CONSIDERATIONS

ON

THE HINDOO LAW,

AS IT IS CURRENT IN BENGAL.

BY

THE HONORABLE

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"MISERA EST SERVITUS, UBI JUS EST VAGUM AUT INCERTUM." *4th Inst.*

SERAMPORE:

PRINTED AT THE MISSION PRESS.

1824.


کتاب کالج فورٹ ولیم
किताब कालिज फ़ोर्टविलियम
পুস্তক কালেজ ফোর্টউলিয়ম
सत्यमेव जयते

PREFACE.

IT was not until the beginning of this year, that I determined upon a publication, relating to such topics of the *Hindoo* law, as most frequently come into discussion before the Supreme Court of Judicature.

My views, yet limited, were enlarged as I made progress. I at first, intended to confine myself to the few principles which seemed to have been reduced by practice, or by common consent, into axioms; but I afterwards (perhaps erroneously) conceived, that more might be done with advantage to the public; and thought if it was desirable to make known what was fixed, that it could not be useless to show how much remained in a state of uncertain-

There is hardly any question arising out of *Hindoo* law, that may not be either affirmed or denied, under the sanction of texts, which are held to be equal in point of authority.

But I did not enter upon an enlarged plan, from a belief in my own competency to complete it. I knew the task to be arduous; and I felt well assured, that its performance required more and more talent, than I had of either to bestow.

If another had engaged in the work, he might have commanded my most earnest assistance; and I should have been much better pleased in giving my aid unobserved, than I am in coming forward as an ostensible author.

I avow myself an author, because I have been told by some whose opinions I value, that no good could be expected from an anonymous publication. I never imagined that this would be enhanced by my name, but I gave credit to those who assured me, that such a one sent forth without any name, would be likely to pass without any notice.

It did not require much sagacity to discover, that an attempt of this nature must be displeasing, because it may be injurious, to men whose importance and profits depend upon the obscurity of laws, which it is their business to expound.

The interpreter of an ambiguous, or equivocal ordinance, becomes a legislator at once; and if, in all his constructions, he can find authorities for his support, he may legislate with indemnity, and without control.

I will not dissent from him who may affirm that I have done but little; and it is not for my own sake that I shall desire evidence of the fact, that I shall ask to be judged by comparison. Let sentence of inefficiency be passed, and it will be received with submission, if pronounced by one, who in his own endeavours may prove that he can do more than I have been able to accomplish.

It was a belief, whether well or ill founded, of its necessity, that led me into a very troublesome, and probably a very thankless, undertaking; but, when a man approves of his own motives, he is not without reward. I neither desire nor deserve any other; I am therefore regardless of opinions, and secured against disappointment.

By some, I may be thought to have come to conclusions with too much assurance; by others, with too much distrust. Let me not be suspected of a disposition to dictate, and I shall be satisfied.

The RIGHT of *Hindoos* to have their contests decided *by their own laws*, has been established by the legislature of *Great Britain;* and I most cordially concur in the sentiments which have been expressed by *Sir William Jones*, upon this subject. In the month of March, 1788, he uses the following language, when addressing the Chief Government of *India:*—"Nothing indeed," he says, "could be more obviously just, than to determine private contests according to those laws which *the parties themselves*, had "ever considered as the rules of their conduct and engagements "in civil life; nor could any thing be wiser, than, by a legislative "act, to assure the *Hindoo* and *Musselman* subjects of *Great* "*Britain*, that the private laws, which they severally held sacred, "and a violation of which, they would have thought *a most* "*grievous oppression*, should *not be superseded* by a new system, "of which they could have no knowledge, and which *they must* "have considered as imposed on them by a spirit of rigour and "intolerance."

As to the *Hindoos*, I have not a predilection for the tenets of any of their schools, or for the doctrines of any of their scholiasts, in particular. Such as their law is, they have a right to an administration of it, among "the parties themselves." To deprive them of this right against their will, or without their desire, would be rigorous in a civil, and intolerant in a religious, point of view; for, their laws, and their religion are so blended together, that we cannot disturb the one, without doing violence to the other.

I am fully aware of the difficulty, at which I have now arrived. I may be asked, if I myself, have not shown that the contradictions amount to a nullity of the *Hindoo* law? I admit that there is much in the books, which is quite unintelligible; I admit, in many instances, where authors can be understood, that they neutralize the authority of each other. Still I say, their own is the only law to be administered to them. It is our duty to select such parts of the code, as may be most beneficial to the people. These will be confirmed into use, by their undeviating application to cases, which may call for decision in our Courts of Justice; we may command consistency, at least; we may hope, in time, to cleanse the system of its aggregated corruptions, and to defecate the impurity of ages.

Give them not any laws but their own, yet under a pretext of dealing those out, let us not subject the people to wrong. By this time the *Hindoos* ought to have had such rules, as are applicable to ordinary occurrences of their lives, established with some degree of accuracy and precision.

Laws which are repugnant to each other, must not all keep

their ground ; and where we cannot reconcile, we must abrogate. Let equity and wisdom declare the preference.

I would not expunge any thing, *because I thought it absurd;* yet, if absurdity be met by absurdity, I would make the most detrimental give way. By removing one, I should render the more harmless that which remained. One despot may be consistent, and may be endured, but an archonship of co-ordinates in tyranny, is intolerable ; and what will be the fate of that community in which none of them can conquer or be vanquished ?

I do not profess to censure, and I could not attempt it, without the risk of doing injustice.

Legislators may have given laws, lawyers may, in opposition to each other, have commented upon them without blame, and with good intentions. It is enough that we know there are conflicting authorities, and that no man can be secure against the powers of construction.

Ministers of Justice, ought not to be makers of laws; much less ought they to be furnished with authorities which may justify any decree. If left to their own discretion, they must act at their peril ; but when right and wrong may be sustained by equal powers, the condition of suitors becomes truly deplorable. We might wish for an establishment of the worst system, as a relief from such a state. A chance of receiving justice is nothing, if there be a power of doing wrong according to law.

The plan of *Sir William Jones* may have been excellent, but the execution of it fell to the share of *Jagannat'ha*. He has given us the contents of all books indiscriminately. That he should have reconciled contradictions, or made anomalies consistent, was not to be expected; but we are often the worse for his sophistry, and seldom the better for his reasoning. His incessant attempts to display proficience in logic, and promptitude in subtilty, he might have spared without the regret of his readers.

If it should be objected that I have advanced much which may be refuted by a reference to *Hindoo* sages, I shall admit that I have advanced much which may be so refuted. I undertook this work, because little can be advanced which is not refutable by such authority. I have endeavoured to collect from decided cases, such principles as ought, in my judgement, to be adopted, and such as ought, if adopted, to continue immutable.

I had felt the inconvenience which was universally experienced, of being obliged to have recourse to *Pundits*, upon points as they arose.

I have published in the Appendix, many opinions which were obtained for me by my son, *Mr. William Hay Macnaghten*, Registrar of the *Sudder Dewannee Adawlut*. The question was simply, whether or not an adopted son, could succeed to the estate of his adopting father's father; and it is hardly credible that such a one should have produced the contrariety of opinion which will appear. Still more strange, that in the support of opposite doctrines, reliance should have been placed upon the same authorities.

Those "holy saints" to whom the *Pundits* refer, are greatly at variance with each other. Some holding that such a son is, and others that he is not, heir to kinsmen. These opposing opinions, we are told, may be reconciled, by a reference to the qualities, good or bad, of the person adopted; but this criterion seems to be abolished, in the present, or *Kali*, age of the world; and its meaning is yet to be defined. To constitute good qualities, we are told by some, that a man must be versed in all learning, and adorned with every virtue; whilst good qualities are reduced by others, to liberality alone.

Of the twelve descriptions of sons, six are said by *Menu*, to be heirs of kinsmen, and six heirs of their fathers only. The doubt is, to which class a son given in adoption belongs.

In their enumeration, different sages assign different places to "the son given." As the six highest are heirs of kinsmen, and the six lowest heirs of their fathers only, those who rank a son given in the first class, make him heir to kinsmen generally; those who rank him in the second, confine his heirship to the father. It is affirmed that the original collocation has been, and affirmed that it has not been, altered by transcribers; that the son given ought to stand in the first, and that he ought to stand in the second, class; and I know not how, without the aid of common sense, such a question can ever be decided.

It is said, in the way of reasoning, *because* he is to present the funeral cake to the *manes* of his grandfather, that he is to suc-

ceed to the estate; but again, it is denied that he is to present the funeral cake. Some say that he shall present the funeral cake, and shall not succeed to the estate; others that he shall succeed to the estate, but that he shall not present the funeral cake. In short, it is a question of *Hindoo* law.

A majority of the *Pundits* who have delivered their rescripts declare, *that the adopted son shall succeed to the estate of his adopting father's father*, and they are apparently supported by the most rational construction; yet from the *Zillah* of *Saharunpore* it is answered, that the adopted son is excluded from inheritance by the *Mitacshara* and *all other authorities*.

I shall here give another quotation from the letter of *Sir William Jones*, out of which I have already taken an extract. He seems to have been well aware of the peril in which suitors are placed by the uncertainty of *Hindoo* law, and the character of its expounders.

Five and thirty years have elapsed since *Sir William's* letter was written; and in that time, there have been many occurrences in the Supreme Court, such as could not have been within his contemplation.

He says, "It would be absurd and unjust to pass an indiscri-
"minate censure on so considerable a body of men; but *my expe-*
"*rience* justifies me in declaring, that I could not with an easy
"conscience, concur in a decision, merely on the written opini-
"on of native lawyers, *in any cause in which they could have*

"*the remotest interest in misleading the Court;* nor, how vigilant "soever we might be, would it be very difficult for them to mislead "us; for *a single obscure text, explained by themselves*, might be "quoted as *express authority*, though perhaps, in the very book "from which it was selected, it might be *differently explained,* or "introduced *only for the purpose of being exploded.*"

Since the time *Sir William Jones* wrote this letter, we have had translations of *Hindoo* law books, in numbers sufficient to enable English readers to judge for themselves; and those who have perused them, must be convinced, that they contain enough, without being aided by the craft or the cunning of a *Pundit*, to mislead any man; that they contain express and distinct authority, supporting the affirmative and the negative of almost every question. That they admit of different explanations, it would be folly to deny, because there is hardly a passage in any one of them, which has not been differently explained.

But when we talk of matter introduced for the purpose of being exploded, we ought not to forget that the matter so introduced, is as well attested as that, by which it is to be exploded. It frequently happens, that he who assumes a right of exploding the doctrines of others, has his own opinions afterwards exploded; and that the exploding authority, is exploded in its turn.

Native lawyers, may not be deserving of the blame which is imputed to them; but there are instances of their partiality, and tergiversation, which cannot be palliated or denied; nothing but an as-

certainment of the law, can prove a corrective of this evil; and, as their own law, is to be administered to our *Hindoo* fellow-subjects, we ought, in our decisions, to be guided by those rules, which are most consistent with its general tenor, which have been preferred to others, by the most able of their commentators, and which appear to be the most rational in themselves. We shall then by a series of adjudications give consistency to the law, and leave the rights of a people unmolested.

I disclaim all intention of casting a reflection upon our present Supreme Court *Pundits*. I have had much conversation with them both, and I believe them to be in all respects, better qualified than such men usually are, for their offices. Yet it has often been observed, that opinions delivered in a particular cause, varied from those which had been obtained upon former occasions; and I persuaded myself, that it would be satisfactory at least, to ascertain their sentiments, at a time when they could not be biassed by favor, or by any feelings connected with the parties to an existing litigation.

Notes, which I possessed of decided cases, enabled me to direct my enquiries, and to put such questions as might lead to a better understanding of the subject. I have been much assisted by *Mr. Mactier*, a most active and intelligent officer of the Supreme Court, whose knowledge of his duty, enabled him to perform the task, which he cheerfully undertook, of procuring me the Records I required, and of pointing my attention to cases, which might otherwise have escaped my notice.

To my son, of whom I have before spoken, I am much indebted for a supply of knowledge, and for having been able to appreciate the value of information, which I had drawn from other sources. He furnished the materials of which my two last chapters are composed, and I have to lament his absence from *Calcutta*, at a time when I required his aid.

In my chapter on Adoption, the name of *Mr. Blaquiere* will occur. He supplied me with a manuscript translation of his own, from the *Sanscrit*. The work which he translated, is a compilation of *Sri Natha Bhatta*, a celebrated *pundit*, under the title of *Dattaka Nirnaya*. I do not wish to conceal any of the debts which I may have contracted, and I believe I have now acknowledged them all.

I refused admission to every thing, which I could not introduce with some degree of confidence. My doubts upon the authenticity of an opinion, if they did not induce me to exclude it, have made me accompany its admission with such observations, as I deemed calculated to prevent that which was questionable, from being implicitly received. Nothing has been retained, which I could see reason to reject; yet caution may have failed in its office, and left me exposed to the censure, which I was so anxious to shun. I can deny the charge of having substituted my own, for other, authority. I have inserted but little that I did not think pertinent, and I have omitted enough to acquit me of ostentation.

It will be said that some of the doctrines to which I assent, are contestable. I go further; I believe they are all so. From what I

have already avowed, I need not now say, that it was this belief which prompted me to my undertaking. Uncertainty, is the mischief to be remedied; authorities from *Hindoo* law books, may be collected to support both sides of any question. All claims may be countenanced, and all decrees may be sanctioned, by authority.

In the Supreme Court, some principles have been established by decisions, and it may be useful to compare judgements which have been pronounced in similar cases, even when they are not consistent with each other; although we should not be directed to the right, we gain something by learning how to avoid the wrong, course; and I may not go too far when I say, that a position *directly at variance* with any one in the following pages, ought not to be adopted without enquiry, or deliberation.

If I have made myself intelligible, that may be considered by those, who have attempted to extricate the *Hindoo* law from books, as a matter of some importance. Where I am right, assent may be the more easily conceded; where wrong, I may be the more easily confuted. I have yielded to that, which I conceived to be the best information. If I have laid a foundation, upon which a fabric may be raised by abler hands, and with better materials, I shall be satisfied. If I can, in future enlarge or correct this work, I shall do so from inclination, as well as from duty.

Experience has convinced me that some such publication is necessary. In this volume, it will appear, that two *Pundits* of the same Court, may maintain opposite doctrines, and each adhere to

its own with resolution or obstinacy, deriving equal advantages from books of law, severally relying upon different writers for support, and each resting upon the same author with a parity of confidence.

In truth, it is difficult, if possible, with the purest intentions, to come at justice, by the *Hindoo* law. Much of it is now obsolete, or declared to be inapplicable to this age of the world. Research is productive of little more than perplexity; the conflict of lawgivers is endless, and they can never be reconciled. Some *Pundits* will prefer one text writer, and some one commentator, to another; some will prefer the text to the commentary, and some the commentary to the text; some will give their opinions, taking the text and the commentary together; and some will pronounce the law, in an utter regardlessness of both.

There is great scope for the exercise of partiality, and the operations of corruption; authors may have expressed themselves equivocally, to retain the power of interpretation in its greatest latitude; expounders have failed in their attempts at illustration, if indeed, it was their intention to illustrate. They are seldom in harmony with their author, generally in discord among themselves; and it never is practicable, to obtain the satisfactory solution of an existing doubt.

If this be admitted, and I never heard it denied, it surely becomes desirable to set up points, which, being fixed, may guide us to a right conclusion in some cases, although they should not direct us in all. If certitude be established in any particular, its

principle may be extended to doubts, which were not supposed to have been within its influence.

Such considerations have induced me to attempt that, which I well know I am far from having accomplished. I have had many difficulties to encounter, but I believed that my endeavours could not operate injuriously, although they might not be productive of advantage; I therefore with but little leisure, and many objects to distract my attention, determined upon an effort (feeble as I feared it would prove) to give some consistency to the *Hindoo* law, believing that I shall have been useful, if right; and if wrong, hoping that others, when they prove me to be so, will establish the doctrines by which we ought to abide.

If my attempt can be said to have any merit, it is that of being the first which has been made to simplify *Hindoo* law; to separate its practical parts, from the theory and controversy with which they were intertwined or confounded. Of *Jagannatha's digest*, it is enough, in this place, to say, that the labourer might have given a more appropriate appellation to his work.

Translators have their merit, but it does not follow that translations have their use. The translator, having substituted a known, for an unknown, language, is *functus officio*. He has done all that he undertook to perform; he gives an author to his readers, but he does not impart value to the gift; he opens the casket, but he does not add to the worth of its contents. If we find nothing but perplexity and confusion, disorder and deformity, the fault is not his. He is not answerable for the defects of his original, nor

ought he to be held responsible for the uselessness of his own labours. He does not undertake to alter the nature of things; and that which is unavailing when known, might as well have remained in concealment.

There are some strictures, to which I know this volume is obnoxious, and there may be many which I do not anticipate; want of time has occasioned faults of an opposite nature. It has prevented me from shortening that, which will be found too long; and from lengthening that, which will be found too short.

I might have greatly improved my arrangement, but, situated as I was, I must have left off deficient in the method which I know to be requisite.

I should not have spared pains, if I could have commanded time. That was not within my power, and I judged it better, upon the whole, no longer to postpone a publication, which I feared was not likely to be much improved by delay.

I could not but feel for the situation of men, among whom I had lived the best years of my life, when I reflected upon the precarious tenure by which their property is held, and considered that wealth might be either given or taken away, under the same circumstances by the same law. If I shall have been the instrument of rendering them more secure than, at present, they are, in

the enjoyment of their rights, I shall have accomplished all that I hoped for, and more than I could have expected.

FRANCIS WORKMAN MACNAGHTEN.

Calcutta, the 22nd November, 1824.

ERRATA.

Page 23 line 10 for *questionably* read *unquestionably*.
—— 25 —— *(in the note)* for *Duttika* read *Dattaca*.
—— 33 —— 9 for *not* read *non*.
—— 142 —— 15 for *eight* read *five* years.
—— 144 —— 9 for *eight* read *five* years.
—— 214 —— 8 for *Dattica* read *Dattaca*.
—— 269 —— 26 for *subtility* read *subtilty*.

For exceptions to rule 6th, page 146, see pages 149 and 185.

Other trifling errors may possibly be discovered, but none it is hoped of any importance.


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11. *Hoorasoondaree Dossee v. Cosinoth Bysaack and al.* S. C. Will made during minority, void. Interest taken by a widow in her husband's estate. The opinions of Pundits, and alteration of the first Decree.

18. *Doe ex dem. Kisnogovind Sein and al. v. Gunganarain Sircar*, S. C. A widow, as heir to her husband has a life interest only in her husband's *immovable* estate, and such estate conveyed away by her, may after her death, be recovered by the next heir of her husband.

19. *Doe ex dem. Ramanund Mukhopodia v. Ramkissen Dutt*, S. C. A grant made by a widow of *immovable* property, she having succeeded to it as her husband's heir, is good for her life.

20. *Dialchund Adie v. Kishoree Dossee*, S. C. A woman taking under her husband's will, has a life interest only in his *movable* and *immovable* property. Doubts as to this decision, considering that the woman took *under a will.*

23. *Cosinoth Bysaack and al. v. Hoorasoondaree Dossee*, S. C. Judges satisfied that the distinction between *movable* and *immovable* property in the possession of a widow, is groundless.

29. *Gooroopersaud Bose v. Seebchunder Bose and al.* S. C. Upon partition made between her son, and *grandsons*, the son's mother has a right to share, as she would have shared, had the partition been made between her *sons.*

35. *Dialchund Adie v. Kishoree Dossee*, S. C. *Movable* and *immovable* property put upon the same footing; and will; doubts as to the propriety of the Court's decision in this case.

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36. *Cosinoth Bose et al. v. Hoorasoondaree Dossee,* S. C. The Court's opinion that a widow taking on the death of her husband has no more than a life interest, in either *immovable* or *movable* property.

44. Same case noticed again.

44. *Gooroopersaud Bose v. Seebchunder Bose and al.* S. C. Rights of a *mother* taking on partition, the same as the rights of a *widow* taking as heir to her husband.

48. *Joynarain Mullick and al. v. Bissumber Mullick and al.* S. C. Brothers of an undivided family, may acquire separate property. Descendants taking *per capita* and *per stirpes.*

60. *Sree Mootee Mundoodaree Dabee v. Joynarain Puckrassee,* S. C. A widow upon making out a sufficient case, may compel the son of her husband to make an adequate allowance for her separate maintenance.

62. *Cunjhunnee Dossee and al. v. Goopeemohun Deb and al.* S. C. A widow cannot without sufficient cause, compel the sons of her husband to give her a separate maintenance.

62. *Seebchunder Bose v. Gooroopersaud Bose and al.* S. C. Mother entitled to a share, upon partition made by her sons. Childless widow not entitled to such share, will upon partition made by the sons of her husband, be entitled to have a fund set apart, sufficient for the security of her maintenance.

64. *Sree Mootee Jeeomonee Dossee and al. v. Attaram Ghose and al.* S. C. Partition ordered upon the prayer of a widow who succeeded by her husband's death to his share in an undivided estate. The mother of *one* son, is not entitled to a separate share, upon a partition made between that one son, and his half brothers. In case of a son surviving his father the estate will vest in him, and if this son shall die an infant and unmarried, the estate will go to his mother; but, if his mother should have died before him, the estate shall not go to another wife of his father, although if the son had died in his father's life time, the father's estate would have gone to his widows. The grandmother (i. e. father's mother) is the heir of an unmarried infant male, whose own mother is dead in preference to any other wife of his father. Upon partition, a woman will take one share as heir of her grandson, and another share as grandmother, although she herself, *as her grandson's heir,* is a partitioning party, or even if, *as such heir,* she had enforced the partition. In case of a

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grandmother so succeeding, she must maintain her *daughters-in-law*, or the childless widows of her grandson's father.

69. *Seebchunder Bose v. Cooroopersaud Bose and al.* S. C. Guardian removed on account of his mismanagement. Upon a partition made between one son, and the sons of another son of A, the widow of A will be entitled to one-third, the son to a third, and the sons of the other son, to a third of the estate. The only son of one wife shall take a share to himself, and the five sons of another wife, shall each take a sixth part, and their mother a sixth part of the remainder upon partition. Mother, instead of being entitled *absolutely* to the share of *movable* property taken by her upon partition, declared entitled to the property so taken, *real* and *personal, according to the rules of the Hindoo law. Pundits* opinion.

74. *Issurchunder Corformah and al. v. Govindchund Corformah and al.* S. C. Will declared *well proved*, but *wholly inoperative*, except, &c. Seven sons who survived their father equally entitled to his estate. The widow of one, and the mother of one of the seven sons *who died after their father*, declared entitled to their shares as heirs and representatives. Mothers entitled to shares, on partition made by their sons. The principle of partition herein adopted, was not followed in the case of *Jeeomonee v. Allaram*, &c. which was decided ten years afterwards.

78. *Govindchund Bysaack v. Cosinoth Bysaack and al.* S. C. Executor relieved from his executorship upon fully accounting, and bringing the money belonging to his testator's estate into Court. Partition ordered. Will made by a *Hindoo* under the age of sixteen, declared void.

83. *Hoorasoondaree Dossee v. Cosinoth Bysaack and al.* S. C. Widow declared entitled to her husband's estate. The mother of an infant widow appointed her guardian, and a competent monthly allowance ordered to be paid out of her husband's estate, for her support during her infancy. Jewels belonging to her and her husband, ordered to be delivered for her use, to her mother. Decree *rectified*. Widow instead of being entitled to the *movable* property of husband *absolutely*, declared entitled to his *estate* to be possessed, used and enjoyed by her, in the manner prescribed by the *Hindoo* law. Widow ordered *possession* of her husband's *movable* estate; order appealed against by the next heirs of her husband. Bill filed by a mother claiming her share of an estate upon partition having been made between the widow of her deceased son, and her two surviving sons, dismissed with costs. Mother's right in this case, taken away by her husband's will. Effect given to wills.

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126. *Kullean Sing v. Kirpa Sing et al.* S. D. A. Son adopted by verbal declaration only; this according to the law, as it prevails in *Mit'hila*. This a *Critrima* adoption; not known in *Bengal*. *Lustration* dispensed with in *Critrima* adoption.

129. *Sreenath Serma v. Radhakaunt,* S. D. A. Adopted son excluded from a share in the property in his natural family.

139. *Dutnarain Sing and al. v. Rughoobeer Sing,* S. D. A. Adopted son is entitled to the share of the person adopting him.

142. *Kerutnarain v. Mussummut Bhobinisree,* S. D. A. Adoption, as it appears, cannot take place if tonsure has been performed in the natural fathers, or has not been performed in the adopting, father's, family. Child adopted ought not to exceed the age of five years; may be adopted at a more advanced age, if he be nearly related on the *paternal* side to the adopter.

155. *Gowerbullub v. Juggernotpersaud Mitter and al.* S. C. Adoption prevented by the death of the father of the boy who had been selected for adoption.

156. *Shamchunder and al. v. Narayni Dabee and al.* S. D. A. Two widows if duly authorized by their husband to do so, may after his death adopt in succession to each other.

157. *Solukhna v. Ramdulol Pande and al.* S. D. A. Husband may authorize his widow to adopt a son after the death of one son whom he leaves surviving him.

157. *Gowrepershad Rai v. Jymala,* S. D. A. A husband having adopted a son on account of one wife, may authorize another wife to adopt a son for herself. If she does so after the death of her husband, the two sons so adopted will take the inheritance jointly.

159. *Gowerbullub v. Juggernotpersaud Mitter and al.* S. C. A widow, whose husband's father survives him, may by the authority of her husband, adopt a son after the death of her husband's father; and the son so adopted, will be entitled not only to the estate of her husband, but to the estate of her husband's father also. This adoption does not seem to require the sanction of the husband's father, he having died leaving neither widow nor child surviving him. Quere.—What would be the rights of this adopted son, if the husband of the woman who adopted him had had brothers, i. e. if his father had had other sons? *Pundits* of the Supreme Court differ in opinion upon the case decided. *Pun-*

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dits of the *Sudder Dewannee Adawlut.* Case put for the opinion of *Pundits* in the *Mofussil.* For their opinions from fifty-one different stations, see the Appendix.

