 (6)

3. Mere existence of a decree, however, is not sufficient evidence of necessity, ... ... ... 245 (note.)

4. The head of a family may alienate for support of family, services of religion, or other pressing necessity, ... ... ... 239 (6)

5. Payment of Government Revenue is a legal necessity, ib.

6. So also the performance by a widow of the husband's Sraadh, or the maintenance of a minor son, ... ib.

7. So also for payment of husband's bona fide debts, ... 240 (6)

8. But the debts should not be of small amounts which might well be met by other means, ... ib.

9. A Hindu widow has a larger power of disposition for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, than for purely worldly purposes, ... ib.

10. The building of a Thakurdwara and the sinking of a well, although in obedience to the wishes of her late husband, were held not to justify alienation by the widow of the husband's real estate, ... ib.

11. The payment of marriage expenses of a younger brother is a valid necessity, ... ... ... ib.

Obligations in cases of—

1. The onus of proving the application of the purchase money in the case of a son suing to set aside a sale by a father, where the purchaser claims a refund of the purchase money, lies on the purchaser, 241
ALIENATION.—(Concluded.)

Onus probandi in cases of—(Continued.)

2. Ordinarily, however, a purchaser or mortgagee is not bound to prove actual necessity, or the appropriation of the money raised by such sale or mortgage; it is sufficient if he can prove that he acted bona fide and with due caution, being reasonably satisfied at the time of the necessity of the sale or mortgage, ... ... ... 245

Limitation in actions to set aside—

1. Where limitation has begun to run no subsequent devolution of the estate can give a fresh starting point to the heir who succeeds; and reversionary heirs are bound by decrees which are obtained against the widow without fraud or collusion, and they are also bound by limitation by which she, without fraud or collusion, is bound, ... 297

2. A reversioner can either sue in the lifetime of the widow for a declaratory decree, or for possession after her death; in the former case he must sue within 12 years from date of sale or transfer, and in the latter within 12 years from her death, ... 308

3. No time is allowed for any disability arising after cause of action has accrued, ... 308 (2)

ANCESTRAL DEBTS.

1. A creditor of a deceased Hindu obtains no better position on the death of his debtor, as against the debtor's estate, than which he enjoyed during the debtor's lifetime, ... ... ... 309

2. Where the heirs have disposed of the estate to a bona fide purchaser, the creditor cannot follow it in the hands of the latter, ... ... ib.

3. The sale of the rights and interests of a father in ancestral property in payment of a family debt, extinguishes the contingent interests of his sons, ... 316

4. But not so if the debt was contracted solely for the use of the father, ... ... ... ib.

5. The proposition that 'debts are a charge on the inheritances' considered with reference to the Mitaksara law, ... ... ... 318 (1 & 2)

6. Do. Do., to the Bengal law, ... 319 (3)
ANCESTRAL DEBTS.—(Concluded.)

7. Sons have a vested interest in ancestral property, and *their* interest is saleable at any time in satisfaction of claims against them, ... ... 319 (4)

8. But the rights of a son to succeed by survivorship to his father's specific share cannot be sold in execution of decree, such right being too remote, ... ib.

ANCESTRAL PROPERTY.

1. Profits of an ancestral estate are patrimony, and properties acquired with them become the joint estate of father and sons, ... ... 320, 334 (1)

2. Construed in the sense of 'paternal', and held to mean property derived from the father in whatever manner the father had acquired it, ... 334 (2)

3. Query, whether ancestral property on division becomes in point of descent or of alienability, the same as acquired property? ... ... ib.

BAIRAGIS.

1. A Hindu becoming a *Bairagi* is not excluded from inheritance, ... ... ... 336, 337 (1-2)

2. In the case of *Suniyas* the right of succession devolves on the Chela, or adopted pupil, ... 337 (3)

3. But the pupil must be virtuous, assiduous in the study of theology, in retaining the holy science, and practising its ordinances, ... ... ib.

4. In the case of a hermit an associate in holiness takes his goods, ... ... ... 338

5. In the case of a professed student the preceptor is heir, but the natural heirs take the property of a temporary student, ... ... ... ib.

6. An ascetic cannot alter the succession to an endowment by any act of his own, ... ... ib. (4)

BROTHERS AND THEIR ISSUE.

1. A brother succeeds to his brother, leaving neither widow, father, mother, nor issue, to the exclusion of his nephews, the sons of an elder brother, ... 340
BROTHERS AND THEIR ISSUE.—(Concluded.)

2. The widow of one brother is no heir to the property left by another brother, ... 345 (note.)

3. A united brother takes in preference to the separated brother who does not inherit; and the son of a united brother in like manner excludes the son of a separated brother, ... 346

4. Conflicting doctrines of the text books as to what constitutes re-union, ... 349 (2)

5. Decision of the Bombay High Court that the re-union must be made by the parties, or some of them, who made the separation, ... ib.

6. In cases of a divided and un-reunited Hindoo family, the brothers of the whole blood have a preferential right to the brothers of the half blood; but where the property is undivided and immovable, uterine and half brothers succeed equally, ... 350, 364 (1)

7. When, however, the succession devolves on nephews, those of the whole blood in every case peremptorily exclude those of the half blood, ... ib.

8. No express distinction in the Punjab Civil Code between uterine and half brothers, but query how far the Code intended to lay down a special law, ... 364 (2)

9. Right of representation does not exist in case of property left by a brother, ... ib. (3)

10. A brother's daughter's son is no heir, ... 365

11. A father's brother's daughter's son is also no heir, ... 366

12. Nor can brother's son's daughters inherit, ... 371