166. *Ramchunder Chatterjea v. Sumboochunder Chatterjea,* S. C. The Court erroneously decides that a *Brahmin* may lawfully adopt the son of his sister.

168. *Sree Mootee Dagumbaree Dabee v. Sree Mootee Taramonee Dabee and al.* S. C. Adoption under *Luckinarain Tugore's* will—question as to which of three widows has a right to receive the son in adoption. Executor of Executor recognized by the Supreme Court as the *Hindoo* Testator's representative. This being a family of *Brahmins,* and the child adopted being son to the uncle of one of the widows, can that widow of whose uncle the child is son, receive him in adoption? This boy being adopted, and having died, can he now be replaced by another in adoption? *Quere.*

177. *Shamchunder and al. v. Narayni Dabee and al.* S. D. A. A man leaves two widows and authorizes them both to adopt. One adopts in virtue of this authority, and she and her adopted son both die. Case not satisfactorily reported. The nature of the authority given by the husband not stated, nor how soon after his death the first adoption was made. After the death of the first widow who adopted, and of her adopted son, the other widow adopts; held that the second adoption is valid; and that the son so secondly adopted is entitled to the whole estate of him, who had authorized his wives to adopt.

181. *Gowreepershaud Rai v. Jymala,* S. D. A. A childless man gives authority to each of his two wives to adopt. He, in his life time, adopts a son on account of one wife. After his death the other wife, under the authority she had received, adopts a son for herself. Held that the adoption made by the husband himself, did not abrogate the authority which he had given to his wives; and considering the circumstances of this case, that the second adoption was valid. It would seem however, that the adoption by the father himself, *after he had given authority to his wives to adopt,* would have operated as an ademption of the authority so given, if there had not been reason to infer, that he intended, notwithstanding his own adoption, to continue the power of adopting in his second wife.

184. *Solukhna v. Ramdulol Pande and al.* S. D. A. A man having a son by a deceased wife, may authorize his living wife to adopt in case of the *death* of that son, but *not* in case of a *disagreement* between him and the widow.

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186. *Verapermal Pillay v. Narrain Pillay and al.* Decided in the Recorder's Court at *Madras*. Strictures upon that decision.

195. *Gopeemohun Deb v. Rajah Rajecrishna*, S. C. Proof that a boy to be adopted did not exceed the age of five years supposed to be necessary; not presumed that the necessary forms have been attended to, although circumstances exist to show that adoption actually took place—*semble*.

196. *Kerutnarain v. Bhobinesree*, S. D. A. A boy of the age of eight years may be adopted, if he has not undergone the ceremony of tonsure in the family of his natural, but has undergone it in the family of his adopting father.

210. *Gowrbullub v. Juggernotpersaud Mitter and al.* S. C. Said that the death of a father who had consented to give his son in adoption, before the gift of the boy actually took place, will prevent his (the boy's) being given in adoption.

228. *Gopeemohun Deb v. Raja Rajekrishna*, S. C. Case arising out of the adoption and will made by *Raja Nobkissen*; not finally decided by the Court.

265. *Ranjkisno Bonerjee and al. v. Taraneychurn Bonerjee and al.* S. C. (Master's Office.) Opinion given by the Pundits, concerning the right of a father to make unequal distribution among his sons. See also a conversation between the Supreme Court Pundits and me, upon the same subject, page 260; also Appendix, page 8.

268. *Ranjkisno Bonerjea and al. v. Taraneychurn Bonerjea and al.* Further proceedings on the Master's report, S. C.

269. *Soorjeecomar Takoor's* will, S. C. Property of all descriptions left by the Testator to his brothers, although he had a childless widow surviving; considerations thereon.

271. *Eshanchund Rai v. Eshorchund Rai*, S. D. A. A *Zemindar* may give the whole of his *Zemindary* to one son, making a pecuniary provision for his other sons.

274. *Sham Singh v. Mussumut Umraotee*, on the part of *Kalee Sur Singh*, a minor, S. D. A. By the law as it prevails in *Mit'hila*, a father cannot, by a *deed of gift, unaccompanied by possession*, give the whole of his *ancestorial immovable* property to one son, in exclusion of another. *Quere*—Does this decision admit that such a disposal of property may be made in *Bengal?*

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283. *Runkoomar Neaee Bachesputtee v. Kishenkunkar Turk Bhoosun*, S. D. A. A man may by the *Hindoo* law, as it prevails in *Bengal*, give by *Danputra* or deed of gift, the whole of his *ancestorial immovable* property, to his younger, in exclusion of his elder, son.

283. *Bhowannychurn Bunhoojea v.* the heirs of *Ramkaunt Bunhoojea*, S. D. A. A *Hissanama*, or deed of partition, made by a father, *and not carried into effect by him, in his life time*, is not binding upon the sons after his death. This decision is very unsatisfactory, and seems to have turned entirely on *possession* not having been given by the father *in his life time*. If this be settled as law, it must deprive the *Hindoo* of a right to dispose of his property by will. If the decision implies a denial of the father's right to make an unequal distribution of his property, among his sons, it is directly at variance with the two former decisions. Observations on the conduct of the *Sudder Dewannee Adawlat*, and other *Pundits* who were applied to in this cause.

283. *Mahmut*, widow of *Gungagovind Sein v. Kuleani*, and two others, S. D. A. A widow, possessing a *Talook* by the death of her husband, cannot make a gift of it to enure beyond her own life.

310. *Bijya Dibeh v. Unpoornah Dibeh*, S. D. A. A widow succeeding to an estate, either as heir to her husband, or, upon the death of her son as his heir, has a life interest only; and upon her death, the estate she so succeeded to, in either case, will go to the heirs of her husband. An estate "passes to daughters, for the sake of male issue."

316. *Eshanchund Rai v. Eshorchund Rai*, S. D. A. Said to have been received as a precedent which settles the question of a father's right to dispose of his property, even contrary to the injunctions of law, &c.

317. *Mr. Colebrooke's* opinion respecting the right of a *Hindoo* to dispose of his property by will.

320. *Issurchunder Corformah and al. v. Govindchund Corformah and al.* S. C. A will declared to be well proved, but wholly inoperative except as to one bequest. Except that bequest, all the property left to a *Shib*, or Idol. The will seems to be that of a madman. See *Goculchunder Corformah's* will in the *appendix*.

323. *Nubkissen Mitter and al. v. Hurrischunder Mitter and al.* S. C. An unequal distribution made of property by a father not disputed. Land, &c. left for

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the maintenance of an Idol. This disposal by the Testator held good. It appears that a father cannot by his will prevent the descendants from coming to a partition among themselves. In case of a quarrel among the descendants, and a separation; the family idols ordered to be enjoyed by them alternately. The time of enjoyment to be ascertained according to the proportions of the estate which were left by the ancestor to the several descendants. Every thing given by the ancestor to the Idol to accompany the possession of it.

331. *Ramdullol Sircar and al. v. Sree Mootee Soonah Dabee and al.* S. C. A bequest of property for pious purposes upheld.

335. *Radhabullubh Tagore v. Gopeemohun Tagore and al.* S. C. All the family property applied to the support and worship of a family Idol permitted. It seems to have been so applied by consent of the sons.

336. *Ramtoonoo Mullick and al. v. Ramgopaul Mullick and al.* S. C. Court declared that a *Hindoo*, "might and could, dispose by will, of all his property, movable and immovable, and as well ancestorial as otherwise"—Appeal—and Decree affirmed by the King in Council. A large sum directed to be applied to pious purposes, according to the Testator's desire.

349. *Doe ex dem. Kishnomohun Surmono v. Gopeemohun Tagore and al.* S. C. Will of self-acquired property; two sons disinherited (on account of misconduct) by the Testator; each left a legacy of 10,000 rupees only; one son, because deaf and dumb, left 20,000 rupees only; and the whole estate, with the exception of the above legacies, and 30,000 rupees, left for the worship of an Idol, given to four sons equally.

350. *Gowerchurn Mullick*, by his will disinherited one son on account of his alleged misconduct when serving in a house of agency; left him a small sum of money only. The estate very considerable. The testator's will acquiesced in. The property consisted of movable and immovable, ancestorial and self-acquired.

350. *Woomischunder Pal Chowdry and al. v. Premchunder Pal Chowdry and al.* S. C. Will of property supposed to have been self-acquired, leaving six *anna's* share to two sons, and ten *anna's* share to two other sons, established. Supposed that the decree would have been the same, had the property been ancestorial; 100,000 rupees left for the purpose of establishing a *Shib* or family Idol.

353. *Rajah Nobkissen's* will, S. C. Although the *Rajah* had a begotten, and an adopted son, he left an ancestorial *Talook* to the sons of his brother; this act was affirmed by the Court.

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357. *Dialchund Adie v. Kishoree Dossee,* S. C. Will leaving property, real and personal, between the wife and the son of a Testator, affirmed. The wife declared entitled for life only, to her share. *Quere* as to the propriety of this decision, *the property having been left as it was by the testator to his wife.*

360. *Soorjeeomar Takoor's* will established, S. C. This will, although the testator had a wife, gave all his property (a provision which he made for his wife excepted) to his brothers.

361. *Bustom Doss Mullick v. Rajindro Mullick and al.* S. C. A *Hindoo, having a wife and two daughters,* made a provision for them by his will, and left the whole of his estate to a brother. The estate was ancestorial and self-acquired, movable and immovable; widow of the testator, having commenced a suit advised to discontinue it. A first cousin, having a *right* to half of the property, relinquishes that right, and accepts of one-third; held good, as against his adopted son—*semble.*

369. *Rogonot'h Pal's* will, S. C. Self-acquired property, movable and immovable, may be distributed by will, unequally among the younger sons, in exclusion of the eldest son.

370. *Kishnonundo Biswas v. Prawnkishno Biswas,* S. C. No objection made on the ground of a testator having left three-fourths of immovable property to one son, and one-fourth only to another.

371. *Debnath Sandial and al. v. Pat. Maitland and al.* S. C. Hindoo leaves two-thirds of his property to religious uses. Wife burning with the body of her husband, not constructively supposed to die along with him. Legacy left her by her husband to go to her daughters, and not to make part of the residue of the husband's estate.


सत्यमेव जयते

OF INHERITANCE.

TO prevent the confusion which might possibly be occasioned by a consideration of the rights of widows, it may be declared, once for all, that a widow cannot claim any property *in right of her husband,* except such as the husband was *actually possessed of* in his life time. For example, A has an only son B; B marries and dies before his father, not leaving a son, but leaving his widow surviving. The widow shall be entitled to the property which was possessed by B her husband—but she shall not, upon the death of A her husband's father, be entitled to his property. The estate of A, would, if B had left a son, have gone to him; yet the widow shall not take it, because her husband in his life time was not in possession. If B had acquired property, and if A (his father) had died first, and then B had died, leaving a widow but no son; the widow would have succeeded to all, as well that which descended to B from his father, as that which he himself had acquired.

1st. The primary rules of Inheritance are these—A (the original acquirer) shall be succeeded

1st. By his son, or sons—if no son, by

2d. His widow, or widows—if none, by

3d. His daughter, or daughters—if none, by

4th. His daughter's son or sons—if none, by

5th. His Father—if dead, by

6th. His mother—if dead, by

7th. His uterine brother or brothers—if none, by

8th. His brother or brothers of the half blood—if none, by
9th. Sons of uterine brothers—if none, by
10th. Sons of brothers of the half blood—if none, by
11th. Grandsons of uterine brothers—if none, by
12th. Grandsons of brothers of the half blood.

Here the succession in this line ceases. A's Estate will now go back to the son or sons of his sisters, and their heirs; failing them, to his paternal grandfather,—then to his paternal grandfather's widow,—then to the paternal grandfather's sons and their heirs.

I believe I have now set forth a sufficient number of Reversioners for all the purposes of utility. A Table in Mr. Wynch's translation of the *Daya crama sangraha* may be consulted by those who desire to go further. I have given it in the appendix—I must add however, although the line of Inheritance, is perhaps less disputable than any other part of the *Hindoo* law, that the one marked out in the *Daya crama sangraha* is not universally acquiesced in.

When no relations by blood are to be found, the property will go to spiritual preceptors, to *Brahmins learned in the Vedas*, and finally to the King, or ruling power. There are many unconnected by blood, as well as spiritual preceptors, and learned *Brahmins*, who will succeed in preference to the Sovereign power. Those (for instance) bearing the same family name—Fellow students—and men descended from the same *Patriarch*. But Sovereignty itself shall never succeed to the estate of a *Brahmin*, or to that of any other person, if there be a *qualified Brahmin* to intercept the Inheritance.*

* *Menu* thus lays down the law—"To the nearest *Sapinda*, *male* or *female*, after *him* in the third degree, the inheritance next belongs, then on failure of *Sapinda's*, and of their issue, the *Samanodaca*, or distant kinsman, shall be next heir; or the *spiritual preceptor*, or the *pupil*, or the *fellow-student* of the deceased."

"On

2d. There is a peculiarity in the *Hindoo* law, as it relates to descent in the right line. The estate cannot descend to a *great great* grandson, unless there be an intermediate heir, through whom it may be conveyed. For instance, If A have a son B, B have a son C, C have a son D, and D have a son E ; E will then be the *great great* grandson of A. Supposing then B, C, and D to die in the life time of A, E shall not upon A's death take the estate—nor shall he ever take it, if it does not come to him through a long course of reversioners. Yet if D had survived A, D would have taken as A's great grandson, and E would have taken as D's son. If C had survived A, C would have taken as A's grandson, and E would have taken as C's grandson—or if B had survived A, B would have taken as A's son, and E would have taken as B's great grandson.

3d. In the above case (B, C and D having died in the life time of A) the widow or widows of A will in the first instance take his estate as they would have done if he never had had a son, E (the *great great* grandson) being at present cut off from the Inheritance.

4th. If collaterals, entitled to the estate be living, they shall take in exclusion of the *representatives* of other deceased collaterals—as, A, B, and C, (being uterine brothers) A dies leaving sons,—B dies childless not leaving widow, daughter, daughter's son, father or mother surviving him ; C shall take the estate in exclusion of the sons of A. But if C also had died before B, leaving sons, then the sons of A and the sons of C would have succeeded jointly to B. But if B had had a half brother living at his death, the half brother would have succeeded in exclusion of the sons of his uterine brothers.

" On failure of all those, the lawful heirs are such *Brahmens* as have read the three *Vedas*, as are *pure* in *body* and *mind*, as have *subdued* their *passions* ; and they must consequently offer the (funeral) cake : thus the rites of obsequies cannot fail."

" The property of a *Brahmen* shall *never* be taken as an *Escheat* by the *King ; this is a fixed law ;* but the wealth of *other classes*, on failure of all heirs, the King may take."

5th. Supposing A to die leaving neither son, nor widow, nor daughter, but having had daughters who all died in his life time leaving sons; then upon the death of A all the sons of all the daughters will succeed jointly, equally, and *per capita* to his estate. But if one of A's daughters had survived him, she would have taken in exclusion of her sister's sons *for her life*,—and her sons after her death would have succeeded *jointly with the sons of her sisters*, all *per capita* to the estate.

6th. If from a defect of intermediate heirs, the estate shall go to the sons of sisters, then all the sons of all the sisters shall take jointly. The sisters themselves, cannot in any case succeed to the estate.

7th. If a woman before her marriage shall acquire property in *streed'hun* (i. e. in her own right) or if, after her marriage, property shall accrue to her, (be it real or personal,) her husband will not have any control over it, but it shall be held at her own absolute disposal.

8th. If a husband shall, in his life time, give real or *immovable* property to his wife, he shall continue to have dominion over it during his life; after his death it shall become the widow's (hers to whom it was given) in *streed'hun*.

9th. In case of personal or *movable* property so given by a husband to his wife, it shall be in *streed'hun*, and at her absolute disposal from the time of the gift.

10th. In property acquired by *the death of another*, and property acquired by the *mere operation* of *Hindoo* law, there is not (as it seems) any distinction made between real and personal—*movable* and *immovable*.

11th. In alienation of *ancestorial* property by the act of a party in pos-

session, a distinction (whether well or ill founded) has been taken between *movable* and *immovable*. It has indeed been affirmed, that even an *unequal* distribution of *ancestorial immovable* property cannot be made among sons, grandsons, or great grandsons. I shall however, have occasion to enter into the question more at large in another part of this work.

12th. The son is next heir of his father; and if there be any number of sons, whether by one wife, or by different wives, they will succeed as joint heirs to an undivided estate, without reference to their mothers, or the number of them which may have been born of each mother—they will all take equally *per capita*. The children of these sons will take *per stirpes*. Thus if A shall leave three sons B, C, and D,—B by one wife and C and D by another,— B, C, and D will enjoy the estate of A equally between them. But if B shall die leaving two sons E and F,—if C shall die leaving three sons G, H, and I,—and if D shall die leaving four sons K, L, M, and N; then E and F shall be entitled to one-third,—G, H, and I, shall be entitled to one-third, and K, L, M, and N, shall be entitled to one-third of A's estate;—and they will so inherit jointly, or so take upon partition, even if B, C, and D, had all died in the life time of A. B, C, D, had they survived A, would have taken *per capita*,—but their sons, or more remote descendants will take *per stirpes*;—and if in the life time of A, B had died leaving grandsons,—C had died leaving sons, and D had survived A; then D would have taken one-third, the sons of C would have taken one-third, and the grandsons of B would have taken one-third of A's estate.

13th. The widow, if there be no son, shall succeed to her husband's estate, and this she shall do whether he was of a *divided*, or of an *undivided* family; if there be a daughter, and no widow, the daughter shall succeed.

14th. If there be a daughter and no son, the widow, if there be one, will first take her husband's estate—and after her death it will go to her hus-

band's daughter if there be but one, or daughters, (if there be more than one) equally.

15th. Upon the death of a daughter inheriting immediately from her father, or mediately through her father's widow, the estate shall go to the *son*, but *never* to the *daughter* of this daughter. Nor shall it ever go to the daughter or the son of her husband by another wife.

16th. A daughter taking immediately from her father, or through his widow, shall have an estate for life only.

17th. A granddaughter, whether she be so by a daughter or a son, cannot succeed to her grandfather, or through the widow of her grandfather.

18th. If there be two or more widows, and no son, the widows shall take equally, although some of them have daughters, and the others have been childless. The daughter or daughters, will in this case succeed to the widows respectively, as they die. They will succeed equally to those who were not, as well as to those who were mothers, and between the widows there is no right of survivorship.

19th. If a son had been born, and had died in the life time of his father, the *mother* of this son will not have any preference in consequence of having borne him. The widows (the deceased son's mother included) will all succeed equally to the estate of their husband.

20th. If a man shall leave any number of widows and a son by one of them surviving him, and if the son shall then die leaving neither widow nor son; his mother shall then as his heir, succeed to the estate of his father, in exclusion of all the other widows. The other widows will in this case be entitled to a maintenance only.

21st. A sister whether of the half or whole blood, can never succeed to the estate of a brother, but the son of a sister may succeed; and the son of a sister will succeed in preference to the son of an uncle. Thus, if there be two brothers A and B,—if A shall die leaving a son C and a daughter D,—and B shall die leaving a son E;—then upon the death of C, (without leaving a widow or child,) his cousin E (the son of B) shall not take the estate of C; but the sons of D (C's sister) will take it, although neither D nor her daughters could have succeeded to it.

22nd. One sister cannot take property as *the Heir* of another—but one may succeed to another in the wealth which had been derived from their father—In this case she will succeed not as her sister's, but as her father's, heir.

23rd. A brother may succeed to the property of a sister, held in *stree-d'hun*, but not to property derived by her from her husband.

24th. It is a *general* rule, that a male succeeding to property, shall take an absolute estate; and that a female so succeeding, shall take an estate for life only.

25th. If a man shall leave a daughter or daughters, and no widow,—his daughter, if but one, shall take his estate; his daughters, if more than one, shall take it equally between them.

26th. If a man shall die, leaving any number of daughters, whose mothers are all dead, and one or more childless widow, or widows; the childless widow or widows shall first take, and then the daughter or daughters.

27th. If the daughter succeeding shall have daughters only, the estate shall not go to them, although her *son*, or *sons* would have succeeded to it. In this case it will go back to the mother of her father,—to the paternal grandmother of her with whom the descent stopped for want of male issue.

28th. It does not follow that a person whose duty it is to perform the *shrad'ha*, or funeral rites, shall succeed as heir to the estate; or that the person succeeding to the estate, shall have the duty of performing the *shrad'ha* cast upon him. Sons of a sister may succeed to the estate, but they cannot perform the *shrad'ha*, except in the absence of relations in the male line; or except in a case in which it may be performed by any person of the same *caste* or tribe. So if there be sons of a sister, the sons of a male cousin cannot succeed to the estate, and yet it will be their duty to perform the *shrad'ha* in preference to the sister's sons. It is an invariable rule, that the *shrad'ha* can never be performed but by one of the same *caste*.

29th. If A shall die leaving any number of sons, and B (one of the sons of A) shall marry and then die leaving any number of widows, and a son C, by one of them surviving him, the other widows of B having been childless, or having borne daughters only; if then C shall die, not leaving either widow or child,—C's mother will, in exclusion of all the brothers and the other widows of B, take his (her son C's) estate. And if the mother of C had died in the life time of her husband B, or after his death and before her son C, then the estate would not go to any of the brothers, or surviving widows of B, but it will go to the widow of A, the paternal grandmother of C.

30th. Supposing A to have two wives B and C,—B to have had a son D, and C to have had a daughter;—B then to have died in A's life time,—A then to have died,—and D (the son of B,) and C and her daughter, to have survived him;—supposing D then to have died, in this case the estate will not go to C or to her daughter, but it will go to the mother of A, who will succeed to it as grandmother of D. If B the mother of D had survived him, she would have succeeded as his heir. In the above case if A had had brothers, it would not have made any difference in the succession, as the grandmother of D, would have succeeded in preference to them, (D's uncles.)

31st. Widows who take an estate, shall take it for life only; and if there are not daughters, the next heirs of their husband will take as they die, in like manner as the daughters would have taken had there been any.

32nd. If a wife shall die in the life time of her husband A, she (the deceased wife) having left a daughter B,—if A the father of B shall then die, leaving a childless widow C and his daughter B surviving him,—C shall first take the estate, and upon her death it shall go to B.

33rd. On the death of a *maiden*, her uterine brother or brothers shall take her wealth—If no uterine brother be surviving, her *mother* shall take it. And her *father*, if her *mother* be dead—The wealth *given* by a *husband* to his *wife*, shall upon her death, revert to the donor—A married *woman's* own proper wealth, *not derived from her husband, or her father* shall go equally among her sons, and her *unmarried* daughters—If no daughters, the sons will inherit—and if no sons, the daughters—If there are neither sons, nor *unmarried* daughters, then the *married* daughters will inherit:—*maiden daughters*, and next, *married* daughters, shall succeed to the wealth *given by a father* to his daughter. I have omitted many inheritors of women's wealth, and many distinctions which are applicable to those I have noticed. The subject is one more of curiosity than of use, for it rarely happens that women die possessed of wealth.

N. B. It will have been observed that by the *Hindoo* law, the wealth of a woman after her death, will be differently disposed according to her situation, and the manner in which she became possessed of it—That the distribution of it will depend upon her having been married, or a maiden. And the mode of its acquisition—whether she *inherited* from her father—whether she took it by *gift* from him, or from her husband; and whether it was possessed by her in any other right.

34th. If there be three sisters, A, B, and C, who succeed jointly to their father's estate,and if they all die childless, or having daughters only; —then upon the death of one, the two others will succeed to her share in equal proportions;—and upon the death of one of these, the whole estate will vest in the survivor for her life; but upon her death it will not go to her daughters:—again, supposing A to die childless, or having daughters only, and B and C to survive her; supposing also B to have one son, and C to have three sons,—then upon the death of A her share shall go to her sisters equally between them, for their lives; and as they die, the proportion of B shall go to her *only* son, and the proportion of C shall go equally among her *three* sons.—But if B and C shall each die in the life time of A, then the proportion of A shall be differently distributed; and it shall go to the one son of B, and the three sons of C in equal proportions, share and share alike.—That is, if B and C had survived A, their sons after the deaths of their respective mothers, would have taken *per stirpes*;—but if B and C shall die before A, then their sons upon the death of A will take *per capita*.—The law in one possible event, is left perfectly doubtful—there are opinions and authorities both ways.—Supposing either B or C, (C for instance,) to have died before A, and B to have survived her; it is agreed that upon the death of A, her estate will go to B,—but whether on the death of B, it shall go to her *only* son, or be divided between him, and the *three* sons of C, is *vexata questio*. Except the law, as declared in the 5th rule, I cannot procure any light upon the subject; and according to it, or at least by analogy, I should be inclined to conclude, that upon the death of B, the estate of A is to be equally divided between the one son of B, and the three sons of C, share and share alike.

There is no doubt but that the *original* share of B, will go to her *only* son; nor is there any, but that the *original* share of C shall be divided among her *three* sons—If the father of B and C had survived one of them, and

one of them had survived him, it is certain that the daughter surviving him, would take his whole estate for her life,—and upon the death of this surviving daughter, that her son or sons, *and* her sister's son or sons, would take the father's estate equally and *per capita* among them.—And if there be two daughters, one having ten sons, and one having one son, if these daughters shall survive their father, it is agreed that they shall take his estate equally between them,—and that upon the death of one, her *one* son shall take her share,—and upon the death of the other, her *ten* sons shall take her share among them.

35th. It was formerly held by the Supreme Court that the widow took *movable* property *absolutely*, and *immovable* property for life only—but it has since been thought that there is not any ground for such a distinction, and that the widow takes but a life estate in *movable* as well as *immovable* property.—In December 1814, in the case of *Hoorasoondaree Dossee* against *Cosinot'h Bysaack* and *Ramanot'h Bysaack*, it was declared that *Hoorasoondaree* was entitled to an *absolute* interest in the *movable* property, and an interest for *her life* in the *immovable* property of her husband. The case was this, *Bishonot'h Bysaack*, *Cosinot'h Bysaack*, and *Ramanot'h Bysaack*, were brothers.—*Bishonot'h* married the complainant *Hoorasoondaree*.—He died under the age of sixteen years; having, as his brothers alleged, made a will in their favor. The Court determined that this will having been made in the minority of *Bishonot'h*, was void;—and the above declaration was made in *Hoorasoondaree's* favor, he (her husband) *having died intestate*.—A bill in the nature of a bill of review was afterwards filed by *Cosinot'h Bysaack* and *Ramanot'h Bysaack* against *Hoorasoondaree Dossee*.—Error was assigned in the Decree having declared *Hoorasoondaree* entitled to an *absolute interest* in her husband's *movable property*.

On the 10th of December 1818, the Supreme Court Pundits, (*Turapershad Bhattacharjea* and *Mritonjoyhee Bhidialunkar*) were interrogated

as to the right of widows succeeding to their husbands' estate. The questions and their answers were as follow :—

Question 1. "If a *Hindoo* widow succeed to the property of her husband dying without male issue; what interest does she take in his *immovable* property, and what interest in his *movable* property?"

Answer. "According to the *Dayabhaga* and other *Shastras prevalent in Bengal*, there is *no distinction* in this instance, between *movable* and *immovable* property.—The widow has a *life interest* in *both*, and is entitled to the enjoyment of the same and to *dispose of the same*, by gift, mortgage, sale or otherwise *for the benefit of her departed husband's soul*, even without the consent of her husband's kinsmen. In so doing she will observe "*moderation*."—(N. B. The Court *Pundits* explained the word "moderation" used by them, to mean generally "moderation in expenditure"—but other *Pundits* present explained the "moderation" of a widow to mean "moderation in diet and clothing.")—The Court *Pundits* proceed,—"She has *no authority whatsoever* to dispose of the property by *gift* and so forth, for *worldly* purposes *unconnected* with *religious* purposes, without the consent of her husband's kinsmen.—If she does so, the act is *invalid;* (religious purposes include a portion to a daughter, building temples, for religious worship, digging tanks and the like;) she may make gifts and donations to the relatives of her deceased husband,—and, with the consent of her husband's kinsmen, to her own family. The kinsmen of her husband have the priority to her own family with reference to gifts, *because* the widow is *under their immediate control*, it being *incumbent upon* her to act *as they direct*."

Question 2. "If she convey away his *immovable* property for other than an allowable cause, is such conveyance valid against herself, or the next of kin of her husband?—and if she give away his *movable* property for other than an allowable cause, is such gift valid against herself, or against the next of kin of her husband?"

Answer. " Such gift as to immovable property is *not valid* against *herself, or against* the next heir of her husband.—The *same would be invalid as to movable* property. Jewels going to a widow as part of her husband's estate, and given away without *allowable* cause, *could be recovered by her or her husband's next of kin the same as money.*"

Question 3. " Has the widow an *absolute* (independent) interest in the property of her husband, either *movable* or immovable?"

Answer. " *She has not an absolute interest in such property.—She has not an uncontroled interest in that property.—She can do nothing of her own authority.*"

Question 4. " Has a widow so succeeding a right to the *possession* of the *movable* property to which she has succeeded?"

Answer. " The widow so succeeding *has a right to the possession* of the *movable* property to which she has succeeded, subject to the control before mentioned."

Question 5. " Have the relations of her husband any right to take such property out of her possession?"

Answer. " They *cannot* dispossess her of that property, but they *may control her in the use of it.*"

Question 6. " Is there any difference in the quantity of interest which a woman takes in property by *partition* between her sons, and that which she takes by the death of her husband without (male) issue?"

Answer. " *There is no difference in the interest so taken.—There are differ-*

ent opinions upon this subject. Some *Pundits* affirm that property obtained by a woman sharing with her sons, is to be considered as *streed'hun*—or her own, over which she has perfect uncontroled authority.—There are opinions both ways—we are of opinion *that the most eligible mode* would be to consider it *streed'hun*, *it being* more in the nature of a *gift*, that what she succeeds to in *her own right.*"

Question 7. "Does this answer apply equally to *movable* and *immovable* property?"

Answer. "It applies equally to the *movable*, and to *immovable* property. *Fixed property* given by a husband to a wife, *is not alienable by the wife.*"

Question 8. "If a widow for a just cause ceases to reside with the family of her husband, does she thereby forfeit the right of succession to her husband's estate?"

Answer. "If a widow from any cause other than *unchaste purposes*, ceases to reside with her husband's family, and takes up her abode in the family of her parents, her right would not be forfeited."

Question 9. "Where the consent of the husband's kinsmen is necessary to authorize the widow to make gifts, &c. for *other than religious* purposes—who are those kinsmen whose consent is requisite?"

Answer. "*Those who are next immediately to inherit the property after her decease.*"—"The *Bibad'h Rutnakara* and *Bibad'h Chintamonee* are of authority in this country, where *uncontradicted* or *not censured* by the *Dayabhaga* and *Dayatutwa* and other treatises current in Bengal." "The *Bibad'h Chintamonee* and the *Bibad'h Rutnakara* are *not current* in Bengal.—They are of AUTHORITY in *Mit'hyla.*"

On the same day *Seebnot'h Bidyabak'husputtee,—Ramohun Bidyabak'husputtee,—Dabeechurun Turkalunkar,—Sumboo Bak'husputtee,* and *Radanoth Turkosedundo* were interrogated by the Court; and they say, "We differ in opinion from the *Pundits* of the Court in this respect:—according to the *Dayabhaga* and *Dayatutwa*, the *donation* of property is *valid*, although the *Donor incurs moral guilt.*—The Pundits of the Court have quoted the *Dayabhaga* as their authority—*we therefore differ from them in opinion*, There are *older* treatises of law, by which donation of property as before stated, is declared *void.* The ancient lawyers are of opinion that the alienation of property by a person who has *not uncontroled* authority over it, is *void;* and in this there are distinctions—as to *fixed* and *movable* property and so forth. It *is our opinion* that, consonant to the doctrine laid down in the *Dayabhaga*, the *widow has authority* to dispose of her husband's property for *religious purposes without* the consent of her husband's relations,—and that she has *not* the power to dispose of it for other than religious purposes *without their consent;*—but, that if she does so, *the disposal is valid*,—she having a *vested* right therein.—*Vachusputtee* and *Chundyshawara* declare that a childless widow succeeding to her husband's property, has *independent authority* over the *movable* part of her husband's estate, and *not* over the *fixed* property.—The doctrines laid down in these two codes which have not been declared inadmissible by the author of the *Dayabhaga* and *Dayatutwa*, are still considered of authority in this part of the country.—This doctrine has *not been contradicted* by the *Dayabhaga* and *Dayatutwa.*—The subject is not *particularly* noticed in either of these books. The compiler of the *Bibadhee Chintamonee* was *Bak'husputtee Missre;* and the compiler of *Bibad'h Rutnakara* was *Chundeshswara.*"

Next came the *Pundits Rughoram Shiromonee*, and *Kisnochunder Bidhyalunkar;* they were asked, "Do you agree with, or differ from, the opinions of the *Pundits* of this Court delivered in your hearing, on the several points of law, as laid down by them? If you agree, say so;—if not, state in what respects you differ."

Answer. "We agree upon all points with the opinions given by the Court *Pundits*, with this exception—They stated that gifts of *movable* and *immovable* property made by a widow for other than an allowable cause were *not valid* against herself or the next heir of her husband—We agree with them in saying that such gifts are *not valid* as against the *next heir* of the husband—but they *are valid as against the widow* who could not reclaim them, whereas the heir *is entitled to do so*."

With such guides, I believe it will be admitted, that it was not easy to arrive at the right conclusion. The Court took time to consider the matter, and to obtain further information.—Finally, on the 11th of August, 1819, it was declared, that *Hoorasoondaree Dossee*, the widow of *Bishonot'h Bysaack*, do take both his *movable* and *immovable property to be enjoyed by her in the manner prescribed by the Hindoo law*.

The original Decree was thus altered—The Court having rescinded that part of it, which declared *Hoorasoondaree* entitled *absolutely*, to the *movable* property of her husband. It might perhaps have been better if the Court had embodied in this last Decree the opinion which was declared from the bench by, I believe, all the Judges, namely, that with respect to the widow's right, there is no distinction between *movable* and *immovable* property, *and that she has no more than a life interest in either*. An appeal from the first Decree was then depending; and that, according to my recollection, was the reason assigned by the Court for not wording the Decree, according to its own conviction of the law.

The opinions of nine *Pundits*, which I have given above, although not concurring, are certainly less discrepant, than the opinions of *Pundits* are usually found to be upon any question. The five Pundits who were examined next after the two who belonged to the Court, declare, that "the ancient Lawyers are of opinion that the alienation of property by a person who

has *not uncontroled* authority over it, is *void*." They then say, "there are distinctions as to *fixed* and *movable* property." They conclude by giving their opinion generally, (without regard to the distinction which they admitted to exist between *fixed* and *movable* property,) "that consonant to the doctrine laid down in the *Dayabhaga*, the widow *has* authority to dispose of her husband's *property* for religious purposes, *without the consent of her husband's relations*, and that she has *not* the power to dispose of it, for *other than religious purposes*, *without* their consent;—but that *if she does so* the *disposal is valid*,—she having a *vested right therein*." It is not easy to conceive that a person may by virtue of a *vested* right in property, make a *valid* disposal of it, if that person has *not a right* to *dispose* of the property at all. I do not at present, nor did the five *Pundits*, speak of property given for *religious purposes*. That point will require a separate consideration. The two Court *Pundits* informed us in answer to the second question which was put to them, (and which *excluded* gifts for *religious* purposes,) that "such gift as to *immovable* property is *not valid* against (the widow) *herself*, *or against* the next heir of her husband. *The same would be invalid* as to *movable* property.—Jewels going to a widow as part of her husband's estate, and given away *without allowable* cause, could be recovered by *her*, or *her husband's next of kin*, *the same as money*." This I presume must have meant money *due to them*. The two last *Pundits* examined agreed with those of the Court in saying, "that such gifts are *not valid* as *against the next heir of the husband*" and they very rationally disagree, by saying that such gifts "*are valid* as against *the widow*, who could *not recover* them, whereas the *next heir is entitled to do so*."

It is evident, I think, when the *Pundits* spoke of a *Jewel*, they meant to be understood, that if *any thing* was given by a widow, *without allowable cause*, it might, *if it could be identified*, be recovered by the next heir, from the *donee*. It is said "money has no ear mark"—and the next of kin

who attempted to recover a sum of money from a *donee* to whom the widow had given it *without allowable cause*, would probably have many difficulties to encounter, and must, I should think, necessarily fail, if it did not appear that the widow had diminished the *principal* of her husband's personal estate

The Supreme Court never had a doubt as to the limited right of a widow over *immovable* property, nor ever at any time considered, that she had more than a life interest in it. The question in this case, if not lost sight of, was not kept fully in view. The Court *Pundits* indeed, in their answer to the seventh question, seem to put *movable* and *immovable* property upon the same footing,—and for my part, so far as a widow is concerned, I have been unable to trace *any distinction* between them in the *Hindoo* law. I took great pains to come at the best information which was attainable, during the time we were considering this question after having examined the *Pundits* in Court, and I was satisfied at last, that in the case of a widow, there is not any distinction made by the *Hindoo* law, between *movable* and *immovable* property in her hands.

Two cases which were tried before the Supreme Court may serve to illustrate this question, as it relates to *immovable* property.—They were both in *Ejectment*. The first was tried on the 9th of November, 1816, and was *John Doe* on the joint and several demises of *Kisnogovind Sein* and *Taramonee Dossee* v. *Gunganarain Sircar*. *Kisnocaunt Sein*, the brother and one of an undivided family with *Kisnogovind Sein*, (one of the lessors of the Plaintiff,) died in 1801. He did not leave any issue, but left two widows *Oojulmonee Dossee* and *Taramonee Dossee*, (now one of the lessors of the Plaintiff,) surviving him. *Oojulmonee* had died some time before the action was brought, and it was alleged that she had in her life time, made a conveyance of the premises in question to the Defendant. *Kisnogovind* (the lessor) was next heir after *Oojulmonee's* death, to her proportion of

the estate of *Kisnocaunt*, which had continued to be undivided. One witness only was examined ; when the court, satisfied that the case was according to the statement, declared a decided opinion that *Oojulmonee* had no right to make any grant of her interest in the estate which could enure beyond her own life—The defendant finding that the grant (which it now appears he had) from *Oojulmonee*, would not avail him, declined further contest, and a verdict was given for the Plaintiff.

The other case came on, (the trial lasted several days,) on the 25th of June, 1817. It was *John Doe* on the demise of *Ramanund Muk'hopodia* v. *Ramkissen Dutt*. *Noyan Shá* had been dead about fifty years. He left two widows, one of whom burned with his corpse. The other *Pooranee Dossee* IS STILL ALIVE. *Noyan Shá* not having left a son, and one widow having sacrificed herself, the other *(Pooranee)* succeeded to the estate of her husband—She had made a grant of the premises in question to the lessor of the Plaintiff; and they were afterwards seized, and sold in execution in satisfaction of a judgement which had been recovered against *her*. The lessor of the Plaintiff had been in possession, but dispossessed by the Defendant, who was purchaser at the Sheriff's sale, and the present action was brought to recover the possession.

There were some circumstances in this case which were calculated to excite *suspicion*. No pecuniary consideration had been given by the lessor of the Plaintiff to *Pooranee Dossee*. She was said to have made the grant to him *for the benefit of her husband's soul*, he (Ramanund) having been a *Brahmin*. It clearly appeared however, that the deed of gift had been executed *before* the suit, on account of the costs of which the premises were sold, had *commenced;* and it also appeared that the Defendant had notice before the biddings at the Sheriff's sale

were entered on, that the lessor of the Plaintiff was in possession of the premises by virtue of a deed of gift made to him of them by *Pooranee Dossee*—the verdict of the Court was not unanimous. Sir Antony Buller and I, were of opinion, (against the opinion of the Chief Justice) that the Plaintiff ought to recover, and he recovered accordingly.

Had a proceeding been instituted by *Poorance Dossee* against *Ramanund Bundhapodia*, I should probably have been inclined to think, that from a want of consideration, he could not hold as against *her;* but as *she was still alive*, and examined as a witness on behalf of the Plaintiff, I thought that a verdict against him, would have amounted to a denial of *her* right to dispose of the property in question for *her own life.*

There was not, I may venture to say, any disagreement on the Bench upon the subject of *Hindoo* law. A majority of the Court thought that there was not any fraud which ought to operate as between the *parties* to *the pending action*—and the case being free from fraud as to them, that the Plaintiff ought to recover. It was admitted by all that a grant made by her was good *for her life.* If *after the death* of *Poorance Dossee*, the heirs of *Noyan Shá* shall proceed against *Ramanund Mukhopodia*, the case will be very different; I do not foresee that he can have any defence as against them.

In the year 1799 the Court seems to have thought in the case of *Dialchund Adie* v. *Kishoree Dossee*, that a woman (widow) is not to take more than an *estate for life* in the *movable* property of her husband; and I am not able to discover why it first began to declare the *widow*—and *mother*, entitled to an *absolute* property in the *movable*, and *a life interest* only in the *immovable* estate.

In this last mentioned case *Jugul Adie* died, leaving his wife *Kishoree*

Dossee and his son *Nundolol Adie* surviving. *Dialchund*, the son of *Nundolol* was the complainant, *Nundolol* having died before the bill was filed. By this bill *Dialchund* claimed the whole of the property which had belonged to *Jugul*; also that which had belonged to *Nundolol*, it having been alleged that *Nundolol* had acquired separate property in his father's (*Jugul's*) life time, and after *Jugul's* death.—*Kishoree* denied that *Nundolol* had acquired any property at any time: and she set up a will of *Jugul* by which he had appointed her his executrix, and *Nundolol* his executor,—and given his estate jointly between them: under this will she insisted that she was entitled to one half of *Jugul's* estate, admitting that the complainant as son and representative of *Nundolol*, was entitled to the other half; but claiming the right of management of his half until he attained the age of sixteen years. He was then four or five years old. I shall have more to say on this subject when I come to treat of wills; in the mean while, I mention the case, merely for the purpose of showing the opinion which the Court *at that time* entertained, respecting the right of a woman who came into possession of her husband's estate—*even by his will.* It was declared that *Dialchund* (the complainant) was entitled to a moiety of the estate. One half of the personal property (which was very considerable) was ordered to be paid into the hands of the Accountant General of the Supreme Court for his use. A receiver of the real estate was appointed, who was ordered to pay one half of the rents, issues, and profits of it, into the hands of the Accountant General, to the complainant's credit,—and the other half to the Defendant (*Kishoree*) during her life, to be disposed of by her as she thought proper:—as to the other half of the personal property, the defendant *Kishoree* was declared entitled to it for *her life*, and it was ordered that such proportion of it as was not invested in Company's securities, should be so invested; and so endorsed as to prevent her from disposing of it,—that as the loans were paid off at the treasury, the money should be reinvested, and endorsed as the former securities had been.—and that she should be entitled, during her life, to draw

the interest, and to use it at her own will and pleasure—with respect to the profits or savings which had been made since the death of *Jugul*, she was declared entitled to a moiety of them, in her *own absolute right and at her own disposal*,—and the Court did "further order and decree that the said Defendant, *Kishoree Dossee*, is entitled to, and shall have, receive, and be paid, *previous to any division*, and over and above the sums herein before mentioned, from the joint stock of the said estate, and to be *at her own disposal*, the full and just sum of *Current Rupees seventy-nine thousand three hundred and sixteen, fourteen annas and two pie*, the said *Nundolol Adie* having in his life time, and the said *Dialchund Adie*, since the death of the said *Nundolol Adie*, having expended that sum on their separate accounts, from the joint funds."—The above is part of the *Final Decree*. The cause was long pending in Court. It appears that cause was shown on the 6*th and* 7*th of April*, 1795, against a rule which had been obtained on the 28*th of October*, 1793, and that the Court (April, 1795,) declared "the Defendant *Kishoree Dossee* was entitled to *an estate for life*, of and in *one moiety* of the estates bequeathed by the will of *Jugul Adie* deceased, with *full permission to dispose* of the rents, issues, and profits thereof, *during her life*, and WITH LIBERTY TO BREAK INTO THE PRINCIPAL SUM for PIOUS USES OR OTHER PURPOSES with THE EXPRESS PERMISSION of this Court, or WITH THE CONSENT of the said *Dialchund Adie*, her grandson, *after he shall come of age*."—N. B. It was this rule that directed the Registry, &c. of the Company's securities, so as to prevent their negotiation when in the hands of *Kishoree Dossee*.

The *whole* of the proceedings in this case are not perhaps quite reconcilable with other decisions which have since taken place in the Supreme Court. It seems clear that the grandmother, *(Kishoree Dossee)* had such an interest in the real estate as would have entitled to her to a partition, and if she had insisted upon one, that she might have got into the receipt of the rents, &c. of one half of the landed property, and got rid of the receiver, so far as she was concerned.

This was the case of a *will*—and the right of *Hindoos* to make wills had not then been so fully recognized by the Supreme Court, as it has been since. The subsequent decisions warrant us in thinking, that such an instrument would now have a more enlarged operation in the widow's favor; but it seems at that time, to have been assumed that a widow could not take more than a *life interest* in the estate of her husband. The Court must, I conceive, have been misled, by adverting to the law which would have applied if she had taken upon *partition*, or in consequence of her husband's *death without* male issue. But be this as it may, I mention the case for the purpose of proving what it questionably does prove; namely, that the widow's power over the *movable*, was put upon the *same footing* with her power over the *immovable*, property;—and it was declared that the consent of her grandson after he came of age, or the express permission of the Court (whose ward the grandson was) during his minority, was necessary for the purpose of enabling the grandmother "*to break into the principal sum*," even for "*pious uses*."

I cannot but wish that the law, as it was certainly understood to exist, in the case of *Cosinoth Bysaack* and *Ramanoth Bysaack* against *Hoorasoonduree Dossee* may be adhered to. The Judges were satisfied that a distinction between *movable* and *immovable* property in the hands of a widow was groundless.—The hardships which in former times might have arisen, by preventing a widow from breaking in upon the principal, cannot now be apprehended:—we have now public funds in which the money may be placed, and from which the widow may be secured for her own use, as much as can be made of her husband's property; and as much probably, as he, had he lived, would have expended. The *right* of his next of kin to succeed after the widow's death, *has never been questioned*.—If she pleases to make gifts to *Brahmins*, and to perform *other pious duties*, they will not be the less meritorious for having been performed at her own inconvenience; or the more so, for having been performed in fraud of the Reversioner.

It is, we are told, immoral, sinful, forbidden—and therefore I should hope *illegal*—for a widow to deprive her husband's heirs of the estate, by giving it away in her life time—but some *Pundits* say No.—Immoral, and sinful, and forbidden we admit it to be,—yet being done, it is *valid* in *law*.—That is, the brothers have a *right* to succeed, and a sister-in-law has a *right* to cut them off from the succession. The property is *by law* to be preserved for them, and she *by law* may squander it away at her pleasure.

Landed property, if it cannot be kept in the hands of a widow, may be recovered from those of her *alienee*. And what reason is there in the law which declares that the next in remainder may be irretrievably cheated out of his interest *in money*,—yet enables him to do himself justice if a fraud should be attempted by the disposal *of land* to his prejudice? As to the widow herself, it is surely enough to expose her to imposture, and to suffer her to be cajoled out of every thing that is *her own*.

I remember to have been much affected when *Pooranee Dossee* came to give evidence in the Ejectment of which I have spoken. It was proved that she had given gold ornaments and money to the *Brahmins*—perhaps all that she had. They told her however, that it was necessary to *give land also*. When she was examined as to her interest in the question, she said with great simplicity that it "was usual to *give to the Brahmins*, but never to take any thing *from them* until a person was *driven to the last push*." She was now old and decrepit. She had given away property to the amount in value of many thousand Rupees, and when she was pressed for an answer on the ground of her interest, she said she thought it likely, if the plaintiff recovered in this action, that the man to whom she had given all, might allow her, as he had allowed her before, to squat herself down in a corner of the house.

Considering the helplessness of such creatures, and the nature of those

into whose hands they are likely to fall, I cannot but think that Courts of Justice ought to interpose their authority as far as the law will allow;—and I believe it will allow of their securing the principal for the next of kin, giving to the widow its annual produce during her life. Such a measure, if she is to be plundered, would make it the interest of her plunderer, to treat her with humanity and care. But the influence of *Brahmins*, the terror of her *g'hooroo* or spiritual teacher, and the cupidity of her relations, operate so powerfully upon her weakness; that it is, in my judgment, the duty of our Courts to adopt some means, whereby the expectant may be secured in his rights, and the widow herself protected against such a host of assailants.*

If, upon the death of a *Hindoo*, his sons shall all be under age; the mother, or mothers of these sons, shall manage the estate during the minority. If there be a son or sons by one widow only, that widow shall manage until her son or one of her sons, shall attain the age of sixteen years; and this she shall do although her husband left other widows, if they are childless, or mothers of daughters only.

If there be four widows, two of them mothers of sons, one the mother of daughters and one childless; the two mothers of sons shall manage jointly in exclusion of the other widows, until a son of one of them shall attain the age of *sixteen* years.

This is the *Hindoo* law, as it prevails in the Supreme Court; but by the Regulations of Government, which are law in the *Mofussil*, the minority of sons continues until they attain the age of *eighteen* years.

* I find the following passage in the *Duttika Mimansa*, "Since the *power* of widows is *fixed*, to be that of *using* property *during their lives*, it is *established* that *they have not power to adopt a son.*" It will be observed that this is a *general* proposition, applied to the subject of adoption in particular; and that the *power of adoption* is denied to *widows*, *because* their power as to *property*, is *that of using* it for their *lives only*.

For the purpose of paying debts contracted by the deceased husband; his widow, or widows, may sell, and make a good title to, his estate, or a competent part of it. She or they may also raise money by sale or otherwise, if it be necessary for the maintenance of the children, or for the due performance of religious ceremonies, or for other necessary family purposes.

The power of their mothers will cease, upon an attainment of one of the sons to the age of sixteen years;—and an adult brother, during the infancy of his brethren, will have the same power, which the mothers possessed during the infancy of all.

Contracts made by the *managing* member of an *undivided* family, are, generally speaking, valid, and binding on the other members: but this must be understood as applying to such contracts as have been necessarily made; or such as have been entered into, in the course of the family's trade, dealings, or concerns. Fraud will vitiate all such contracts and give the members defrauded, a remedy against the manager, or the parties with whom he shall have dealt, as the case may require.

In the Supreme Court, Frauds among *Hindoos*, and among *British* subjects, have always been considered and determined upon the same principles.

It has been ruled by the Supreme Court, that the purchaser of *joint* property from *one* of an undivided family, must look to the necessity for selling which existed at the time of the sale, and even to a proper application of the purchase money.

Nonclaim by the infants after an attainment of their age, will be construed into an acquiescence in the sale. This is reasonable and consonant

to the rules of *Hindoo* law. Four years' nonclaim, after an attainment of full age, is the term which is said to bar the right of recovery from a purchaser—but this supposes the sale to have been made from necessity, and without fraud. Many circumstances may be connected with the transaction, which will either lessen or enlarge that period ; such as absence of the claimant, or his being under some special disability upon his coming of age—his being fully apprised, or in a state of ignorance as to his rights—his having permitted, or prohibited an expenditure of money by the purchaser, upon the premises ; in short every thing may operate, as it shall tend to indicate good or bad faith in any of the parties.

It is necessary that such a power as the one I have mentioned, should, during the incapacity of some of the family, be vested in those who are capable of conducting its concerns ; and as such a power is liable to be abused, it is certainly proper that its exercise should be examinable, and that those who are excluded from interference, should be protected against fraud or collusion.

OF PARTITION

I SHALL here confine myself to Partitions made by the partitioning parties *themselves*, or enforced by one having a share in an undivided estate,—and the immediate consequences of such partitions when so made.

Partitions made *among others*, by the *sole owner* in possession, may be more properly noticed when I come to treat of *wills, gifts*, or *unequal distribution*.

To this chapter I shall subjoin some decisions of the Supreme Court, which may throw light upon the subjects of *Inheritance* and *Partition*.

The right of a *great* grandmother to a share of the estate, upon a partition made of it by her *great* grandsons, is no where recognized in the *Hindoo* law. Between such parties it is not indeed *likely* that a question should ever arise—none, that I know of, has hitherto arisen—But whether it be that this is a *casus omissus*—or whether *Hindoo* legislators thought it impossible that a woman could live until her *great* grandsons divided the estate—or whether, contemplating the possibility, they thought she ought not to be entrusted with property after having attained such an age, must be left to conjecture—The fact is certain, that there is no provision made, by which the *great* grandmother can claim any share, in case of a partition of the estate by her *great* grandsons—By moral obligation however, they are bound to support her—and this is a *duty*, the performance of which, might undoubtedly be enforced in the Supreme Court.

A woman's right to a share of the estate, if even *one* of the partitioning parties be a *great* grandson, is no where expressly declared.

In the case of *Gooroopersaud Bose* v. *Seebchunder Bose*, &c. the right of a woman to come in for a share upon partition made by her *son* and *grandsons* was questioned.—I shall have occasion to advert to this case again. In the mean while I shall say, that the opinions of such *Pundits* as were *acquainted with the contending parties*, ran in opposite directions, —some affirming the woman's right to a *son's* share, and some denying her right to *any* share. The case, so far as it relates to the present point, was shortly this, *Kisnoram Bose* died leaving two sons, viz. *Gooroopersaud*, the complainant, and *Muddungopaul*, who before the filing of this bill had died, leaving *six* sons.—*Kisnoram* left a widow, named *K'hunjunnee Dossee*, who was the mother of *Gooroopersaud* and *Muddungopaul*.—Upon a partition prayed as between *Gooroopersaud*, and the sons of *Muddungopaul*, (that is between *K'hunjunnee's* son, and her grandsons,) the question arose. It was admitted by *all* the *Pundits*, that she would have been entitled to one-third of *Kisnoram's* (her husband's) estate, if the partition had been made by her sons *Gooroopersaud* and *Muddungopaul*. The unanimity of this concession may perhaps be accounted for, as it did not affect the interest of any one of the litigants, or make any advance towards a termination of the contest. As to the point at issue, some *Pundits* declared, the partition having been postponed until after the death of *Muddungopaul*, that *K'hunjunnee* was not entitled to any share. Others declared that her right was the same, partition having been made between her son and grandsons, as it would have been had the partition been made, in the life time of *Muddungopaul*, between her two sons. In point of *intrinsic* authority, these Pundits were equal, and they seemed equally well fortified by commentary and text. The Court made further enquiry, and obtained the best information ;—we were ultimately satisfied that, upon a partition by her *son* and *grandsons*, *K'hunjunnee* was entitled to share, as she would have been, had the partition been made by her *sons*.

Since that time, I have had several conferences with the Supreme Court Pundits on the subject of a woman's right to a share, if *one* of the partitioning parties should be a *great* grandson. They have invaribly said that the law is silent; but that from reason and analogy, she *ought* to have a share, and if such a question arose, they supposed it would be decided that she should have one. Yet it would seem, to entitle her to a share, that there must be some more *proximate* descendant than a *great* grandson, party to the partition—for if the partitioning parties be *all* so *remote* as *great* grandsons, it does not appear that her claim can, in any manner, be supported. The *Pundits* are of opinion, if one of her *sons* be a party, that she *ought* to have a *son's* share—and if her *sons* are all dead, and one of her *grandsons* be a party, that she *ought* to have a *grandson's* share. This is conformable to the principle of partition;—for in a division between her *son* and her *grandsons*, she will undoubtedly, be entitled to the share of a *son*.

It is well established that she is entitled to a share, if her *sons*, her *grandsons, or* her sons *and* grandsons should divide the estate—And as there is *nothing to exclude* her in case of a more remote descendant being a party to the Partition; it is, I think, both reasonable and just that she should have her share, although such a person should chance to be one of the Partitioners.

An expedient for the escape from difficulty, is seldom wanting to a Pundit; and it is said by some, that the *Sanscrit* word "*Pootro*," may be construed "*grandson*" *or* "*great grandson.*" Such a construction might indeed, readily rid us of all embarrassment; for it would, without doubt, give a share to the *great* grandmother, even if her *great* grandsons were the *most proximate* parties to a partition, just as it would do, if the partition had been made by her *sons*. But what share is she to take if her *great* grandsons are the Partitioners? If *pootro*, be invested with the

signification contended for, she will take the share of a *son*—and that cannot be, because it is provided that she shall be entitled, the *grandsons* dividing, to a *grandson's* share only. This consideration would, I conceive of itself, be sufficient to deprive such ingenuity of all its force.

For my own part, I prefer the *known* rigours of any law, to the incertitude of arbitrary interpretation—and the attempt to which I have alluded, if successful, might justify us in giving any meaning, to any words. If indeed it could be shown that *pootro* was the only word by which son, grandson, and great grandson were expressed in the *Shastras*, the attempt made, might be entitled to some notice—or if it could be shown that the word *pootro* was used when *grand* son or *great grand* son was evidently signified, we might consider it worthy of some attention—but there are three words, "*Pootro*,"—"*Powtro*,"—and "*Pro-powtro*,"—"*Son*,"—"*Son's son*"—and "*Son's Son's son*," each severally applied throughout the *Shastras* to the different persons intended to be designated—and where a partition among *grand* sons is spoken of, *Powtro*, or *son's son* is the term applied. I have therefore resisted this effort to get at that, which may be considered by some as a desirable conclusion.

I have assigned her a share, although her *great* grandsons may be among the Partitioners, *provided* some of her *more immediate* descendants are parties, or some *one* more immediate descendant is a party, to the partition;—but I thought it proper to state all the authority upon which I have done so.

The *interest* which a mother has in property taken by her upon Partition, is not at all satisfactorily defined by the *Hindoo* law. In this case, as in almost every other, the texts admit of, and have received, different constructions. By some *Pundits*, it has been declared that she takes an *absolute* estate—and that her proportion is at her own free and unrestrict-

ed disposal—By others it is held that she takes an interest *for life* only; and that upon her death, her proportion will revert to the parties, or their representatives, from whom she took her share when partition was made. —By others a distinction between real and personal *(movable* and *immovable)* estate, has been set up; and they affirm that she takes the *movable absolutely*, and the *immovable for life* only.

Generally speaking, *movable* and *immovable* property, are subject to the same rules.—It is said that a wife, who receives a GIFT of *immovable* property from her husband, shall not have the control over it until after his death,—but that *movable* property shall be at her own disposal, from the time of the gift, and during the life time of her husband (the donor.)—This may be called an exception to the rule, although it is certain that, he who gives, may annex what conditions he pleases to the gift.

It has also been said that *immovable* property, IF *ancestorial*, is not to be dealt with in *unequal distribution*, as *immovable self-acquired*, or *movable*, however acquired, may be,—but I doubt the validity of such a doctrine, even up to this extent,—and, considering all that has been adjudicated upon the subject, I think reason to doubt will sufficiently appear.

I have been unable to discover the authority, (and I believe there is not any) upon which a distinction between *movable* and *immovable* property, coming to a widow by the death of her husband, or to a woman by partition made among her descendants, can possibly be supported;—nor do I believe there is any authority for saying, that a female who so takes, shall have more than a life interest in either.

When there was not any way by which money could be secured, so as to give such parties the interest of it for their lives; and when it therefore, became necessary to entrust them with a possession of the princi-

pal, it might have been inferred that they had a right, as they certainly had a power, to diminish the capital.

The *Pundits*, (always excepting gifts made to *Brahmins*, and *other* pious donations, pious because *Brahmins* receive the benefit of them,) inform us that it is *immoral* and *sinful* in a woman to reduce the property of which she may have come into possession, by the partition of an estate, or the death of a husband;—yet some, indeed most, of them add, that her act, if she does so, is valid.

The maxim "*quod fieri not debet, sed factum valet*" is of general, if not universal, application in the *Hindoo* law;—and depredation upon property in such hands, must necessarily be promoted by a recognition of the principle; for the embezzler is free from restraint, and the receiver protected against retribution.

In almost every book upon *Hindoo* law, we have instances to prove the influence of this maxim. In the *Dayabhaga* we find, "But the texts of *Vyasa* exhibiting a *prohibition*, are *intended* to show a *moral* offence:"—"They are *not meant* to *invalidate* the *sale* or *other* transfer."—So likewise *other* texts must be *interpreted* in the *same* manner.—"Therefore, since it is *denied*, that a *gift* or *sale* should be *made*, the *Precept* is *infringed* by making one;—but the *gift* or *transfer* is *not null: for* a *fact* cannot be *altered* by *a hundred* texts."

Here we are to suppose all the parties conusant of the circumstances, as well as of the *precept*—and we have only to ask, is it reasonable that goods shall be withheld from their owner, by a man who with a knowledge of their having been stolen, had received them, *because* the theft cannot be nullified by a restitution?—

Upon the words "*a fact cannot be altered by a hundred texts,*" there is a note by *Raghanandana*, (author of the *Dayatatwa*,) which, on account of its singular felicity in the way of illustration, may be thought worth transcribing. He says, "If a *Brahman* be slain, the *precept*, 'Slay not a *Brahman*, *does not annul* the murder: nor does it render the killing of a *Brahmana impossible.* What then? It *declares the sin.*"

This exquisite gloss is from the pen of *Rughunanden*, whose compilation of *Hindoo* law, *Sir William Jones* says, approaches nearly in method and in merit, to the Digest of *Justinian.*

The Supreme Court has *at all times* limited the interest taken by a mother or a widow in *immovable* property, to an *estate for life.* The property of many, perhaps of most, *Hindoos*, consists chiefly of money, jewels, and securities, or merchandise. They enjoy neither privilege nor franchise from the possession of land; all are alike considered merely as wealth, and if it be not considered more reasonable that the reversioner should be defrauded out of one species of wealth, than out of another, it would surely be better to put them all upon the same footing, unless it can be shown, as I am sure it cannot, that the law is explicit and manifest, securing expectants in one case, and leaving them defenceless in the other.

From what has already taken place, if the next in expectancy were to file his bill, alleging that a widow or mother in possession of *movable* property, was making away with, or wasting, it to his prejudice, and if he were to establish such a case; I believe the Supreme Court would some way preserve it from dissipation and waste:—that it would be ordered into the Accountant General's hands, or otherwise secured for the reversioner.

I do not desire, and I believe I could not obtain, any advantage from those

precepts, by which a *Hindoo* woman who has lost her husband, is enjoined to an ascetic life, by which the use of ornaments is forbidden; and that which is most spare, and most homely in diet, and in clothing, prescribed;—for if she should be inclined to voluptuousness, we might be told of her freedom from secular restraint—that she was sinful in transgressing, but had nevertheless a *right* to transgress.

In the case of *Dialchund Adie* v. *Kishoree Dossee*, the Supreme Court put *movable* and *immovable* property upon the *same footing*, and declared that a woman, *although taking under the will of her husband*, was not entitled to more than *a life interest* in either. The propriety of this decision, she having claimed under a will, may well be questioned. The property of the Testator had been acquired by himself; and looking at the decree in any point of view, it cannot, in my humble judgment, be reconciled to the principles by which the Court, upon other occasions, appears to have been guided. The cause was for many years pending, and the final decree was pronounced in 1799. Such questions had very rarely been agitated before this period, and it seems to have been thought, that a *Hindoo* woman could not take a greater interest than one for her life, in *any description* of property. If the distinction which afterwards arose, (whence it sprung I know not,) had then existed, the Court could not but have declared the *legatee* entitled to an *absolute* interest in the *movable* estate of her husband. *By the effect which is now given to the wills of Hindoos*, she would, I presume, at this day, be declared entitled to an *absolute* interest in the whole—both *movable* and *immovable*.

In her answer, she relied upon her right, under the will of her husband, to a moiety of *all his property*. This, as will appear when I come to treat of wills; was given to her in the most express, and unambiguous terms, but her claim was disregarded by the Court. I now advert to the

case, merely for the purpose of showing, that in the year 1799, the Court did not make any distinction between *movable* and *immovable* property in the hands of a *Hindoo* woman.

After that period, a distinction originated—and widows claiming as heirs of their husbands, and mothers taking upon partition, were held to be entitled to *movable* estate *absolutely*, and to *immovable* for life only. *Widows* and *mothers* so taking respectively, have *always* been considered to stand upon the *same* footing in point of *interest*—and in the case of *Cosinoth Bose* and *Ramanoth Bose* against *Hoorasoondaree Dossee*, it was the opinion of the Court upon a bill of review, that a *widow* taking by the death of her husband, was not entitled to more than an estate *for life* in either *movable* or *immovable* property. This was in the year 1818.

How the Court came to distinguish between *movable* and *immovable* property, with reference to the rights of *widows* or of *mothers*, I am not (as I have before intimated) at all informed. The *Hindoo* law is not sufficiently explicit upon the subject, to justify such a distinction—and it must be admitted, that giving these parties a life interest only, in each species of estate, will be more just as it relates to others, and more beneficial as it relates to themselves.

The *widow* is generally instigated by her own relations to demand a partition of the estate ;—or she is rather a tool in their hands, with which they may work out their own gains :—give her the interest of her husband's wealth for her life, and she will be maintained as she had been before his death ;—give her the principal, and she will be pillaged out of the means of subsistence.

As to the *mother*, she herself cannot move towards a partition ; but her son who may have an ascendancy over her, can enforce it. The conse-

quence is, that this son may divide an estate against the will of his brethren; and under the pretext of allotting a share to his mother, take in reality, two shares to himself. He will thus, without conferring any benefit upon her, defraud those whom he forces into a division of the estate.

If the *mother* is to take, as I think she ought to take, a life interest only; the incentive to fraud will be abated—the discord of families may be prevented—and a degree of peace and contentment preserved to the mother herself, such as she is very unlikely to enjoy, after having a proportion of the family property at her own absolute disposal.

I shall add, that the right of a mother to a share, upon partition being made, is a necessary consequence of the act, for *unless the father chuse* to distribute an estate, a division of it is not authorized until after the *mother's* death. The *eldest* brother, ought, *before partition*, to *manage* the patrimony, and the others ought to live under him, as they had lived under their father.

The portion of the estate to be deducted for the eldest brother before partition of the heritage, is a *twentieth* part—for the middlemost, a *fortieth*, and for the youngest an *eightieth*. But there is no distinction made in Bengal, and *Menu's* is merely *nominal, if there be not* a *transcendency* of *learning* and *virtue* on the part of the eldest son. This *transcendency* might be difficult of ascertainment, and the legislator says, "Among brothers *equally* skilled in performing their *several duties*, there is no deduction of the *best in ten*, or the *most excellent* chattel; though *some trifle* as a mark of *greater veneration*, should be given to the *first-born*." This *trifle* however, is with some degree of sarcasm, denied by the *Daya crama Sangraha*, to a *first-born* in the present age.

1st. In this (the Kali) age there is no difference as to the amount of

shares taken by brothers upon partition. By *Menu*, it is laid down, that sons born of women of the several *castes* or tribes, shall be entitled to four, three, or two shares, or one share. He says, "let the son of a *Brahmini* take four shares; the son of a *K'hittry*, three shares; the son of a *Bhoice*, two shares; and the son of a *Soodra* one share." This distinction is now abolished; and marriage, except between men and women of the same *caste*, absolutely prohibited. The *eldest* son was formerly favored, and is declared by *Menu* to be entitled to a larger share, by reason of a *greater veneration;* but this inequality of partition is no longer countenanced. The author of the *Daya crama Sangraha* informs us, that *equal division* is the *only* mode adopted in this age, *because* younger brothers who entertain the veneration spoken of by *Menu* are seldom met with, *and* because elder brothers deserving of it, are not more frequently to be found.

2nd. If there be two or more brothers, any one of them, or the representatives of any one, may enforce a partition of the joint property; as well that which was derived from their ancestor, as that which was *jointly* acquired by themselves.

3rd. In case of a partition made among brothers, each will take an equal share. If some be dead, their representatives will share *per stirpes* with the surviving brothers. Thus if A, B, C, and D, are four brothers of an undivided family; upon a partition made between them, each will take an equal share. But if A shall have died, leaving two sons E and F; and B shall have died, leaving two sons G and H; and G shall have died, leaving three sons J, K, and L; upon a partition made, the estate will be divided into four parts, of which the surviving brothers C and D will each receive one. E and F, the sons of A, will receive one between them, and H (the son of B) and I, K, and L, (the sons of G,) will receive the other between them; of which last mentioned share, H will be entitled to one half, and I, K, and L jointly, to the other half.

4th. A widow, whose husband dies not leaving a son, becomes his heir, and will, upon partition made by the brothers of her husband, (which partition she may enforce as well as any of the brothers) become entitled to a full share in right of her deceased husband. Thus, if there be three brothers, A, B, and C; and A shall die leaving a widow D and no son; the estate upon partition, shall be divided into three equal shares, of which D will take one, and B and C one each.

5th. If A shall die leaving three sons B, C, and D, (whether they are all by one wife, or each by a different wife, will in this case make no variance.) B, C, and D will enjoy the estate of A jointly, or divide it *per capita*. If they all die in an undivided state, B leaving one son, C leaving two sons, and D leaving three sons; these sons of B, C, and D, will become entitled *per stirpes*—and upon partition among them of A's estate, it shall be divided into three parts, of which the son of B will take one, the two sons of C will take one, and the three sons of D will take one.

6th. Suppose B, C, and D to have been sons of different mothers, widows of A, and they the widows all to be living when a partition of A's property is made between his sons B, C, and D; none of their mothers will in this case be entitled to a share. It would be the same if one wife of A had been the mother of B, and another the mother of C and D; and if C and D had continued undivided, because it is a partition among *her own sons or descendants* that gives the mother or grandmother a right to her share;—but if C and D had come to a partition among themselves, then *their* mother would have shared equally with them, and taken one-third of their two-thirds of A's estate—or if A had left his three sons B, C, and D by *one* wife, then upon a partition made between them, their mother would be entitled to her share; that is, the estate of A would be divided into four parts, of which the mother of B, C, and D, would take one—and this she would do whether *two* of her sons remained undivided, or whether they *all* separated from each other.

7th. If A shall die leaving a widow the mother of B, C, and D, and these three sons surviving him; if B then shall die leaving three sons, E, F, and G,—and C die leaving four sons H, I, K, and L,—and L die leaving two sons M and N, and a partition then take place between the several parties, i. e. D the surviving son of A; E, F, and G, the sons of B; H, I, and K, the sons of C; and M and N, the sons of L; the estate of A shall in the first instance, be divided into four parts, of which his widow will take one; D his surviving son will take one; E, F and G, the sons of B, will take one; and the descendants, the sons and grandsons of C, will take one; or if all the parties separate from each other, then the estate of A being divided into forty-eight parts, his widow will take twelve; D will take twelve; E, F and G, four each; H, I and K, three each; and M and N, one and a half each or three between them.

8th. We have seen that on a *primary* partition in the last mentioned case, the widow of A will be entitled to a fourth part of his estate; that his surviving son D will be entitled to a fourth part; that the sons of B will be entitled to a fourth part; and that the descendants of C will be entitled to a fourth part. Now let us suppose the widows of B, C, and L, to be living when their sons respectively come to a partition among themselves; then the proportion of E, F, and G shall be divided into four parts, of which the widow of B will take one, and E, F, and G one each. The proportion of H, I, and K shall be divided into four parts, of which the widow of C will take one, and H, I, and K one each. The proportion of M and N shall be divided into three parts, of which the widow of L will take one, and M and N one each. But upon the *primary* partition, A's will be the only widow entitled to a share. The claims of the other widows will not arise, until partition be made among their *own sons*.

This appears to me, to be clearly conformable to the *Hindoo* law. It is true that no decision going the whole length of the case supposed in

the 7th rule has ever been pronounced by the Supreme Court, but at a time when neither favor, nor prejudice could exist, I consulted *Pundits*, as well as others on the subject, and they were all of opinion that if such a question arose, A's widow *ought* to be decreed a fourth part of his estate.

Her right to a *fourth* part, will be found to depend upon partition being made during the *life time* of *one of her own sons*:—for if it had not taken place until after the last survivor of her sons had died; and had then been made between her *grandsons* and the others, her share would have been lessened, and she could have claimed the share of a *grandson* only.

9th. If A shall die, leaving a son B, and a widow C, and B then die leaving a widow D, and two sons E and F,—and E and F shall come to a partition, then the estate shall be divided into *four* equal parts, of which C, the grandmother, shall take one, D, the mother, shall take one, and E and F shall take one each.

10th. Although if A shall leave three widows, one the mother of B, one the mother of C, and one the mother of D; none of the widows upon a partition made between B, C, and D will take any share, but will be maintained by their sons respectively; yet if the sons of one of them, (of B for instance,) shall after the death of B separate from each other, then A's widow the mother of B, shall take a share equal to that of each of B's sons; or if B's widow be living, she and B's mother, and B's sons shall each severally share alike.

11th. If A shall leave any number of childless widows, or widows who have borne daughters only,—if he shall also leave two or more sons, the mother of whom shall have died before her sons make partition; the sons shall then divide the estate equally between them—the childless wi-

dows, and those having borne daughters only, not being entitled to any share; the widows will be entitled to maintenance only. Their right of enforcing it will be considered towards the end of this chapter.

12th. If A shall leave three widows, one the mother of B, C, and D; one the mother of E, F, and G, and one the mother of H, I, and K; upon a separation of these three sets of uterine brothers from *each other*, they will form three joint and undivided families, and their respective mothers will not be entitled to a separate share, but if one set shall come to a partition *among themselves*, then *their* mother will be entitled in severalty to a fourth part of their estate. If another set (E, F, and G for instance,) shall all die without having come to a partition; E leaving sons, F leaving grandsons, and G leaving great grandsons—then the sons of E, the grandsons of F, and the great grandsons of G will form a joint and undivided family, and the mother of E, F and G will not be entitled to any separate share.

13th. The *Hindoo* law does not expressly recognize any right in the *great* grandmother, upon partition being made among her *great* grandsons, or between her *great* grandsons and her other descendants. The following case was put by me to the Supreme Court *Pundits;* supposing the mother of E, F, and G to be living, when the sons of E, the grandsons of F, and the great grandsons of G come to a partition—what share (if any) will the mother of E, F, and G take upon that partition? It will be between her *grandsons*, her *great* grandsons, and her *great great* grandsons. I was told that the *Hindoo* law did not make any provision for such a case. I reminded them that the *Hindoo* law gave a grandson's share to the grandmother upon a partition made among her grandsons—and a son's share upon a partition made among her sons and her grandsons. This they admitted to be the law. I asked then if it was not reasonable that she should take a grandson's share upon a partition made among her grandsons, and her more remote descendants. The reasonableness of the thing they acquies-

ced in—and said, if such a case arose, they supposed it would be so decided, and that she would get a grandson's share.

14th. If there be three widows, one the mother of three, one the mother of four, and one the mother of five, sons; the rule as to partition will be the same as it is when they are mothers each of an equal number of sons; that is, if the uterine brothers separate from their half-brothers, and continue united among themselves, their respective mothers will not be entitled to any several share;—but if they come to a partition *among themselves*,—then the mother of the *three* sons will be entitled to a *fourth*—the mother of the *four* sons to a *fifth*, or the mother of the *five* sons to a *sixth* part in severalty.

15th. I believe it may now be laid down as the law, that mothers who take a share upon partition, take an estate *for life* only,—and with respect to dominion over the property, stand upon the same footing with widows who succeed to their husband's rights. I am aware that a distinction has been made; and I admit that it is not without an *appearance* of reason—for it has been said that what is taken by a *mother* upon partition, is more in the nature of a *gift* than that which is taken by a *widow* on the death of her husband. If *all* the sons agreed to divide, it might indeed be said to be in *the nature of a gift*, because they would all have concurred in the act by which their mother became entitled to a share of the estate—yet if there be ten sons, any one of them may enforce a partition; and although the other nine continue living in an undivided state, and although the tenth separated himself from them against their will, his separation alone will give the mother a right in severalty, to one eleventh part of the estate. In such a case, what she takes can hardly be said to be in the nature of a *gift*—certainly it is not a gift from *her sons;* nine of them out of ten, being desirous of withholding from her, that which one enables her to take by compulsion from the rest;—but whatever the reason may be, the law is

conclusive upon the subject. She has a right on partition being made, although the greater number of her sons may have been unwilling to divide.

The Supreme Court has not hitherto made any distinction between the interest taken by a mother upon partition, and that taken by a widow upon the death of her husband. In the case of *Dialchund Adie* v. *Kishoree Dossee*, it was determined that the woman who took under the *will* of *her husband*, had an estate for life only, in the *movable* and in the *immovable* property.

Since the year 1799, (when the case of *Dialchund Adie* v. *Kishoree Dossee* was decided,) the Court, still keeping the mother who takes upon partition, and the widow who takes upon the death of her husband, on the same footing, has introduced a distinction applicable to the nature of the property succeeded to in both cases, and has given both to mother and widow, an *absolute* estate in the *movable*, and an estate *for life* in the *immovable* property.

In the case of *Cosinot'h Bysaack* and *Ramanot'h Bysaack*, which will be found in the chapter on *Inheritance*, and more detailed at the end of this chapter, it may be seen, that the Court upon a bill of review, modified the decree by which a *widow* was declared to be *absolutely* entitled to her husband's *movable* estate. This was in the year 1818, and in the year 1820 in the case of *Gooroopersaud Bose* v. *Seebchunder Bose* and others, which I have added to this chapter, it will be found that the rights of a *mother* taking upon partition, have been declared as the *widow's* had been with respect to *movable* and *immovable* property; and that this declaration, in the *mother's* case, was upon a *bill of review*, modified, as in the case of a *widow* it had therefore been. In *each* case the Court has amended a decree by which it had been declared, that the *mother* in one, and *widow* in the other, was entitled to an *absolute* estate in *movable* property; by sub-

stituting a declaration, that each should take both *movable* and *immovable* according to the rules of the *Hindoo* law.

Upon these two occasions the Court was called upon to consider, whether or not, the *widow* and the *mother* had a right to an *absolute* estate in the *movable* property. In each case the decree by which such a right had been declared, was *amended*, and the declaration expunged. The opinions delivered by the judges were unequivocal, and it was well understood by the profession, that no more than an estate *for life* in *movable* property could be taken by a widow in right of her husband, or by a mother upon partition made among her sons.

They have always been considered by the Supreme Court to stand precisely on the same footing; and if it ever had been doubted, the two decisions of which I have spoken, are sufficient to set the question at rest.

16th. The mother cannot in any case enforce a partition, but her right to a share will accrue, if a division should be made by the agency of her sons, or any one of them, or by her grandsons, or by the widow of any of them who had died without leaving a son.

17th. Any one of the parties possessing a joint estate, may enforce a partition of it. One of five brothers, for instance, may compel the other four to give him a separate share, or the sons of a brother, may compel their uncles to give them a separate share, or the widow of a brother may compel the brothers of her husband to give her a separate share,—and upon a partition so enforced (by a widow, a brother, a nephew or nephews, a son or sons, a grandson or grandsons) the mother of the first five will be entitled to her (or a sixth) share; and this, even although four of her sons, or their representatives, shall continue living together as a joint and undivided family.

18th. Partition may be enforced as well of *immovable*, as of *movable* property, whether it be *ancestorial*, or *jointly acquired*.

19th. If brothers of an undivided family, shall possess *immovable* as well as *movable* property, and if one brother shall take his share of the *movable* property to his own separate use, continuing to possess the *immovable* property joint and undivided, with his brothers; this will give the mother a right to her separate share of the *movable*, but not of the *immovable* property.

20th. If out of ten brothers of an undivided family, one shall die, leaving three or more childless widows, or any number of widows having daughters only, and shall not leave a son, the widows will of course succeed to their husband's estate; any *one* of these may then against the will of her co-widows, separate herself from the nine surviving brothers of her deceased husband—and if she shall do so, the mother of her husband and of his nine brothers, will by her (the widow's) act, become entitled to one eleventh part or share of the estate in severalty, and she will be so entitled, even if her nine sons shall continue living together with all the widows but one of her deceased son, in a joint and undivided state. This proportion the mother shall take by the mere act of one of her son's widows, acting in opposition to all the rest.

21st. If there be *immovable* property only, (ex. gr. to the amount in value of ten lak'hs of Rupees,) possessed as a joint and undivided estate by any number of brothers,—if one be desirous of separating himself from the others and does separate himself accordingly,—the other brothers continue to live together, having given the separated one, *a sum of money* which he receives in full satisfaction of his share in the *immovable* estate; —the others not only continue to live undivided, but to possess the *whole immovable* estate unbroken. The mother shall in this case, be entitled to

her share of the *immovable* estate in severalty. N. B. I propounded the above, in the shape of a question to the *Pundits* of the Supreme Court. It was put to them separately, neither knowing that it had been put to the other—and each, without any hesitation, answered it in the affirmative. At first it did not appear to me to be quite consistent with the doctrine contained in the 19th rule, which doctrine the Pundits had theretofore sanctioned:—I shaped my enquiry for the purpose of endeavouring to ascertain how far the right of a mother extended, upon a partition made among her sons;—and upon fuller consideration I do not think there is any discrepancy between the 19th and 21st rules.—The mother is entitled to the *joint protection* of *all* her sons, and if the protection of one be withdrawn, she has a right to share in the wealth in order that she may be enabled to protect herself. Besides, the case in the 21st rule supposed that there was not any, except the *immovable*, property, among the brothers. —It might have been presumed therefore, that the separating brother had been satisfied out of the savings, to a share of which the mother is clearly entitled upon partition; or if the separating brother had not been so satisfied, that the estate was encumbered to the amount of the sum given to him in satisfaction of his share. By the case put in the 19th rule, the mother did not lose any *protection*, her sons having *all* continued to live undivided as to the *immovable* estate—and by receiving a share of the *movable* property which her sons had agreed to divide, she had nothing whatever to complain of.

22nd. If there be any number of sons, and one be by *any means*, separated from the others; even if he should be separated by authority of the Magistrate, without the consent of any one of them, or against the will of all, the mother shall be entitled to her several share.

23rd. *Hindoos*, although of a joint and undivided family, may each by his individual exertions acquire separate property—and property so ac-

quired, shall be held in exclusion of the rest of the family.—Such property, upon a partition of that which was *ancestorial*, or jointly acquired, shall be held by the separate acquirer, *as his own*—but he will, upon partition, share with the others in the *ancestorial*, or *jointly acquired* property.

The following case was decided in the Supreme Court, August, 1819. The complainants were, *Joynarain Mullick*, *Ramdhon Mullick*, *Brijumohun Mullick*, and *Gourpriah Dossee*. The Defendants, *Bissumber Mullick*, *Goverdhon Mullick*, *Ramnarain Mullick*, and *Piaree Dossee*.

Radachurn Mullick, was the first acquirer of property in the family. He died in the *Bengal* year 1214 or 1808. *Radachurn* left four sons, viz. *Huludhur*, *Bissumber*, *Goverdhon* and *Joynarain*, and he died *intestate*. —*Goluckchunder* was another of *Radachurn's* sons, but he died in the Bengal year 1210—1803 in the life time of his father—leaving *Gourpriah* (one of the complainants) his widow,—and *Ramdhon* and *Brijumohun*, two of the other complainants,) his sons, surviving him. The other complainant (*Joynarain*) was a son of *Radachurn*. The defendants *Bissumber* and *Goverdhon* were sons of *Radachurn*; *Huludhur* his other son survived him and died leaving *Ramnarain* his son, and *Piaree* his widow,—the two other defendants surviving him.

It was alleged that *Goluckchunder* in his father's life time had served as a *banyan* and made considerable gains, which all went into the *joint* family stock. This was the statement of *his own* sons (the complainants) in their bill. Upon the death of *Radachurn*, *Huludhur* managed to the Bengal year 1220—1813 when he died.—From the death of *Huludhur* to the time of filing the bill, it was stated that the management had been in the three defendants, *Bissumber*, *Goverdhon* and *Piaree*—*Ramnarain*, the other defendant (*Piaree's* son) being an infant.

It is to be observed, although a *partition* was prayed by the bill, that

the two widows, *Gourpriah Dossee* and *Piaree Dossee*, were not necessary parties. *Ramdhon* and *Brijumohun* (the sons of *Goluckchunder* and *Gourpriah*) not having sought a partition as *between themselves*, but having by their counsel desired to take between them, that to which in right of their father, (*Goluckchunder*,) they were entitled. As they were not to divide, their mother (*Gourpriah*) could not be entitled to a separate share. Neither could *Piaree* be entitled to a separate share, she having had one son only, with whom there was not any body to divide.

The object of the bill was not to obtain a partition of the estate as it existed at the death of *Radhachurn*, but to have all the property as it stood when the bill was filed, declared joint, and to have it equally divided among the parties.

Ramdhon and *Brijumohun*, supposing their father *Goluckchunder* to have acquired property by his own exertions, had given up their claim upon that ground, they having stated that his acquisitions had been added by *himself* to the *joint* family stock.

Goverdhon, not having had any pretensions on account of his own exertions, put in an answer favorable to the complainants, and was desirous of such a partition as the bill prayed.

Bissumber insisted by his answer that *he had made money by his own individual efforts*,—denied that it ever had been added to the joint stock, —averred that it had always been kept separate and distinct *as his own;* and relied upon his right to it, in exclusion of all the other parties.

Ramnarain, the infant, by his next friend, submitted his rights to the protection of the Court.

And *Piaree Dossee*, his mother, answering to the best of her knowledge and information, said that her husband, (*Huludhur*) *had acquired separate* property, which she claimed for her infant son, (*Ramnarain,*) in exclusion of the other claimants.

It appeared that the parties had all lived together *in the same house* as a *joint* and *undivided* family:—and the Court having been *satisfied as to the law*, viz. *that parties so living together are capable of acquiring separate property, and have a right to enjoy property so acquired in severalty*, directed issues to try the *facts*, namely, whether or not the claimants of such separate property, had actually acquired it by their *own several exertions.*

The issues were favorable to the claimants, severally;—and the result was a final decree, declaring the infant *Ramnarain* entitled to a house, and Company's securities to the amount of 27,000 Rupees, in severalty,—declaring *Bissumber* entitled to three houses and Company's securities to the amount of 11,700 Rupees in severalty,—ordering the remainder of the landed property to be sold, and decreeing that the purchase money, together with 9,000 Rupees in Company's securities, should be divided into five parts or shares; of which *Bissumber*, *Ramnarain*, *Joynarain*, and *Goverdhon*, should each take one share, and *Brijumohun* and *Ramdhon* should take one between them.

It will be observed, that I have given this report of the case, merely for the purpose of showing how far the Supreme Court has gone in adjudicating *self-acquired property*, to the *several* members of a *Hindoo* family, in *all other respects joint and undivided.*

It was the property of *Radhachurn*, and the increase of that property, which was ordered to be equally divided among his sons, and their representatives—giving their *own acquisitions* to the acquirers, i. e. those of *Bissumber* to himself and those of *Huludhur*, to his son *Ramnarain.*

Here it will be seen that *Bissumbur*, *Goverdhon*, and *Joynarain*, the surviving sons of *Radhachurn*, each took *per capita*; that *Ramnarain*, the only son of *Huludhur*, took a share in right of his father;—and that *Ramdhon* and *Brijmohun*, the two sons of *Goluckchunder*, took *per stirpes* his share between them.

24th. The mother shall not be entitled to share in the property acquired by the individual exertions of one of her sons, nor in the property acquired by the joint exertions of them all, unless it shall appear that such acquisitions were made out of the patrimonial wealth,—in which case, she shall be entitled to share in the *increase* of the patrimonial wealth, upon partition.

25th. In case of a widow being mother of daughters only, the question upon partition, never can arise; for she (the widow) will in that case, take the whole estate for life. See Rule 37.

26th. The widow is entitled to share upon partition made among *her own sons*, or their descendants, only. She will not be entitled to any specific share, but to maintenance alone, upon a partition made among the sons of her husband by another wife.

27th. If the *widows*, *sons*, and *grandsons*, shall *all* have died *without* having come to a partition, and *then* the *great* grandsons shall divide the estate among them; their great grandmother, will not be entitled to any share of the estate so partitioned by her *great* grandsons; although she would have been entitled to her proportion if her sons, *or* her grandsons, had divided, or if a *son* or *grandson*, had been dividing with more remote descendants. Her great grandsons are *morally* bound to maintain her;—and from what has occurred in the Supreme Court, I venture to

say, that there, a performance of this *moral* obligation, may be *legally* enforced.

The case put in this rule, is very unlikely to occur;—but if it did, I do not think a *great* grandmother could be allowed a share in the estate divided by her *great* grandsons, (no more proximate descendant being in existence at the time of partition.) The Supreme Court Pundits say, if a *son* be one of the partitioning parties with great grandsons, that she *ought* to take a *son's* share;—and if a *grandson* be such a party, that she *ought* to take a *grandson's* share. They think themselves justified in this opinion by the principles of law, although the law itself is not expressly declared.

28th. If A shall have three sons B, C, and D, by one wife, and if A shall die, leaving his sons B and C, and his grandsons E, F, and G, by his son D, and his widow the mother of B, C, and D surviving, then upon partition made between B, C, E, F, and G, the mother of B, C, and D, (i. e. the widow of A) shall take one-fourth of his (A's) estate, or as much as E, F, and G, (the sons of D) shall take among them jointly. The same rule will hold if two of her sons had died, and if partition had been made between her living son, and the sons of her two deceased sons;—as, if C and D had died, she will in this case also take one-fourth of A's estate—she shall take one share—her living son B shall take one share—The sons of C shall take a share among them, and the sons of D shall take a share among them.

29th. But if B, C, and D, the sons of A shall all have died before partition made, and each of them have left sons; then upon a partition between these sons of B, C, and D, their grandmother, (the widow of A,) shall not be entitled to one-*fourth*, as she would have been, had either B, C, or D been living at the time of partition—but she shall share with her grand-

sons *per capita*, although they will share *per stirpes*. Thus if B shall have left two, C three, and D four, sons;—the estate of A shall be divided into *ten* parts,—of which his widow, (the mother of B, C, and D) shall take one,—the two sons of B shall take three,—the three sons of C shall take three, and the four sons of D shall take three.

30th. If there be three brothers A, B, and C, whose mother D is living, and whose paternal grandmother E is also living, then upon partition made of the estate by A, B, and C, it shall be divided into five parts, of which the three brothers A, B, and C, shall each take one,—D shall take one,—and E shall take one,—see rule 29, with which this is perfectly accordant, as it gives E, the grandmother, a share equal to that of each of her partitioning grandsons. It is accordant also with the rule by which the mother takes a share equal to that of each of her partitioning sons. If D, or E, the mother, or grandmother of A, B, and C, had died before partition, then the estate would have been divided into four, instead of five, parts, and the mother or grandmother whichever had lived to the time of partition, would have taken one, and A, B, and C, one each.

31st. But if A, B, and C, had all died leaving sons, and those sons had come to partition, then D, being their grandmother, would share with them *per capita*. But E, being their *great* grandmother, would not be entitled to any share.

32d. If the father of A, B, and C be dead, leaving their mother D surviving.—If A, B, and C, shall then severally marry and die, each leaving a widow and sons, surviving; upon a partition between the sons of A, the sons of B, and the sons of C, the mother of A, B, and C, (i. e. D,) shall take a grandson's share. But the widows of A, B, and C will not be entitled to any share, unless *their* sons shall come to a partition among themselves. If the sons of A shall divide, then their mother (the widow of A) shall take

a share equal to that of one of her sons. In like manner the widow of B will be entitled, if *her* sons shall divide;—but if the sons of C shall continue undivided, their mother will not be entitled to any share.

33d. A woman who has had *one* son only, never can be entitled to a share of *his* estate, because there is not any body with whom it is to be partitioned; but if that one son shall die, leaving *sons* who divide the estate, then the mother of that only son, will share with her grandsons.

34th. A grandmother, upon partition of *her husband's estate*, never can have less, but she may have more, than a mother of the parties dividing. If a partition be made by her grandsons *(they being all sons of one mother)* the mother and grandmother will share equally;—see Rule 30; but if A be the mother of B, C, and D, and if B, C, and D shall die each leaving a widow and three sons;—then if the sons of one of them, (B, for instance,) wish to come to a partition among *themselves;* this cannot be done without a primary separation of *them* from the sons of C and the sons of D. Upon this separation A, the mother of B, C, and D, shall be entitled to one *tenth* part of the estate;—and upon the division made by the three sons of B among *themselves,* their mother will be entitled to a *fourth* part of their *three-tenths* of the estate, by which she will have less than a *thirteenth* part, the grandmother having taken a full *tenth* of the whole.

35th. Partitions, to entitle the mother to a share, must be made of *ancestorial* property, or of property acquired by means of ancestorial wealth. Therefore if the property had been acquired by A, the father of B, C, and D, and B, C, and D, come to a partition of it; their mother, (the widow of A,) shall, but their *grand* mother shall not, take a share;—and if the estate shall have been acquired by B, C, and D themselves, then neither the grandmother, nor the mother, will be entitled to a share upon a partition of it.

36th. The state of every *Hindoo* family, is that of *union* in *Board,* in

Property, and in the *performance of religious ceremonies*. Families thus united, may separate, as to *Board*, *Property*, *or the performance of religious ceremonies*—or as to any two of them; and continue united, except in so far as the separation shall take place. It is a partition of *property* only, that will entitle the mother or grandmother to a separate share. *Menu* seems to recommend a separation in the performance of religious rites, "since religious duties are multiplied in separate houses, their separation is, therefore, legal, and *even laudable*."

37th. Sisters, or co-widows, as well as brothers, may come to a partition of their joint estates;—but among sisters or co-widows a division cannot be productive of more than convenience to the partitioning parties themselves. It will not give any one of them a right to dispose of her separate share, or in any manner vary the rules of inheritance;—whereas among males, it confers the absolute right of disposal, and will, in some cases, alter the course of succession.

The rights of sisters, (if rights they can be called,) to a share of the estate upon partition, are undefined,—or stand upon a definition so qualified and confounded, as to render it impossible, when there is property of value, to say what proportion of it the sister is entitled to receive.

These *rights* depend for their realization much more upon moral, than upon legal obligation.

Menu says, "To *unmarried* daughters by *the same mother*, let their brothers give portions, out of their own allotments respectively, *according to the classes of their several mothers*;—let each give a fourth part of his *own distinct* share; and they who refuse to give it, shall be degraded."

In the *Dayabhaga* it is laid down, that if the funds be *small*, the sons

must give to the daughters *one-fourth* part of their, (the son's) *respective* shares. This precept is however applied to *maiden* sisters only, for married sisters have not any claim. It is further stated, that the portions of daughters are not taken in virtue of their having a title to succession.

The obligation of giving the sisters in marriage is also imposed upon brothers ;—and the author of the *Dayabhaga* declares, "Since the daughter *takes not in right of inheritance, if the wealth be great*, funds *sufficient* for the nuptials *ought* to be allotted, but it *is not* an *indispensible* rule that the *fourth* part should be assigned."

If the number of brothers and the number of sisters be unequal to each other; that is, if there be more sisters than brothers, or *vice versa*, the sisters shall *not have* a fourth part. They do not indeed seem to be protected *against* a fourth part, if there should be *ten* sisters and *two* brothers —but if there be *one* sister and *ten* brothers, then it is *clear* that she shall not have a fourth part from each—the reason for denying her such a share, under such circumstances, is, that it would give her one quarter of the whole estate.

The number of sisters must be equal to the number of brothers, or the sisters cannot expect the *fourth* part of a *small* estate. Yet if there be an equality of numbers, that will not entitle the sisters to a fourth, or any specific, part of a *large* estate.

It is a duty however, and one, the performance of which, is I believe, generally secured by family pride, to bestow the sisters suitably in marriage—and this is all I can say for the *rights* of sisters.

It would appear upon the whole, that sisters have a *claim*, rather than a *right*, that the widow and daughter may succeed to the estates of a hus-

band or a father, by the *Hindoo* law—and that the mother has a contingent right which may be enforced by her upon a partition of her husband's estate being made. Her original right is to maintenance only—which is to be suitable to the wealth of which her husband died possessed; but it is by the *act of others* that she becomes entitled to any *specific* share. The reason given for this is modern but satisfactory. She has a right to participate in all the comforts which are enjoyed by her family in its undivided state, and a legal as well as natural claim to that protection which may be derived from a union of her descendants. If therefore she is deprived of such advantages, it is but just that she should be enabled to take care of herself, and not be obliged to go from door to door, (as the *Hindoo* authorities express it,) for her support. The doctrine is rational, and I have not been able to discover that it is any where contested.

It will have been seen that in cases of partition, the mother's right depends upon the parties by whom the division may be made. That it must be made by her *own descendants*, and that the childless widow, or the widow who had borne daughters only, will not be entitled to participate in the event of *her husband's* descendants coming to a partition of his estate.

That *mothers* are entitled to a share upon partition, and that *grandmothers* are entitled to a share "*similar to mothers*" we may receive as law. The author of the *Daya crama Sangraha* says, "Here, since the term *mother* relates to the *natural parent*, the *step-mother* does not participate, but she must be maintained with food and raiment."

He then tells us that in a partition of the *grandfather's* wealth, the *grandmother* must be made an equal sharer.

Again, "all *grandmothers* are pronounced similar to *mothers*—it is

shown, that as the mother is entitled to an equal share in a partition of her husband's wealth, made by her own sons, so in a partition about to be made of the *grandfather's* wealth by *grandsons*, the grandmother has an equal share with *them*." "In this instance likewise, the *contemporary* wives of the *grandmother* are *not* entitled to participate; they need only be maintained." "For the reason above stated, the *term grandmother* refers exclusively to the *natural parent* of *the father*. This is the received opinion: although in fact, considering the use of the words '*all*' and '*grandmothers*' (in the plural number) in the text above quoted, it is *reasonable*, that the contemporary wives of the *grandmother* should be allowed to participate."

He then proceeds to inform us, that the followers of the *Mithila* school, on the authority of *Vrihaspati*, contend that "mother" *means* "step-mother," and that *step-mothers* are entitled to an equal share upon partition.

It may be sufficient to say that by the *Hindoo* law *as current in Bengal*, the *step-mother* (if so she is to be called) is not entitled to any share upon partition. *Menu* declares that partition of the *patrimonial* estate is to be made *after* the death of the father *and* the *mother*—hence arises the mother's right, if partition should be made in *her life time*.

When we depart from first principles, we are generally led into error—and every writer upon *Hindoo* law, appears to consider that his *own notions* of fitness, may be properly substituted for positive enactment.

All widows being equally entitled to a maintenance out of their husband's estates, it will perhaps be admitted, that none of them have reason to complain of advantages which may be conferred upon others, by chance.

Their rights are in truth separate, and even dissimilar, according to

the various situations in which they happen to stand,—and if the law be in one view of it objectionable, it must in another accord with our wishes; for in this instance it is fixed, and if a grievance be imposed by the Legislator, it is more easily endured than that perplexing despotism which the fanciful theorist never fails to introduce.

Let us now see how far the rights of widows depend upon their being, or not being, mothers of male children; and we may be better able to ascertain the degree of justice with which one can complain of events, that may possibly place another in a better condition than herself.

I do not here speak of those austere rules by which every woman who has lost her husband is enjoined to abide. The breach of these injunctions is a moral offence,—an adherence to them is not to be enforced by secular authority; and in this (the *kali*) age of the world, they are generally disregarded.

The rights of widows who have, and the rights of widows who have not, sons, are perfectly distinct.

The widow who has *a son*, cannot claim any thing beyond a maintenance in his family. The widow who has *sons* is in the same situation; she is entitled to a maintenance only, unless her sons make a partition of their father's wealth, and by *their act* give their mother a right to her share. In herself she has no right to separate property, nor can she ever possess it by an act *of her own*. She may indeed inherit as the heir of her son; if he should die, leaving neither child nor widow surviving.

The widow who is childless, or she who has daughters only, will succeed as the immediate heir of her husband, to his estate. In a worldly

point of view she may benefit by not having had a son, as the mother who had one may benefit by his death. *They have all a common right to maintenance.* In every other respect their situations will be found to be plainly distinguishable, as they may have been childless, as they may have had daughters, or as they may have had sons.

It is now my purpose to show how far a widow having a right to maintenance, may by the *Hindoo* law, as administered in the Supreme Court, compel the person in possession of her husband's estate, to maintain her, or to make her an allowance for the purpose of enabling her to maintain herself.

In the year 1799, *Sree Mootee Mundoodaree Dabee*, the eldest widow of *Tilluckram Puckrassee*, by my advice, filed a bill against *Joynarain Puckrassee*, who was the son of *Tilluckram Puckrassee* by *another* wife then living. This was the first proceeding of the sort, that was had in the Supreme Court. The bill stated that *Joynarain* had threatened to turn the complainant *Mundoodaree Dabee* out of the family house; that the whole tenor of his conduct towards her was unbecoming and improper, and that he had neglected and refused to maintain her in a manner suitable to the wealth of which her husband *Tilluckram* had died possessed. The bill alleged that this wealth was to the amount of *three lakhs of Rupees* in value, and that it was all in the possession of *Joynarain* who was *Tilluckram's* only son. It stated that the complainant was the *eldest* widow of *Tilluckram.* It prayed an account of his estate, and a separate maintenance proportioned to its amount.

Joynarain by his answer admitted *for the purpose of enabling* the *complainant* to *obtain* a *decree,* but for *no other* purpose, that the estate of *Tilluckram was* to the amount in value, alleged by the complainant. He positively denied ever having threatened to turn her out of the family house, or having in any manner ill used her. He affirmed that *Tilluckram*

contemplating his death, had given to her a Company's promissory note for 10,000 *Rupees*, bearing interest at the rate of eight *per cent per annum*, which he *(Tilluckram)* had thought a sufficient provision for her. He further set forth, that in the life time of *Tilluckram*, he had made the complainant, a monthly allowance of between five and six Rupees for her personal expenses, which he (the defendant) offered to continue. He further stated that he was willing to maintain her in the family house. The parties joined issue, and witnesses were examined upon both sides. In November, 1800, the cause came on to be heard upon evidence, but the defendant did not appear. It was then referred to the Master to ascertain, and report what would be a suitable allowance for the complainant, the circumstances of the family being duly adverted to, and she being the eldest widow of *Tilluckram*.—In March, 1801, the cause came on for further directions upon the Master's report, when it was declared that the complainant was entitled to a monthly allowance of 280 Rupees, from the day of the death of her husband *Tilluckram Puckrassee*—and decreed that the defendant should forthwith pay to her the sum of 15,120 Rupees, arrears due from the time of her husband's death ; and also that he (the defendant) should forthwith pay into the hands of the Accountant General a sum sufficient to produce the monthly allowance of 280 Rupees; and that the said sum at the death of the complainant, should revert, and be paid, to the defendant. This money was not paid, and it was subsequently ordered that the decree be carried into execution, and that the Master do sell a competent part of the estate of *Tilluckram Puckrassee* to produce the sum of 280 Rupees a month, and to pay the arrears due to the complainant, and also to pay her costs. The Company's securities at that time bore *eight per cent* interest—and the sum necessary to produce 280 Rupees a month, had been reported to be 42,000 Rupees.

The complainant had not borne a child to *Tilluckram Puckrassee*, and this decision was against his son by *another wife*.

It is thus evident that a maintenance, if not voluntarily yielded, may be enforced by law,—and I conceive it will follow, that widows having a right to maintenance, may restrain the representatives of their husbands from wasting, or making away with, their estates—or at least compel the possessors under such circumstances, to give security for the due payment of a suitable maintenance.

If the assertions contained in the answer of *Joynarain* had not been disproved, the decision would of course have been otherwise than it was.

Cunj'hunnee Dossee and *Belass Dossee*, two of the widows of *Rajah Nobkissen*, filed their bill against *Gopeemohun Deb*, (the adopted son) and *Rajah Rajcrishna*, (the begotten son) of *Rajah Nobkissen*, praying an account and a separate maintenance. To the answer of *Rajah Rajcrishna*, the will of *Rajah Nobkissen* was annexed, from which it appeared that he *had given* to each of his wives, money and jewels suitable to their situation in life—and that he had directed them to be maintained by his son *Rajah Rajcrishna in the family house*. The defendants stated that the widows (complainants) *had left the family house without any cause*, and had gone to reside elsewhere. Their answers were separate, and that of *Rajcrishna* offered to maintain the complainants, if they would return to the family house—he, submitting, as *Gopeemohun* had been decreed one half of *Nobkissen's* estate, that he ought to contribute to the maintenance of his widows. The case made by the defendants could not be denied, and the bill was dismissed. The right of the widows however to a suitable maintenance was not disputed. It was indeed on the contrary, admitted, and it was upon showing that they had, or might have, such a provision as their husband had thought proper, that the bill was dismissed.

In the case of *Seebchunder Bose* against *Gooroopersaud Bose* and others, (which will be found more fully reported at the end of this chapter) the

Court took, in my opinion a correct view, of the right which a widow entitled to maintenance, had to *security* for the due receipt of it. This was a bill for partition; and so far as it relates to the present question, may be said to have been between *two* widows, and *six* sons of *Muddunmohun Bose;*—one widow, *Soosee Mookee Dossee*, who was mother of *one* of the *six* sons, had died; another widow, *Anundmoyee Dossee* who was mother of the other *five* sons, was living. The third widow, *Madubhoyee Dossee*, who had been *childless*, was also living. On the 7th of August, 1813, a partition was decreed and the son of *Soosee Mookee* was declared entitled (his mother being dead) to one-sixth part of *Mudunmohun's* estate. The other *five parts* were to be divided into *six*, of which *Anundmoyee* was declared entitled to *one* and her *five* sons to *one* each;—but it was ordered that *before any* partition be made, the Master do enquire and report what would be a requisite sum for the purpose of securing to *Madubhoyee* (the childless widow) a suitable maintenance, and it was ordered that *in the first instance* such sum be set apart for the purpose.

From these decisions, it clearly appears that the widow entitled to *maintenance*, is not to be left at the mercy of him whose duty it is to maintain her, but that she may compel him to do her justice,—and although the obligation imposed upon him, be indefinite, that a Court of Equity will define it, by adverting to circumstances, and aid her in the enforcement of such advantages, as the possessor of her husband's wealth is bound in conscience to confer.

The decree against *Joynarain Puckrassee* was founded upon the peculiarities of the case. Perhaps it may be thought that an allowance of 280 Rupees a month was too large for one widow, when another was living, and the estate three *lakhs* of Rupees only in value. It ended in the defendant's ruin, but the event was very much owing to his own conduct. There is reason to believe that the estate of *Tilluckram* did not exceed

half the value at which it was estimated in the bill of complaint, but the defendant made an admission which proved very injurious to himself. He insisted that the complainant was not entitled to any account; he refused to render an account before the Master, or to appear at the hearing of the cause. The Court had therefore no course open, but the one it pursued, by directing that the sum stated in the bill as the amount of *Tilluckram's* property, (it not being denied by answer, and an account of the estate having been withheld,) should be taken as a *datum* upon which an estimate of the complainant's allowance, might be made. It was an unfortunate case; yet we cannot pity the defendant, but by seeing the length to which the Court will proceed, for the purpose of rescuing persons in the complainant's situation from oppression or injustice.

The following case which was decided by the Supreme Court on the 10th of December, 1823, during the sittings after the fourth term, may serve to illustrate some of the rules which have been laid down respecting Partition and Inheritance.

IN EQUITY.

Sree Mootee Jeeomony Dossee, the widow and legal representative of *Gungachurn Ghose*, deceased, and *Sree Mootee Dossee Dossee*, widow and legal representative of *Buddenchunder Ghose*, complainants,

AGAINST

Attaram Ghose and *Callachund Ghose*, defendants.

The bill stated, and it was proved, that *Corrunnamoyee Dossee* and *Luckapriah Dossee* were resident at *Chandernagore*, and not subject to the Jurisdiction of the Supreme Court.

The prayer of the bill was for an account and partition of the estate of

Kissenmohun Ghose, deceased,—and that one-fourth equal part or share of the said estate might be allotted to each of the complainants.

The bill also prayed an account and partition of the estate of the said *Kissenmohun Ghose*, as against the defendant *Callachund Ghose* in particular,—and of all profits and purchases made by *Callachund Ghose*, with, or out of the estate of *Kissenmohun Ghose*, since the death of the said *Kissenmohun Ghose*; and that each of the complainants be decreed one-*third* equal part or share of the said last mentioned estate, to be held in severalty by them the said complainants.

The state of the family was as follows:—*Kissenmohun Ghose* died in the Bengal year 1192, leaving two widows, viz. *Corrunnamoyee Dossee* and *Luckapriah Dossee*, who are still living.

By *Corrunnamoyee Dossee*, *Kissenmohun Ghose* left three sons, viz. *Gungachurn Ghose*, who died in the month of *Bhadur* in the Bengal year 1207; *Buddenchund Ghose*, who died in the month of *Joistee* in the Bengal year 1216, and *Callachund Ghose*, who is still living and one of the defendants. By *Luckapriah Dossee* he left *Attaram Ghose*, who is still living and the other defendant.

Gungachurn Ghose had married two wives, first *Joyah Dossee*, who died in the life time of her husband, and in the Bengal year 1201. She left one son *Sumboochunder Ghose*, *who survived* his father *(Gungachurn)* and died in the month of *Shrabun* in the Bengal year 1215. The other wife of *Gungachurn* is the complainant, *Jeeomonee Dossee*.—She had a daughter *Roopah Dossee* by *Gungachurn*, and *Roopah Dossee* is since dead.

Buddenchund Ghose left one widow, the complainant *Dossee Dossee*, by

whom he had one daughter only, (*Doyamoyee Dossee.*) *Doyamoyee Dossee* is still living and married to *Kissenchunder Cowar*. *Callachund*, the other son of *Kissenmohun* by *Corrunnamoyee*, and *Attaram* the *only* son of *Kissenmohun* by *Luckapriah*, are the two defendants.

The defendant *Attaram Ghose*, not only refrained from opposing the partition as between him and the other claimants under *Kissenmohun*, but alleged that a partition had already been actually made.

An account and partition of the estate of *Kissenmohun* was in the first (place ordered as between the other claimants under *Kissenmohun* and him *Attaram*,) he being declared entitled to one-fourth part or share thereof as one of the four sons of *Kissenmohun*. Attaram, then, being *solely* entitled to a *fourth separate* part of the estate of *Kissenmohun*, it was understood and admitted, that his mother *Luckapriah* was *not* entitled to any separate property upon a partition made between her *only* son and his three half brothers, and that she was to look to him for her maintenance.

If *Sumboochunder* the son of *Gungachurn* and *Joyah Dossee* had died in the life time of his father, it seemed to be agreed, (*Joyah Dossee* having died before her husband,) that *Jeeomonee* the surviving wife of *Gungachurn* would have been entitled to his estate; but *Sumboochunder* having survived his father, it was held that his father's estate vested in him, and that *Jeeomonee*, (not being his mother although the wife of his father) could not take from him, (*Sumboochunder*) but that his *father's mother*, (*Corrunnamoyee*) was his heir.

It was also declared that *Dossee Dossee*, the widow of *Buddenchund*, he (*Buddenchund*) not having left a son, succeeded as his heir, and was in his right entitled to one-fourth part of *Kissenmohun's* estate.

It was therefore ordered that a partition be made of the estate of *Kis-*

senmohun, that it be divided into four equal parts or shares and that *Attaram*, the only son of *Kissenmohun* by *Luckapriah*, do take one of the said *four* parts or shares in severalty.

Of the other three parts it was ordered that *Corrunnamoyee* do take one as the heir of her grandson *Sumboochunder*, that *Dossee Dossee* do take one as the heir of her husband *Buddenchund*—and that *Callachund* do take one as the survivor of *Kissenmohun's* sons.

This partition having been made, it was farther declared that *Corrunnamoyee* was entitled to a *fourth* part of the *three* parts which had been so divided, the *third* part which she had taken upon partition contributing to make up the said *fourth* part. It then stood thus,—*Corrunnamoyee* the representative of *Sumboochunder*, *Dossee Dossee* the representative of *Buddenchunder*, and *Callachund* the surviving son of *Kissenmohun*, having come to a partition—*Corrunnamoyee* as mother of *Sumboochunder's* father, as mother of *Dossee Dossee's* husband, and as mother of *Callachund*, became, upon a partition, entitled to a share equal to that of the several partitioners.

The *three* parts were therefore again to be consolidated and then divided into *four*, of which *Corrunnamoyee* as mother was to have one,—the same *Corrunnamoyee* as representing her grandson, one—*Dossee Dossee* as representing her husband, one—and *Callachund* in his own right, one.

Supposing then the three parts (*Attaram* having taken the fourth) to be divided into *twenty-four* parts, *Corrunnamoyee* would have eight, *Dossee Dossee* eight, and *Callachund* eight;—*Corrunnamoyee* then for the purpose of converting the *three twenty-fourths* into *four twenty-fourths* must contribute *two* parts out of the *eight* she had taken,—and *Dossee Dossee* and *Callachund* must each contribute *two* parts out of their *eight*. Then each

(*Corrunnamoyee* in her different characters being considered as two) will have *one-fourth* or six twenty-fourth parts. The result will be, that two-eighths of the share of *Dossee Dossee* and two-eighths of the share of *Callachund* will be added to the eight twenty-fourths of *Corrunnamoyee*, who will thereby have eight twenty-fourths, and four twenty-fourths, or one half of that part of *Kissenmohun's* estate which went immediately from *Kissenmohun* to her own sons. She is now entitled to twelve twenty-fourths or one half of three parts of *Kissenmohun's* estate.

It was also ordered that *Corrunnamoyee* (not being a party to the suit) be at liberty (if she shall please to do so) to come in as a complainant before the Master in taking the account, and before the commissioners in making a partition of *Kissenmohun's* estate.

It is to be observed that on the death of *Dossee Dossee*, her daughter *Doyamoyee* will succeed through her, (*Dossee Dossee*) to the estate of her, (*Doyamoyee's*) father *Buddenchund*.

As to *Jeeomonee*, she has a right to maintenance out of her husband's estate, and may follow it for the purpose of obtaining her right into the hands of *Corrunnamoyee*; but from what has been already said, it is needless to state that she may now, if she has just cause, require security as to her rights—or perhaps the Court would have been, at the hearing, justified in ordering her maintenance to be secured. It was not asked, and she having gone for a specific proportion, and having failed in that, was I presume not apprehensive of the want of a maintenance during her life. If she has grounds for fear, she may yet come in for it upon petition.

The following case so far as it relates to security ordered to be given for the maintenance of *Madhubhoyee Dossee*, a childless widow, has already been noticed. That she had a right to be maintained out of her husband's

wealth is certain, and when that wealth was to be divided among so many, the justice of providing a fund for her support, cannot be questioned; for *no one* of the partitioners being bound to supply her with the necessaries of life, it was just to secure her against want by a joint contribution.

On the 4th of December, 1812, *Seebchunder Bose* filed his bill against *Gooroopersaud Bose*, *Bhoyrubchunder Bose*, *Gopenot'h Bose*, *Bindabun Bose*, *Nilmadub Bose*, *Nubbinchunder Bose*, and *Anundmoyee Dossee*. On the 31st of December the bill was amended by making *K'hunjunnee Dossee* and *Madhubhoyee Dossee* parties,—and it prayed *a partition and account* of the estate.

The bill contained much matter, and related to many subjects, with which I have not at present, any concern.

Bhoyrubchunder, was the eldest *full* brother of the three infant defendants *Bindabun*, *Nilmadub*, and *Nubbinchunder*, and had been appointed their guardian. The bill alleged great mismanagement upon his part; stated that he had incurred large debts, and a fear that his creditors would seize the joint family property in execution. It prayed that he might account before the Master for the property of his infant brothers, that he might be discharged from the guardianship, and that another guardian might be appointed.

Kisnoram Bose (now dead) had been the father of *Muddungopaul Bose* and of the defendant *Gooroopersaud*—*Muddungopaul* died shortly after his father, leaving six sons, viz. *Seebchunder*, the complainant, and *Bhoyrubchunder*, *Gopenat'h*, *Bindabun*, *Nilmadub*, and *Nubbinchunder*, five of the defendants. *Soosee Mookee Dossee* one of the wives of *Muddungopaul* was dead, and she left an only son, *Seebchunder* the complainant. Two widows of *Muddungopaul* were living,—they were, *Madubhoyee* who was

childless, and *Anundmoyee* who was mother of *Bhoyrubchunder*, *Gopenot'h*, *Bindabun*, *Nilmadub*, and *Nubbinchunder*, five of the defendants. These two widows were defendants to the suit,—and the other party was the defendant *K'hunjunnee*, who was the widow of *Kisnoram*, and mother of his two sons *Muddunmohun* and *Gooroopersaud*.

On the 7th of August, 1813, the Court pronounced a decree declaring *K'hunjunnee*, the widow of *Kisnoram*, entitled to one-third part of the estate, the *movable absolutely*, and the *immovable for her life*. The defendant *Gooroopersaud* was declared entitled to one-third part to his own several and separate use. The other third part was declared to belong to the representatives of *Muddunmohun*,—and as to it, the Master was ordered to enquire and report what would be an adequate sum to set apart for the purpose of securing to *Madubhoyee* the childless widow, a suitable allowance for her life. It was then declared that *Seebchunder*, (whose mother *Soosee Mookee* was dead) was entitled in severalty to one *sixth* of the last mentioned *third* part,—and that the remaining *five-sixths* be divided into *six* parts, of which *Bhoyrubchunder*, *Gopenot'h*, *Bindabun*, *Nilmadub* and *Nubbinchunder*, should each take one, and their mother *Anundmoyee*, one—the *immovable* part of which she was to take *for life* only, and the *movable absolutely*. It was further declared, *Bhoyrubchunder* having assigned and made over his share to *Gooroopersaud*, that he (*Gooroopersaud*) was entitled to it. In May, 1815, the several parties having had experience of the expense and delay of a reference in the Master's office, agreed to stop all further proceedings, and to come to an amicable settlement among themselves.

Meetings were held, and agreements were executed, but the result was unsatisfactory, for after sacrifices made or offered by *K'hunjunnee Dossee* to the peace of her family, it was found that the spirit of litigation operated more powerfully than the interest of the parties concerned, and as

the property was large, perhaps it was thought that more money might yet be afforded for the purposes of vexation.

Gooroopersaud had gone upon a pilgrimage, and when he returned in April, 1817, he was informed by his nephews, that they had discovered the decree of August, 1813, *to be erroneous*, inasmuch as it had given to *K'hunjunnee* one-third of the estate, whereas she was not entitled by the *Hindoo* law to more than food and raiment, or a maintenance for her life only, and to no other interest in the estate of *Kisnoram*. They threatened to file a bill of review, and refused arbitration, or any other amicable mode of adjustment.

On the 24th of August, 1818, *Gooroopersaud* so circumstanced, filed his bill against all the parties to the former suit. *Seebchunder*, *Bhoyrubchunder*, *Gopenot'h*, *Bindabun*, *Nilmadub*, *Nubbinchunder*, *K'hunjunnee*, *Anundmoyee*, and *Madhubhoyee*, were made defendants.

Gooroopersaud in this bill recited all the proceedings in the former suit and the several agreements that had been executed subsequently to it; all which he prayed might be declared binding and conclusive upon the several parties, and that he might be declared entitled to one-third of the estate, and also to the share of *Bhoyrubchunder*; that the parties should all be decreed to hold in severalty according to the former decree, and that each should be declared entitled to such part of the share of *K'hunjunnee* as she had bestowed since the decree, by the instruments which she had executed, and also to the *lands* which she had given to them respectively for the *term of her life*. The bill further prayed a partition according to the *decree* and the several subsequent agreements.

Bindabun, *Nilmadub*, and *Nubbinchunder*, who had been infants when the proceedings commenced, got leave on the 1st of October, 1818, to file

a supplemental bill in the nature of a *bill of review*. Accordingly on the 5th of October a bill was filed by them, and *Anundmoyee Dossee*, against *Gooroopersaud, Seebchunder, Bhoyrubchunder, Gopenot'h, K'hunjunnee* and *Madhubhoyee*. *Callachund Bose*, the son of *Gooroopersaud*, was also made a party defendant.

This bill alleged that much of the property had got into the hands of *Callachund*. It also stated that *Muddungopaul* had acquired separate property in his life time, of which it prayed an account. And that the decree made on the 7th of August, 1813, be *reviewed* and *reversed* so far as it declared the right of *K'hunjunnee* to the *movable* and *immovable* estate,—and that the cause be reheard as to her rights, and if *K'hunjunnee* be entitled to any share in the real or personal property, that the reversionary interest be secured. That *Callachund* be decreed to bring into Court and to endorse over all the Company's securities in his hands, belonging to the estate, and that a partition be made. By this bill it was relied upon, that the partition *not having been made in the life time* of *Muddungopaul, K'hunjunnee was not entitled to any separate share*, or if entitled to any, to no more than an estate for life *in the movable or in the immovable part of it.* False charges in his accounts were stated to have been made by *Gooroopersaud*, and instances of them set forth.

On the 9th of December, 1820, the causes came on for hearing. An account of the estate was ordered to be taken as a preliminary measure, and upon the bill which had been filed in the nature of a bill of review, the Court, as it had done in the case of *Cosinot'h Bysaack* and *Ramanot'h Bysaack* against *Hoorasoondaree Dossee*, varied the decree made on the 7th of August, 1813, and *instead of declaring* that *K'hunjunnee Dossee* was *entitled* to the *movable property absolutely* and to the *immovable for her life*, declared her entitled to *one-third of the estate, real* and *personal, according to the rules of the Hindoo law.*

Upon this occasion the Court *Pundits* were consulted, and they expressly declared that the *mother* who took upon partition, and the *widow* who succeeded to her husband's property, stood upon the *same footing* with regard to *their interests* in the estates. They nevertheless seemed to think that the mother would be *less limited* than the widow as to the *disposal* of property; but this was put upon the ground of concession, which the reversioners in the several cases might probably be disposed to make. They said the *mother* would be less restrained on account of *the respect* due to her *by her sons*, adding, that the brothers-in-law would not have so great respect for a brother's widow. There is not in fact any distinction as far as the *right* extends, nor do I believe that any ground of distinction can be found in the *Hindoo* law.

The Supreme Court has always considered the mother who takes upon partition, and the widow who succeeds to the estate of her husband, as *possessed of equal interests*. And it is to be lamented, when two opportunities occurred, that the Court did not insert in its decrees, the decided opinion which it entertained upon the subject; that it did not declare the *widow* and the *mother*, entitled to an estate *for life only*, whether the property of which they came into possession was *movable* or *immovable*.

A direct declaration is always better than leaving a point of this nature to inference. That the Court thought the decrees which declared such parties entitled to an *absolute* estate in *movable* property ought to be altered, is certain. The opinions of the Judges were known and even declared, and as we have not any authority in the books of *Hindoo* law, by which a distinction between *movable* and *immovable* property in the possession of a *mother* or of a *widow* can be justified, it will, I trust, be thought proper to abide by the rule which may be said to have been laid down, and to hold in future that neither *widow* succeeding to her husband, nor

mother sharing upon partition, shall be entitled to more than a life interest in *movable* property. The power of expenditure may be specially given in particular cases.

I am not as I have already said, aware of the Court ever having made any distinction between the *interest* of a *mother* who took upon *partition*, and that of a *widow*, who takes upon the *death* of *her husband*.

The following, is I believe, the first instance in which the interest taken by either in *real* and *personal (movable* and *immovable)* property, was distinguished ; but the ground or principle upon which a larger interest was given in the one, than in the other, species of estate, I never yet have been able to ascertain.

The decree of which I now speak, was pronounced in January, 1813. The cause was between *Issurchunder Corformah* and *Narainee Dossee*, complainants—and *Govindchund Corformah*, *Nemulchund Corformah*, *Conoychund Corformah*, *Dialchund Corformah*, *Rasmonee Dossee*, *Radamonee Dossee*, and *Ramonee Dossee*, defendants.

A cross bill was filed, to which three of the defendants to the original bill, viz. *Dialchund*, *Radamonee*, and *Ramonee*, together with the two complainants in the original bill, were made defendants. All the other defendants to the original bill, were complainants in the cross bill—but the parties were the same.

It was declared by the decree, that the *Will* of *the Testator Goculchunder Corformah* in the pleadings mentioned, was *well proved*, but that it was *wholly inoperative*, *except* as *to a disposition therein contained*, in favor of *Gourmonee Dossee*, the *step mother* of the Testator.

It was then declared that the defendants *Gobindchund*, *Nemulchund*,

and *Conoychund*, the sons of *Goculchunder* by the defendant *Rasmonee*, his first wife, together with the defendants *Dialchund* and *Surrutchund*, (*Surrutchund* being then dead) two sons of *Goculchunder* by the defendant *Radamonee*, his second wife, together also with the complainants *Issurchunder* and *Sooraut*, (*Sooraut* being then dead) two sons of *Goculchunder* by the complainant *Narainee*, his third wife, as the seven sons who survived *Goculchunder*, became entitled to his real and personal estate, of which he was seized or possessed at the time of his death; and that the said seven sons were so entitled in equal parts or shares.

The decree then declares that the defendant *Ramonee*, *widow* and heir of *Surrutchund*, is entitled *absolutely* to his share of the *personal* estate; and to his share of the *real* estate for *her life*: that the complainant *Narainee* as the *mother and heir* of *Sooraut*, is in the same manner entitled to his share: that *Rasmonee*, mother of *Govindchund*, *Nimulchund*, and *Conoychund*, is entitled *absolutely* to *one-fourth* of their three *seven parts* of the *personal* estate—and for *her life* to *one-fourth* of their *three seven* parts of the *real* estate;—and that *Radamonee*, the mother of *Dialchund*, and *Surrutchund*, is in the same manner entitled to *one-third* of their *two seven* parts of the estate.

It will be observed that *Rasmonee*, the mother of three, and *Radamonee*, the mother of two, sons of *Goculchunder*, came in upon partition made, the first by her three sons, the second by one son, and the widow of her deceased son; and also that *Ramonee*, the widow of *Surrutchund*, and *Narainee*, the mother of *Sooraut*, came in as heirs, one of her husband, and the other of her son; and that the mothers and widows so taking were all declared to have the *same* interest in the estates which they severally took, i. e. an *absolute* interest in the *personal*, and an estate *for life* in the *real* property.

That part of the decree which declared the rights of the mothers, proceeded of course, upon the partition made by their sons. *Radamonee* was the mother of *Dialchund* and *Surrutchund*. *Surrutchund* had died, and his widow *Ramonee* was declared entitled to his share—and then, on a partition between *Dialchund* and *Ramonee*, *Radamonee*, the mother of *Dialchund* and *Surrutchund* was clearly entitled to a share.

So far this decree is consistent with all the decisions; but there is one point in which it differs from the decree that was pronounced in December, 1823, in the cause of *Sree Mootee Jeeomonee Dossee* et. al. v. *Attaram Ghose* et. al. in which *Corrunnamoyee Dossee* was declared entitled, as heir to her grandson, to his share—and also, as parent, to a share upon partition; although, as heir of her grandson, she had been joint-owner of the property divided.

In the case I am now reporting, the double claim of *Narainee Dossee* may have been overlooked. It does not appear to have been urged, or to have been brought at all to the notice of the Court.

Narainee was mother of *Issurchunder* and *Sooraut*. *Sooraut* had died, and *Narainee* was declared as his heir, to be entitled to his share. The parties were all severally declared to be entitled to their respective shares, and the decree furnishes as good evidence of a partition between *Issurchunder* and *Narainee*, as between any of the other parties.

Thus then, if the decree of December, 1823, was right, *Narainee* was entitled to more than she received. As representing *Sooraut*, she was entitled to, and received, one-seventh part of *Goculchunder's* estate. If *Sooraut* had lived, he and *Issurchunder* would have been entitled to *two-sevenths*, and upon their separation, *Narainee* would have been entitled to *one-third* of these *two-sevenths*. *Rasmonee* and *Radamonee* had each shared upon this principle.

According to the law as it was declared in the case of *Jeeomonee* et. al. v. *Attaram* et. al. which will be found reported in another part of this book, *Narainee* ought to have taken the share of *Sooraut* as his *heir;* and she ought then upon partition to have shared as the *mother* of *Issurchunder* and *Sooraut*. In the case of *Jeeomonee* v. *Attaram*, the *Pundits* were clearly of opinion that *Corrunnamoyee* was entitled to take as HEIR of her *grandson*, and when in *that capacity* she came to a partition with her son, and a son's widow, she was entitled as parent to one-fourth of the estate; she, and the son, and the deceased son's widow, each took one-third; and upon partition she took *one-fourth* of the whole. The correctness of the opinions which the *Pundits* gave on this occasion, seemed to have been admitted; and from subsequent enquiry, I am satisfied that they were consistent with law; according to that principle *Narainee* ought to have had *eight* shares out of *twelve*. First, upon partition, she ought to have had six parts, or one half; then as mother she was entitled to one-third, or *four* parts of the whole, her own contributing to make up the *four*. This would have taken *two* parts from *Issurchunder*, which would have increased her own *six* to *eight* and left him *four*. Instead of *half*, she ought to have had *two-thirds* of *two-sevenths* of *Goculchunder's* estate.

It is difficult to arrange decided cases, which involve several distinct points of law, so as to apply each part, exclusively, to the subject under consideration.

The proceedings which arose out of disputes, in *Muddunmohun Bysaack's* family, will exhibit the effect given by the Supreme Court to a *Hindoo's* will, and the right of a widow as heir to her husband. Yet I conceive it to be so connected with the subject of partition, as to render its introduction in this place, not improper; for it will show how a partition may be brought about at the instance of a widow, claiming in right of her husband; and how a mother (upon partition made) may be barred of her share, by the operation of her husband's will.

Parts of this case have been noticed before; but, as taken altogether, it appears calculated to throw considerable light upon several points of *Hindoo* law; and, as it is demonstrative of the vexatious spirit, which any disagreement in a family of *Hindoos*, is sure to engender and to perpetuate, I have given the proceedings in a more detailed and connected form.

The first bill was filed on the 14th of October, 1808, by *Govindchund Bysaack*, against *Cosinot'h Bysaack*, *Ramanot'h Bysaack* and *Bishonot'h Bysaack*. This proceeding seems to have become necessary on the part of *Govindchund*, in consequence of the conduct of *Cosinot'h*, who, on his coming of age, determined to interrupt *Govindchund* in the execution of his trust. The complainant and the defendants were first cousins. The complainant had been appointed executor by his uncle, who was father of the defendants, and from all that appears, there is no reason to impute dishonesty, or mismanagement to the executor.

Govindchund succeeded in getting a decree for a partition of the estate, which had been joint between him and the defendants. A family dispute had commenced, and was therefore, if the feelings of the parties could prevail, to be interminable.

It happened that in the partition between *Govindchund* and his cousins, a proportion of the property was left undivided. There was thus "a bone of contention" remaining between the two branches of this family. *Govindchund* died in 1810. But he left sons, and between them, and the sons of *Muddunmohun* (the defendants to *Govindchund's* bill, and their representatives;) and among themselves, we have had bills, and cross bills and pleadings in every variety of litigation, all founded upon claims to this undivided part of the family estate. The contest continues, the spirit of the combatants is I believe unabated, and the duration of this strife will, I presume, if possible, be proportioned to the funds of the family.

These disputes however, were collateral to, and not necessarily connected with, the proceedings which I am now about to report.

All that can be illustrative of the *Hindoo* law, took place between the members of *Muddunmohun's* family, that is, two of his sons, his widow, and the widow of his deceased son.

The family property was acquired by, or originated with, *Soboram Bysaack*, who died in the month of *Aughrun*, Bengal year 1180, or November, 1773. He had had two sons, *Hurrymohun Bysaack* and *Muddunmohun Bysaack*. *Hurrymohun*, was father of the complainant *Govindchund*, and *Muddunmohun* was father of the defendants *Cosinot'h*, *Ramanot'h* and *Bishonot'h*.

Hurrymohun and *Muddunmohun* had both died before the bill of *Govindchund* was filed in 1808.

This bill stated that *Hurrymohun*, (father of the complainant,) had died in the Bengal year 1176, or 1769, in the life time of his father *Soboram*, and that he *(Hurrymohun)* left the complainant, his only son. That *Soboram* made *his will*, by which he left all his property, *movable* and *immovable*, with the exception of some legacies, to his son *Muddunmohun*, and his grandson, the complainant, in equal shares. That the complainant *Govindchund* and *Muddunmohun*, had possessed and enjoyed the estate of *Soboram jointly*, without having made any division of it, until the death of *Muddunmohun* which took place in the month of *Poos* in the Bengal year 1212, or December, 1805. That on the death of *Muddunmohun*, he left three sons, (the defendants,) who were then all minors, under the age of sixteen years. That the complainant, after the death of *Muddunmohun*, managed the whole estate, and that it was still joint and undivided. That *Cosinot'h*, the eldest son of *Muddunmohun*, had lately attained the age of

sixteen years, and that he had *given notice to the complainant not to lay out or expend any further sums of money from the joint estate.* He, *Govindchund*, went on to state the danger which he apprehended, considering the infancy of the two other defendants. He offered to account fully for the estate, while it was in his hands and under his management, and prayed that upon accounting, he might obtain proper releases. He also prayed a partition, and that one-half of the estate might be decreed to him in severalty, and the other half to the defendants. He further prayed that the half decreed to the defendants, might be paid into the hands, or placed under the management, of the Accountant General of the Supreme Court, for the use of them, the defendants.

In February, 1811, the complainant, *Govindchund*, having died, and the suit having been revived by his sons, a decree was made in conformity with the prayer of *Govindchund's* original bill. The Accountant General was appointed receiver of the *immovable* property which had been allotted to the defendants, and half of the personal property which was very large in amount, was ordered to be paid into the hands of the Accountant General for the use of the defendants. So far all went on well.

Cosinot'h, being of age, applied for, and obtained, his share of the personal property, amounting to about 2,50,000 Rupees. *Ramanot'h*, when he came of age, obtained his share also, to the same amount. The share of *Bishonot'h*, he having died before he attained the age of sixteen years, remained in the Accountant General's hands.

Bishonot'h had married *Hoorasoondaree Dossee* and left her, his widow, but no child, surviving him.

Cosinot'h and *Ramanot'h* set up a *will*, which they alleged had been executed by their deceased brother *Bishonot'h*. This will purported to give

the property of *Bishonot'h* to his brothers *Cosinot'h* and *Ramanot'h*, and his and their mother *Comulmonee Dossee*, equally among them.

Whether or not the parties claiming under this document, could have proved the execution of it by *Bishonot'h*, or whether the allegations of *Hoorasoondaree's* friends concerning it, were well or ill founded, we cannot now learn, and need not now enquire, because the Court determined, that *Bishonot'h*, having been under the age of sixteen years, when the paper bore date, (he had not attained that age before his death) was incapable of making a will. The instrument in question was therefore adjudged to be void, and *Hoorasoondaree*, the widow of *Bishonot'h*, was declared, as his heir, to be entitled to his estate.

I have already stated how the decree which declared her entitled *absolutely* to the *movable* part of her husband's estate, has been modified upon a bill of review. The *movable* property belonging to the estate of *Bishonot'h*, is still in the Accountant General's hands—but all the interest which has accrued, and all the increase which has grown out of the principal, have been ordered, since *Hoorasoondaree Dossee* came of age, to be paid to her. No partition has yet been made of the *immovable* property which had been jointly possessed by *Cosinot'h*, *Ramanot'h*, and *Bishonot'h*.

From this statement it is clear that there has been such a partition of the estate of *Muddunmohun*, as *(primâ facie)* to entitle his widow *Comulmonee* (the mother of *Cosinot'h*, *Ramanot'h* and *Bishonot'h*) to a share of the movable part of it.

If the husband of *Comulmonee* had died *intestate*, it appears to me that she must have been declared entitled to one-fourth part of the *movable* estate when a partition was effected upon the prayer of *Hoorasoondaree*, and

when *Cosinot'h* and *Ramanot'h* each took his share of the money out of the Accountant General's hands. But *Muddunmohun* made a will, which *Govinchund* set forth in the bill, by which he sought to separate himself from *Muddunmohun's* sons. It was in the following words:—

"I *Sri Muddunmohun Bysaack* make this written order:—According to my father, the late *Soboram Bysaack's* will, *Govinchund Bysaack* is to receive one half share, and my three sons *Sri Cosinot'h*, *Ramanot'h*, and *Bishonot'h Bysaack* are to receive my share being the other half of nine *annas* and an half share of the *surcaree* property, as also of the private property, all the houses, gardens, grounds, wearing apparel, gold and silver plates, and so forth, the debts and outstanding dues according to the accounts in the names of *Muddunmohun Bysaack* and *Govinchund Bysaack* being deducted, and Company's paper, dues on bonds and accounts, cash and effects which are forthcoming agreeably to the accounts of the estate of the late *Soboram Bysaack*. Gold and silver ornaments, wearing apparel, family expenses, daughter's wedding, performance of usual ceremonies for father and mother and so forth, whatever have been charged in the accounts shall be paid by both jointly, and no one can prefer any claim for excess or deficiency of the same. Of the houses, gardens, and grounds being valued, the total amount shall be divided into halves. He who possesses any ground over and above one-half share, shall pay the amount of the excess above the moiety. *All this property shall remain under charge of Sri Govinchund Bysaack as long as my three sons are not qualified and of age.* The *expense of the family* shall be *conducted in the same manner as it is now.* The lodging expenses and petty charges whatever be necessary and the performance of ceremonies for the father and mother, *unnoprasin*, marriage, &c. of sons and daughters, shall be at the *surcaree* charge of both, according to what is fixed at the *surcar*, besides which, he who makes ornaments and wearing apparel over and above the same, shall be charged *in his name*. He who makes any thing for his private use

and for his future good, the same shall be charged in his name. After this my *private property, cash and effects, gold and silver ornaments, wearing apparel, &c. whatever remain,* THE WHOLE OF THAT my three sons *Sri Cosinot'h, Ramanot'h,* and *Bishonot'h Bysaack* SHALL RECEIVE, *to which* NOBODY HAS ANY CLAIM. When *Sri Cosinot'h, Bishonot'h,* and *Ramanot'h Bysaack* are of age if they can live in this manner in *harmony,* they will do so. If they *do not agree* they will receive their the three brothers' shares agreeably to *this will.* If there be any error in *this will,* I will allow or take for the same. Year 1210, date 24th *Bhadur.* English year 1803, date 8th September." This was signed at the top by the testator, and attested on the back by five witnesses.

Comulmonee Dossee had been made a party defendant to the first bill which was filed by *Hoorasoondaree.* This bill sought a declaration of her right to the estate of her deceased husband *Bishonot'h ;* and, in fact, desired a partition of *Muddunmohun's* estate. *Comulmonee* did not, by her answer, insist upon her rights in case a partition should be decreed ; but she relied solely upon the will of her late son *Bishonot'h,* by which his property had been given to her and her two surviving sons. It was after this, and in December, 1814, that the decree declaring *Bishonot'h's* will void, and *Hoorasoondaree* entitled to his estate, was pronounced.

Supposing *Comulmonee* to have been an instrument in the hands of *Cosinot'h* and *Ramanot'h,* her conduct is perfectly explicable. Had she come in for a share upon partition, she would have got *one-fourth of the whole of Muddunmohun's* estate—but then *Hoorasoondaree* would have had as much. If the will of *Bishonot'h* had been established, *Comulmonee* would have got but *one-third* of *Bishonot'h's* share, or *one-ninth* part only, of *Muddunmohun's* estate ; but then *Hoorasoondaree* would have been entirely cut out. So that, in fact, if we identify *Comulmonee* with *Cosinot'h*

and *Ramanot'h*, the effect of establishing *Bishonot'h's* will, would have been to give them the *whole*, of *Muddunmohun's* estate, and to deprive *Hoorasoondaree* of any share.

Comulmonee, a few days after the decretal order of December, 1814, entered a *caveat* with the Registrar against it, and at the same time petitioned the Court for a rehearing of the cause, upon an allegation of her right, as the widow of *Muddunmohun*, and mother of *Cosinot'h*, *Ramanot'h*, and *Bishonot'h*, to a fourth part or share of the estate, in consequence of a partition having been made, by a declaration of the Court that *Hoorasoondaree* as representative of *Bishonot'h*, was entitled to a third part in severalty.

A rehearing was granted upon the prayer of *Comulmonee's* petition; and then *Hoorasoondaree* filed a supplemental bill, in which she set forth the before recited will of *Muddunmohun*, and contended that under it his three sons, of whom her late husband was one, were entitled to his whole estate and that *Comulmonee*, upon partition, had no right to a share of it.

The rehearing which had been ordered upon *Comulmonee's* petition was postponed until the answers of *Cosinot'h*, *Ramanot'h* and *Comulmonee* to the supplemental bill of *Hoorasoondaree* should be put in.

Here a new scene was opened. The will of *Muddunmohun*, which had been first brought forward by his executor *Govinchund*, and afterwards relied upon by *Hoorasoondaree* in her supplemental bill, was dated in the *Bengal* year 1210, and it was admitted (for it could not be denied) by *Cosinot'h* and *Ramanot'h*, to have been executed by *Muddunmohun*, as *Hoorasoondaree* in her supplemental bill had alleged. But they swore in their answer, that *Muddunmohun* had executed *another*, and a *later* will, on the 25th of *Shrabun* in the *Bengal* year 1212, by which he revoked the will

of the 24th of *Bhadur* 1210; and provided, in case any of his *three sons should die before he came of age*, that the surviving son or sons, should become proprietor or proprietors of all the property, and should maintain the widow, &c. of his deceased son; or in case of disagreement, that each widow should receive 10,000 Rupees for food and clothing. This will was very *much to the purpose—Bishonot'h's* was not better suited than it to the exigency of this case. Its having escaped the researches of *Govinchund*, must have appeared strange; he had not any interest in its suppression; or if he had, it was in his power to destroy it. We must presume that he brought forward the *only* testamentary paper which came to his knowledge: there is no ground for suspicion to the contrary. Yet *Cosinot'h* and *Ramanot'h* both swore in their answer to *Hoorasoondaree's* supplemental bill, that they had discovered this *last* will of *Muddunmohun* after the decretal order of December, 1814, had been pronounced, and (which may have been very true,) that its existence was not before known to them. *Comulmonee* answered to the *same effect*. And now (as she had done in her petition for a rehearing) she again urged her right *to a fourth* part of the whole estate, in case a partition *should be decreed*, according to the prayer of *Hoorasoondaree's* bill.

Cosinot'h and *Ramanot'h* now filed a supplemental bill, in the nature of a *bill of review*. To this bill *Hoorasoondaree*, and their mother *Comulmonee* were defendants. The complainants recited the proceedings which had taken place, and relied upon *Muddunmohun's* will of 1212, which had been so opportunely discovered by them after the decree of December, 1814. They prayed that the *whole estate* of *Muddunmohun* (*Bishonot'h* having died) should be declared *theirs*; they giving a sum of 10,000 rupees to *Hoorasoondaree*, and maintaining *Comulmonee*; and that the decree by which *Hoorasoondaree* was declared entitled to her husband's share of the estate, be reversed, &c.

This bill *Hoorasoondaree* answered by her next friend *Woodichund By-*

saack (for she was yet a minor) submitting her rights as the widow of *Bishonot'h*, to the Court.

Comulmonee, with the complaisance which might have been expected, put in her answer, admitting all that had been stated by her sons in their bill, and asserting once more, her rights as widow of *Muddunmohun*, to *one-fourth* of his estate, if a partition of it should be decreed.

In this state of things, and on the 29th of June, 1815, all the causes came on to be heard—and then an issue at law was directed to try whether or not the paper writing bearing date the 25th of *Shrabun* in the *Bengal* year 1212, purporting to be the *last* will of *Muddunmohun*, was a valid testamentary disposition of his estate.

In this issue *Cosinot'h* and *Ramanot'h* were, of course, to be the plaintiffs. On the 15th of July it came on to be tried, *and the Plaintiffs were nonsuited.*

After their failure in this grand attempt, the prospect of quiet was opened to *Hoorasoondaree*—and as every thing feasible had been attempted in vain, her friends could not have suspected illusion.

Comulmonee got leave to withdraw her petition for a rehearing, which *implied* that she relinquished her claim to a share of *Muddunmohun's* estate. *Cosinot'h* and *Ramanot'h* got leave to dismiss their bill in the nature of a bill of review, which *implied* their acquiescence in the right of *Hoorasoondaree* to her husband's estate, and *Hoorasoondaree* got leave to dismiss her supplemental bill, which, considering the advantage of her situation, *proved* that she was desirous of peace. All this was effected by consent, *and all parties paid their own costs.*

The motives of this simulated pacification, may be conjectured, if they

are not capable of proof. There was enough in appearance, to prevent the suspicion of insincerity—but whatever appearances may be, it is the duty of Courts upon such occasions, to be satisfied that a final and conclusive adjustment of differences has been made. A family dispute *among Hindoos* is seldom to be terminated by arrangements among the disputants themselves.

I find that when these proceedings were on foot, in the year 1815, the little litigant, *Hoorasoondaree*, was reported by the Master to be *twelve* years of age. It was also reported by him that her mother *Jumboobuttee Dossee* ought to be appointed guardian of her person, and the Accountant General guardian of her estate; also that 300 Rupees a month would be a proper allowance to be made for her maintenance until she attained the age of sixteen years. This allowance amounted to 3600, and her money in the Accountant General's hands produced 16 or 17,000 Rupees *per annum*. There was consequently a large accumulation of interest due to her, when she attained her full age of sixteen years.

On the 8th of April, 1816, the cause was set down for further directions upon the Master's report; and then, the sum of 2,74,000 Rupees, which had been in government securities to the credit of *Bishonot'h's* estate, was ordered to be transferred by the Accountant General in his books, to the credit of *Hoorasoondaree*. The jewels and ornaments which had belonged to *Bishonot'h* and *Hoorasoondaree* were ordered to be delivered to *Jumboobuttee* (the mother and guardian) for the use of her daughter. It was not for some years afterwards, that, upon her coming of age, she obtained an order for the payment to her, of the money which had been transferred to her credit by the Accountant General.

The measure to which *Cosinot'h* and *Ramanot'h* now had recourse, if we were not obliged to judge of it with reference to former proceedings,

must appear perfectly unobjectionable. In September, 1818, they filed another bill of review, by which they assigned as error in the decree of December, 1814, that it gave *Hoorasoondaree* an *absolute* interest in the *movable* property of *Bishonot'h* her husband. They stated that they were entitled to the *whole estate movable* and *immovable* of *Bishonot'h, after the death* of *Hoorasoondaree;* and that the fund which had been in the Accountant General's books, to the credit of *Bishonot'h, ought not* to have been ordered to be transferred by him to the credit of *Hoorasoondaree generally;* but that it ought to have been held *in trust* for her during her life. This may be thought to violate the understanding which the proceedings of 1815 imported, but it does not appear open to any other exception; and I think it may be excused upon the ground of these complainants' having now been better advised than they formerly were. In this bill of review however, they further insisted that by the decree of December, 1814, or that of April, 1816, *Hoorasoondaree* ought to have been ordered to live under *their* care and guardianship; *Comulmonee* was made a party to this bill—*Hoorasoondaree*, by her guardian *Jumboobuttee* demurred to it, and her demurrer was overruled. She then answered, setting forth and relying on the several agreements by which all proceedings had been *terminated, the parties severally paying their own costs.*

On the 11th of August, 1819, it was ordered on a hearing of this last bill of review, that the decrees of December, 1814, and April, 1816, be *rectified*, and *Hoorasoondaree* declared entitled to the estate of her husband *Bishonot'h*, to be possessed, used, and enjoyed by her *in the manner prescribed by the Hindoo law.*

Upon the same day, the 11th of August, 1819, *Hoorasoondaree* having attained the age of sixteen years, got a rule to show cause why the Accountant General should not endorse and pay over, *to her* all the Company s securities and cash then in his hands to her credit, amounting to about

three *lak'hs* of Rupees. On the 14th of August this rule was made absolute. As it now stood, it was, that the *principal* sum belonging to the estate of her husband *Bishonot'h*, and the interest which had been received upon it, except such sums as had been disbursed for *Hoorasoondaree's* use, also the proportion of rents, &c. which had been collected on account of *Bishonot'h's* estate, should be *paid and delivered* over to *Hoorasoondaree*,—and further that the costs which she had incurred, to be taxed between attorney and client, should be paid and discharged out of the *principal* sum of which the *personal* estate of her husband consisted. This was done with the intention of giving her the free and absolute power of disposal over the whole of the *personal property*, EXCEPT the *principal sum* reduced by the payment of her costs out of it. To this sum, her husband's brothers or their representatives, would have been entitled after her death. They could not however complain with justice of this part of the rule, for they themselves ought to have been ordered to pay the greater part of the costs which had been incurred by *Hoorasoondaree* throughout the proceedings.

On the 8th of November, 1819, *Cosinot'h* and *Ramanot'h*, filed their petition of appeal against the decree of the 11th, and the order of the 14th of August. They appealed *because* the decree declared *Hoorasoondaree entitled* to the *possession* of her husband's estate; whereas she being entitled to the *use* and *enjoyment* only, it ought to be secured in the hands of an officer of the Court, or deposited with the relations of *Bishonot'h*, who will after the death of *Hoorasoondaree*, be entitled to it. *Because* the costs of *Hoorasoondaree* were ordered to be paid out of the *principal*, and that the interest accumulated during her minority had been ordered to be paid to her; whereas the costs ought to have been paid out of the accumulations, and the *accumulations added* to the *principal* for the benefit of *Bishonot'h's* heirs, *Hoorasoondaree*, having a life interest only, and having had

maintenance which was thought reasonable and sufficient by the Court, during her minority. *Because even* if *she is entitled* to *possession* of the property, she has a life interest only, in it by the *Hindoo* law, with certain powers subject to the control of her husband's relations, and *because* security ought to have been taken for the protection of their reversionary rights. *Because Hoorasoondaree* having left the family house, and having removed herself from the control of her husband's relations, ought not to have the property in her possession, even if she would otherwise have been entitled to it. *Because* it is consistent with the interest of all parties that the property should continue where it at present is; and that it ought to be retained there for the *use* and *enjoyment* of *Hoorasoondaree* during her life, and *because* as the fund produces 18,000 Rupees a year, it yields a much greater income than *Hoorasoondaree* ought to expend, and that the *possession* is unnecessary as to her; and calculated to produce misapplication and waste inconsistent with her interests, and subversive of the rights of the reversioners.

In July, 1820, *Cosinot'h* died, leaving an only son, *Joygopaul.*

In June, 1822, *Comulmonee*, filed *her bill* of *review* against *Joygopaul* her grandson, *Ramanot'h* her son, and *Hoorasoondaree*, her son's widow. The object of this bill was to *reverse all that had been done*, and to have herself declared entitled to *one-fourth* part of the estate of *Muddunmohun*, her husband; inasmuch as a partition of it had been made. On the 9th of December, 1823, this bill of *Comulmonee was dismissed with costs.*

That *Comulmonee*, had it not been for the will of her husband, would have been entitled to a share of his estate, when a partition of it was made by his sons or their representatives, need not be repeated.

It will be recollected that she petitioned for a rehearing, on the ground

of this claim; how far her right might have been affected by her own dismissal of this petition, is another question, and one, which, if it had called for a decision, must have been decided by the rules of English, and not of *Hindoo* law.

The testator *(Muddunmohun)* after having provided for deductions, and speaking of the remainder of his property, says, *the* WHOLE *of that my* THREE SONS *shall receive;* to *which* NOBODY *has any claim.* He goes on,—*When the sons are of age*, if they can live in harmony they will do so—if they do not agree, *they will receive their shares agreeably to this will.*

It certainly appears to have been the intention of *Muddunmohun*, that the three sons should continue to live together, *until they had all* attained their age. The property is *all to remain under charge* of *Govindchund, as long as the three sons are* NOT QUALIFIED, AND OF AGE.

As soon as *Cosinot'h* came of age, and when his two brothers were in their minority, he prohibited *Govindchund* from the necessary expenditure of money, and compelled him to file a bill, for the purpose of getting rid of his trust,—and when *Cosinot'h* received *his own* proportion of the *personal* property, he had so far effected a partition, as to give his mother a right to the fourth part of her husband's personal estate. But although *Muddunmohun* did not contemplate a partition until *all* his sons came of age, and not then, if they could live together in harmony; the Court seems to have considered that the will gave a vested interest to each of them, and the right of *Hoorasoondaree* to the share of her husband *Bishonot'h*, he having died before he came of age, does not appear to have been doubted upon the ground of her husband not having attained the age of sixteen years before his death.

From the whole of the proceeding, it is I think evident, that the Court

held *Muddunmohun's* will to be sufficiently indicative of his intention that his widow *Comulmonee*, should *not have* a share of his estate upon a partition of it among her sons.

The power of *Hindoos* to make wills, and the efficacy of wills when made by them, are fully recognized in this case. It seems to have been assumed, that if *Bishonot'h* had been of full age, and if his will had been duly proved, it would have cut off *Hoorasoondaree*, his widow, from her right to the estate, which she ultimately obtained. It seems also to have been assumed, if that which was set up as the *last will* of *Muddunmohun* could have been substantiated, that it would have had the same effect, and it is certain that the claim of *Comulmonee* to a share upon partition, was defeated by the will of *Muddunmohun*, which must have been construed into an intention of the testator, that upon a partition by his sons, his widow should not be entitled to participate, as she otherwise would have been by the *Hindoo* law.

Whatever effect the will of *Muddunmohun* ought to have had in cutting out *Comulmonee* from a share of his estate when it was partitioned, it cannot be doubted but that her right to maintenance remains in full force—and, if it had been asked upon reasonable grounds, I take for granted that the Court would in this case, (as it had in a similar one) have ordered funds sufficient for the purpose of maintaining her, to be set apart out of the whole of her husband's estate.

She appears now to be supported by her son, *Ramanot'h* alone, and he may yet call upon *Hoorasoondaree* (the widow of *Bishonot'h*) and *Joygopaul* (the son of *Cosinot'h)* to contribute.

The bill of review which assigned a declaration that *Hoorasoondaree* was entitled ABSOLUTELY to the *movable* property of her husband, as er-

ror; was in my opinion justifiable and proper—and the appeal against that part of the Court's order, which directed a payment over of the *principal* to *Hoorasoondaree*, was necessary to the interests of the appellants.

The Court had in one case declared, that a *mother* coming in for a share, on partition made by her sons, and in another, that a *widow* taking upon the death of her husband, were both entitled to an *absolute* interest in the *movable* estate. In each case a reversal of the declaration was prayed by a bill of review, and in each the Court expunged its declaration, substituting, that a *mother* in one, and a *widow* in the other, case, should take according to the rules of the Hindoo law.

It does not appear to me that a distinction between *movable* and *immovable* property in such cases, can be supported by any principle of the *Hindoo* law. It had always been expressly declared by the Supreme Court, that neither *widow* nor *mother* could take more than an estate *for life* in *immovable* property. The alterations made in the decrees which I have noticed, are in themselves sufficient to prove the Court's opinion upon this subject. The sentiments of the Judges were well known, and it is to be lamented that the limited right of such persons was not expressly declared in those decrees which reversed, virtually at least, the declarations that widows and mothers were entitled to an *absolute* interest in *movable* property.

If these females have a *life interest only*, in *movable* property, the probable consequences of *committing it to their custody* ought to be seriously considered.

The order which had been made for the delivery of her husband's personal property to *Hoorasoondaree Dossee*, did not by any means acknowledge her right to dispose of it at her own pleasure. It is admitted

by all authorities, living and dead, that her husband's relations are entitled to it at the expiration of her life. If it be put into her hands it will be *liable to waste,* and the acknowledged rights of her husband's family may be defeated by her weakness or her will. I cannot therefore but think that an appeal against the order which directed *a delivery* of the *principal* to her, was as proper ; as an appeal against that, which directed the accumulations to be paid to her, was unreasonable.

The petition of appeal having been filed, it became necessary, if she took the money, to give security for its restoration in case the order should be reversed. She did not do so, and the principal sum with its accumulations up to the date of the order, are still in the Accountant General's hands.

We now come to a question of great magnitude and importance; one which deserves and requires, the most grave and deliberate consideration.

That it has been usual to give a widow, or a mother *possession* of the property to which she may succeed, must be admitted—and that the money of her husband's estate, would, had it not been for the appeal, have gone into the hands of *Hoorasoondaree Dossee,* is certain. Yet the right of her husband's heirs to it after her death, is indisputable, and the justice of restraining her from waste, is a necessary consequence of this right.

What then is to be done? Possession will enable her to do all the mischief, before any restraint can be applied.

It must not be forgotten that the *discipline* of *Hindoo* women who have lost their husbands, has been greatly relaxed. Formerly a widow lived with the relations of her husband ; with the very persons entitled to the property after her death. This was an effectual control over the expen-

diture, and a sufficient security for the expectants. We are still told, that the family house is her *proper* abode; that she *ought* to live with her husband's relations; but that she *may* live *elsewhere* without penalty, provided she does not change her residence for *unchaste purposes*. Her purposes are known to herself alone; and her practises will be regulated by her inclination. Freed from restraint,—surrounded by parasites,—possessing wealth,—exposed to temptation,—unused to liberty,—ignorant of the world,—and conceiving all happiness to consist in the indulgence of her own immediate desires; can it be hoped or believed, that she will prove a faithful trustee for the heirs of her husband, or that they can have any thing in the nature of security for a succession to their rights?

For certain purposes, a reduction of the capital is said to be allowed. Be it so. Is this to be left to the will of her, who has no discretion—or the discretion of those who have an interest in her prodigality? If manners have taken a course by which the law may be eluded, is it not reasonable that law should be directed in pursuit of the manners?

I do not recommend innovation; far from it. I desire to adhere to the law in its substance; and to give every body that, which he is entitled to claim; but if law be not adapted to the times, it will be lost both in spirit and in principle.

If one be entitled to the immediate, and another to the ultimate, enjoyment of property, it is surely reasonable and just that they should have equal protection according to their several rights.

It is admitted that the widow has a right, for life, to the *produce* of her husband's property. Supposing that property to consist of money, the question is, has she or has she not, a right to *possession* of the *principal?* Let us say that she has. It then becomes us to look back to the time

when this right was conferred, and to consider the effect of the law by which it was accompanied. If we do so, we may be satisfied that the right was but nominal; that the possessor was under control, and that the expectant was invested with a power sufficient for his own security.

One party being deprived of his security, is it consistent with reason or justice, that the right which was given subject to such security, should still be retained? In what respect is the widow aggrieved by a denial of *possession?* Without possession she will receive all that she can lawfully use, but will be prevented from dissipating that which is lawfully to devolve upon another. By possession, her *right* is not enlarged. It will give her the *power* of doing irreparable wrong.

The reversioner's* right is as well founded as that of the widow—and I think it will be admitted, that the law ought to be so administered as to render it consistent with the preservation of both.

The Supreme Court, many years ago, as I have already noticed, made an order that the widow in possession, should not, for *pious purposes, without an express permission of the Court* break in upon the *principal* of her husband's property, during the nonage of her grandson, who was to succeed to it after her death; or *without the consent of her grandson* after he should have attained his full age. This order appears to me to have been made in the spirit of the *Hindoo law.*

Regard is to "*be had to the civil and religious usages of Hindoos.*" This is the statute law of England—and, if the *Pundits* are not unanimous, a great majority of them certainly declare, that the widow may, for *religi-*

* I have used the word "*reversioner,*" and perhaps some other words which have a *legal* signification, in the *popular* sense.

ous purposes, or, *for the benefit of her husband's soul*, dispose of his property, *without the consent* of his relations.

Every thing considered, it is not only reasonable, but indispensable to the maintenance of right, that these expenditures should be under some control; and where can this control be so properly placed as in Courts of Justice? Those who administer the *Hindoo* law ought to cast off their own prejudices, and attend to the usages which they are bound to regard. If they act in this temper, looking upon disbursements for religious purposes as *necessary*, and taking care that the next in remainder shall not be defrauded under a pretext of their performance, the rights and privileges of all will remain uninvaded. The reversioner must submit to all proper deductions, and simplicity will no longer be wrought upon by imposture, to his prejudice.

I admit, and in considering this subject I am bound to admit, that the purposes for which a widow may expend the wealth of her husband, *are religious*. My own sentiments and opinions are quite out of the question;—but if it be not denied that the interest of him in remainder, is as well worthy of the law's protection, as the interest of him in possession; —if the right of both to their several interests be equal, they surely ought to be equally secured. It is impossible that rights can be contrary, and opposite, to each other; and to say that one has a right to a thing, which another has a right to deprive him of, is absolute nonsense in itself, and in terms a downright contradiction.

I do not expect that the value of what I now add, will compensate for the irregularity of introducing it here. After my *manuscript* had gone to the press, I prepared this to be introduced at page 56, but it was mislaid; and when discovered, the printing had advanced too far to admit of its insertion in the proper place.

I know not of an instance in which sisters have shared upon partition, nor did I ever hear of a sister's claim having been brought forward when her brothers divided the estate. I conclude therefore, that her *right* does not exist by the *Hindoo* law *as it is prevalent in Bengal.* Perhaps it is better that she should be entirely excluded; for if the right were admitted, it would be difficult, if possible, to ascertain its extent.

Menu directs, that brothers shall give portions out of their allotments *respectively*, to their *maiden* sisters by *the same mother.* *Let each*, he says, *give a fourth part out of his own distinct share.*

The precept does not require to be explained, for nothing can be less equivocal, or more express; and yet we find in the *Mitacshara* a *construction*, which is quite at variance with this definite law.

The provision is made in favor of sisters by the *same mother.* Some wives of a *Hindoo* may produce sons, and some daughters only; and in such a case, if partition should be made by the sons, the daughters cannot under this law lay claim to any specific share of the estate.

This distinction, in favor of sisters by the *same mother*, does not appear to have been noticed by other writers upon the subject. We may suppose it to be admitted, because it is not denied, but in truth it is not of sufficient importance to justify discussion.

The writer of the *Mitacshara* begins by quoting *Yajnyawalcya*, who says, "Sisters should be disposed of in marriage, giving them as an allotment, the *fourth part of a brother's own share.*" This appears to be in confirmation of *Menu*, but it has not been so interpreted in the *Mitacshara* where we find the *meaning* thus declared, "Here in saying '*of a brother's own share*' the meaning is *not*, that a *fourth* part shall be deducted out of

the portions allotted to *each* brother, and shall be so contributed ; but that the girl shall be *allowed* to participate for a *quarter* of such a share as *would be assignable* to a brother of the same rank with herself."

The text may have been rendered unintelligible by this commentator, but the commentator has made *himself* understood. It will be observed, that he does not rely upon marriage being the purpose to which the sister's share is to be applied, but seems to admit that she has an actual right to some proportion of the estate, and upon this ground he proceeds to an explanation of his meaning. He informs us, that if there be a son and a daughter, the estate shall be divided into *two* equal parts, and that *one* of the *two*, shall again be divided into *four;* of which *four* the girl shall take *one*. By this ingenious mode of construction she is cut off from half of the share which had been clearly assigned to her by the law of *Menu*, and which law had been apparently acquiesced in by *Yajnyawalcya*. The brother instead of taking six parts, will take seven ; the sister instead of taking two parts, will take one part, of the estate.

He continues ; If there be *two* sons and *one* daughter, the whole estate shall, in the first place, be divided into *three* equal parts ; of which *three*, *one* shall be divided into *four*, and the daughter shall take *one-fourth* of the *third* part so subdivided. Thus instead of getting a *fourth*, she will get a *twelfth* part only.

If there be two daughters, and one son, he tells us that the estate shall, in like manner, be divided, first into three equal parts, that each daughter shall take *one-fourth* of *one* of the *thirds*, and that the remainder shall go to the son. That is, he shall take *ten* parts, and his sisters *one* part each.

This author's principle of allotment, is declared to be universally appli-

cable, for he expressly tells us, that "it must be *similarly* understood in *any case* of an *equal*, or *unequal* number of brothers and sisters, alike in rank."

As the sister, by this method of apportionment, never can have more than a brother, one of the objections to the law of *Menu*, is effectually avoided—but in legislating it often happens that by the removal of one mischief, we make room for the entry of another. Our author acknowledges the right of a sister to *something;* and in his earnestness to prevent her from having *too much*, it probably never occurred to him, that by his remedy for the evil, she may eventually be left without any provision. If the sisters should exceed four in number, the law so peremptorily laid down in the *Mitacshara* as applicable to all cases, cannot possibly be applied.

But let us now suppose that there are *ten* brothers and *one* sister, and the estate 100,000 *Rupees;* the whole, by this rule, must be divided into *eleven* parts. *One* of the *eleven* must then be divided into *four*, and one of these four, or a *forty-fourth* part of the estate will be taken by the sister, and instead of receiving a *fourth* part from *each* brother, or 25,000 *Rupees*, she will get somewhat less than 2273 *Rupees*. Yet we have as good authority for extending her right to the larger, as we have for confining it to the lesser, amount. But such effects may be expected from the powers of self-constituted legislation, and the adverse authority of co-ordinates in construction.

To get rid of the law by which a sister might receive a greater share than a brother, we are told that she shall have a *quarter* share *if the funds be small;*—then *if the wealth be great*, that funds sufficient for her nuptials ought to be provided;—then that the rule for giving a *fourth* part *is not indispensable*. Again, that to found her title, there must be an equality in the numbers of brothers and sisters: at last the *Mitacshara* sheds new light

upon the subject, and we are shown that a fourth part of the share of *each* brother, *may* mean, and, if the case should arise, *must* mean the *fourth* of a *twentieth* part of the shares of them all.

In the *Daya-crama Sangraha*, we find the law thus laid down by *Sri Crishna Tercalancara*:—"The sisters also of these sharers, must be rendered participators to the amount of a *fourth share* receivable by the brothers *respectively, for the purpose of marriage*."

Here, this author by recognizing the proportion, and at the same time specifying the purpose for which it is to be given, may be said to have left his meaning ambiguous; for if the fourth part is to be applied to a particular use, we may conclude that it is not applicable to any other. Why then *must* the brothers give a *fourth* part of their shares respectively, if it shall amount to more than may be sufficient for that to which it is to be appropriated?

We cannot, I think, conclude from this exposition, that the sister is entitled *at all events*, to a fourth part to be held at her own absolute disposal; and if not, this author gives some countenance to those who declare that if the *funds be large*, a fourth part is not indispensable, but that sufficient for the nuptials of the girl ought to be allowed.

Upon one point the lawgivers and the expounders are all agreed. They declare that the allotment in question is intended for *maiden*, and not for *married*, sisters. This may be sufficient evidence to show that marriage is considered as a provision, but it proves no more; and if married sisters, because they are provided for, shall be excluded from a share, does it thence follow that an unmarried sister, not being so provided for, shall be left without any provision, if she does not chuse to receive it in the form of a husband?

I know that the disposal of females in wedlock, is considered among *Hindoos* to be a paramount duty; and from what I have heard *Pundits* say, I conclude that the celibacy of a woman is not even contemplated. Yet it may be asked, if a girl cannot be disposed of in marriage, if she be determined upon a single life, or disqualified for the matrimonial state, what is to be done? Is it still to be said that she shall take a husband for her portion, or that her denial shall extinguish the debt which is declared to be due to her, upon partition, by her brothers?

By the unsophisticated law of *Menu*, the unmarried sister has a right to her share unconditionally, and I do not know of any authority by which it is declared that this right shall be forfeited or infringed by her misfortune or her caprice; because she cannot procure, or will not accept of a husband.

It is indeed impossible that any thing in the nature of law can be more unsatisfactory than this. Authors are in direct opposition to each other, upon the very foundation of the claims of sisters; some asserting, and some denying their *rights as inheritors*.

In the *Mitacshara* it is laid down, that "*after the decease of the father*, an *unmarried daughter participates* in the *inheritance;* but before his demise, she obtains that only, whatever it be, which her father gives." In the *Daya-bhaga* we have it, that *daughters do not take portions as having a title to the succession, "for one brother does not give a portion out of his own allotment to another brother, who has a right of inheritance.*"

Upon the mere question of right we have contradictory affirmations. The sister has, and has not a right to her share upon partition. How then is the fact to be ascertained? The test which is offered is by no means conclusive; for her claim may be valid, although it does not stand upon her title *as an inheritor*. But is she, or is she not an inheritor? By

the *Mitacshara* she is,—by the *Daya-bhaga* she is not. The assertions are opposite to each other, and neither is supported by authority. That of *Jimutavahana* does not derive much advantage from his reasoning. Like some other *Hindoo* logicians, he begins by an assumption of his premises, and concludes by begging the question.

Sisters as well as brothers have a right to be maintained out of the estate, while it remains undivided. It is upon partition that either becomes entitled to a separate share. It is not the number of persons who divide, nor the proportion of the estate which each is to receive, that can constitute them inheritors. Twenty will be as much inheritors as two ; and upon partition, the man who is entitled to two shares, will be no less an inheritor than the man who is entitled to eighteen. It is not the mode by which the amount of a share is to be ascertained that can operate to the exclusion of a declared right "*id certum est, quod certum reddi potest;*" and the right of four to a fourth part each, is not more certain than the right of a fifth person to a fourth of each of the four shares. We are but ill requited for our labours, when we find nothing but sophistry in our search after law. It is not justice, but juggling, to give a man nominally, one-fourth more than he has a right to retain ; to call it a contribution from him when it falls into the hands of that person whose property it is ; then to declare that the person receiving it as a contribution, cannot, because it has been so received, be an inheritor, and having thus put an end to the inheritance, to decide that the right is at an end.

What the rights of sisters may be, I do not at all undertake to determine, but if they ever existed, they ought not in reason to be extinguished by an adoption of the method which is necessary for the purpose of their ascertainment.

If the law of *Menu* were at this day prevalent in Bengal, I cannot doubt

but that the Supreme Court would, upon a bill filed by a sister, decree her the immediate possession of a fourth part of the estate. Supposing three brothers and one sister, and the estate 24,000 *Rupees*. I believe the Court would at once declare the sister entitled to 6000 *Rupees*, and that it would not do so, by declaring the brothers in the first instance, entitled to 8000 each, and the sister entitled to 2000 from them severally. I believe such a circuitous mode of coming at her rights, would be particularly avoided if it could be thought calculated to take from her the inheritable quality, and thereby tend to deprive her of her substantial rights.

The law, as it is declared by *Menu*, upon this subject, is, in one respect certain ; although in other respects it is far from being so, because, instead of having a suitable provision, the females may have too much, or too little, according to chance. If there be *ten* sisters and *one* brother, it cannot be thought reasonable that each sister should take but *one* part, and that the brother should take *thirty* parts out of forty ; when, if there had been *ten* brothers and *one* sister, she would take *ten* parts and the brothers but *three* each. Yet objectionable as this rule may be, it has much to recommend it, for it is not to be mistaken or evaded. But when we are told of the right to a fourth part *if* THE FUNDS BE SMALL, the meaning must be fixed by collateral considerations and the question left open to cavil and doubt. Again, when we are told that *if the funds be large*, a fourth part is not indispensable, the same objection occurs ; but in this case sufficient for the celebration of nuptials must be allowed, which throws every thing open to discretion.

Seeing the extent to which the law of *Menu* might go, subsequent writers seem to have been desirous of setting limits to its operation ; but it is to be regretted that they have been so inconsistent in their efforts, and that they did not agree upon some one principle by which their labours might have terminated in certainty.

By the authority of one, be the funds *large or small*, sisters will get a fourth part of them. By the authority of another, sisters will get a fourth part, *if the funds be small.* By the authority of a third, they will not get a fourth part, but be provided for by marriage, *if the funds be large.* But how are they to fare by the doctrine of the *Mitacshara?* By it each sister is to receive the aliquot part of a defined sum. If the number of sisters shall be greater than the number of parts, some must be excluded from a share, and having been informed that each sister shall receive a *fourth* part, we ought to have been told which of them is to be cut out, in case of their number exceeding *four*. If *five* are to divide, each cannot possibly have a *fourth* part of the same thing—and yet, without limitation of number, a fourth part is the proportion to be given to each.

The law of him who is declared by all to have sprung from the self-existent, has been greatly extenuated by some—by some it has been wholly denied; but here is an author who undertakes to fix, and to determine his meaning, and who shows us by an addition of his own terms to the proposition, (although *Menu* had made provision for all the sisters) that the provision is to be limited to four.

I think I am justified in having said, that, among these clashing authorities, the sister's is a *claim*, rather than a *right.* I am well pleased that a law so precarious is not prevalent here. It is more for the advantage of females, that their interests should be committed to the pride, or better feelings of their families, than that they should be encouraged to struggle through discord and darkness after that which may prove worthless if attained. The expounders of *Hindoo* law may in this case be sanctioned by the highest authorities in giving different, or opposite opinions; and in such a state of things, speculation upon the consequences has been rendered needless by experience.

It does not at present occur to me that I can, to any useful purpose, extend, what I have said upon the subject of Partition. I am fully aware of the space which I have left open for criticism, and I am not at all desirous of deprecating its exercise. I shall merely suggest the difficulty of avoiding repetition, when rules are to be illustrated by decided cases, and when the cases involve a variety of points. That it is *possible* I admit; but to succeed, more time will be required than I have at my command. I may be thought to have been too free in offering my opinions, and perhaps rather hasty in having come to some of my conclusions. Upon these heads I feel but little solicitude—I desire that my conclusions and my opinions may be disregarded by all, who do not adopt them from a conviction arising out of their own reason or reading,—and this I hope will be sufficient to protect me from the charge of presumption.

I am far indeed from desiring to disturb any fixed principles, and much farther from wishing to introduce any notions of my own in their place; but the unsettled state of *Hindoo* law is universally complained of; and I have persuaded myself that an attempt to produce order out of the existing confusion, cannot but be in some measure useful.

OF REUNION.

AFTER separation, and a partition actually made, families may be again united. This however, is an event which seldom happens. I do not know an instance of it, and the Supreme Court *Pundits* inform me that none has ever fallen within their knowledge.

In the absence of positive law, of decided cases, and of judicial *dicta*, we must refer to authors of the best reputation; and if among them we do not find a concurrence in opinion, or acknowledged pre-eminence, we cannot derive satisfaction from the reference.

The judgment is baffled between opposing dogmas, if they are delivered by men equal in learning, equal in reputation,—equal in all that can confer a right, (if any thing can confer a right upon individuals) to dictate where the interests of others are to be affected.

In all laws we find mandates which are abstract and absolute,—which do not proceed from, or lead to, any general principle. These ought to be consistent, because they must be implicitly obeyed. They ought to be wise in themselves, because they do not depend upon reason, or upon analogy for their support. When such rules are in opposition to each other, one of them must yield, and if we have not a legislature to interpose, nothing but forensic authority can terminate the contest.

I do not mean to say that the doctrines which relate to Reunion, are more

at variance with each other, than those which relate to any other branch of the *Hindoo* law:—but as no questions arising out of the subject have been brought before our Courts of Justice, all contradictions among authors, at present remain in their primitive force. We may however derive some consolation from knowing, that as the law is entirely unfixed, it is unlikely to be brought into action. Litigation might not have been productive of certainty, but it must have ended in the rejection of some one at least, among the many contradicting authorities—and if cases should henceforth come forward, we may hope that decisions upon them will have a tendency towards the removal of doubt.

The quotations which I propose to give in this chapter from *Jagannat'ha*, offer a fair, certainly not an unfavorable, specimen of what we may expect to gain, when we betake ourselves to his *digest* in quest of information.

Menu says, "A son born *after* a division, *in the life time of his father*, shall *alone* inherit the patrimony, or shall have a *share* of it with the *divided brethren*, if *they return and unite themselves with him*."

This requires explanation, and *Sri Crishna Terkalancara* has explained it in the *Daya-crama Sangraha* as follows:—"Supposing a father who had made partition among his sons, and taken to himself the share allowed him by law; and then, while separated from his sons, to beget a son, and afterwards to die. This son, born after the partition, is entitled to his father's share of the wealth; and the sons who had been separated, are not entitled to any of it." Again, "If a father shall die, after having *reunited* himself with any of his sons, then his wealth shall be equally divided between his *reunited* sons, and the sons born after partition."

It is declared by *Vrihaspati*, that, "He who having been once separat-

ed. dwells again, from affection, with his father, brother, or paternal uncle, is said to be *reunited.*"

Reunion is to be effected by the mutual consent of separated parties. *Terkalancara* declares, that " in a *partition* made by *reunited* brethren, the *eldest* son has *no right*, in virtue of primogeniture." The same is held by *Vrihaspati*, who says, that " among brethren, who having once separated, again live together through affection, there is no right of primogeniture when partition is again made."

It will have been observed, that primogeniture is, in this age of the world, inoperative, and that *Terkalancara* himself, has declared against its rights upon partition; even if it be made *for the first time*, and before a *reunion* had taken place.

There is, according to this author, a special rule, namely, that an acquisition made by a *reunited* father, out of his own several property, or by means of his own exertions, shall belong to the son *born after partition*, and not to those who had separated and become *reunited.* All the wealth acquired by a father who had made partition with his sons, shall go to the son (or sons) *begotten* by him *after* partition. The sons *born* before partition are declared by *Vrihaspati* to have no right to it.

In the *Daya-crama Sangraha* it is said, that " one *born* after partition, is the child of a *conception* which took place subsequent to the partition, *because*, without conception there cannot be a *birth.*" " *Hence* if a partition be made among sons, before the *conception* of the woman is *known*, the property which had been divided must be again collected, and a new partition must be made; and the son born of a conception, which, at the time of partition was unknown, shall share with his brothers who had formerly separated "

Generally speaking, the heritage will, after *reunion*, be as it was prior to separation. The right of succession among brothers, is indeed, after they have once forisfamiliated, left in much doubt; some authors affirming, and others denying the efficacy of *reunion* as applicable to brothers of the *whole*, and of the *half*, blood. Some say that the *reunited half*, shall succeed jointly with the *disunited whole*, brother; and some that the disunited *whole*, shall succeed in exclusion of the *reunited half*, brother.

The two Supreme Court *Pundits* differ in opinion upon the following case:—I put it to them with a view of ascertaining the degree of virtue which is attached to *reunion*, and whether a brother who had *separated*, and *reunited*, stood in a more favorable condition than one who had never separated at all.

They had concurred in saying that the *whole*, and *half*, brothers would succeed *jointly*, if the *whole* had *continued* to live *separate*, and the *half* had *reunited*.

I propounded a question upon this case. A by one wife has two sons B and C,—and by another wife he has a son D. A dies leaving these three sons *undivided*. After the death of A, B separates himself from the family, leaving the half brothers C and D living in an undivided and joint state—C then dies, leaving neither wife nor child surviving him; his mother having died in his life time. Who will take the estate of C? Will it go to B, the *uterine* brother who continued separated, to D the half brother who *never had* separated, or jointly between B and D? It was the opinion of one *Pundit* that B would take the *whole* estate, and of the other that D would *share* it with B.

The *Pundit* who insisted on the right of B to the whole estate of C; admitted, if D had *once* separated, and *then reunited*, that he would jointly

with B have succeeded to C's. estate. It thus appears to be his opinion, that *separation* is the act which would have operated in D's. favor; for the *reunion* could not do more than place him as he was before separation.

If *disunion* were forbidden, we might account for a reward being given to him who had repented of his transgression, and returned to the state from which he ought not to have departed—but this is not the case; and if it had been, we might still ask why a man should be bettered by his disobedience of the law? Why one who *returned* to a duty, should be more favored than one who had never *departed* from it? He who tells us that it operates as an encouragement to *reunion*, must admit at the same time, that it holds out an inducement to separate.

If the *half* brother who has been *reunited*, shall stand upon the same footing with the *uterine* brother who is in a state of separation, then there is a premium upon *reunion*, or a penalty incurred by continued separation; —for if all the parties continue joint from the beginning, or if all are in an actual state of separation, or if all return to union after having once been separated, it is certain that the *uterine*, shall exclude the *half* brother from a share in the estate.

I believe *Jagannat'ha's* method of treating this subject, will be considered more curious than convincing. In the 4th volume of his *Digest*, he quotes a text from *Yajnyawalcya*, " *Two* brothers, who after their forisfamiliation, have *both reunited* themselves to the family of their father, shall reciprocally transmit and receive their estates, as they happen to live or die; and *so shall* two *uterine* brothers."

To this *Jagannat'ha* adds, " *Consequently Yajnyawalcya* having propounded in *general terms* the succession of brothers, whether by *different* mothers, *or by the same*, whether *reunited* or *not*, subjoins this text for the

sake of exhibiting a *distinction*, by virtue of which, if a *single* brother have *both claims*, as related by the *whole* blood, and as being *reunited*, he *bars all the rest*. The share of one *reunited* brother, who deceases, another *reunited* one shall receive, and so forth—but a *whole* brother, not one by the same father only, shall *alone* receive the share of a *reunited* brother by the same mother. A similar opinion is delivered in the *Dipacalica*."

He then says, the following precept from *Yajnyawalcya* is EXPLICIT. "A brother by a *different* mother, *if he return* after partition to the family, *not any other half brother*, shall inherit the estate; but a *whole* brother, even *without* returning, shall succeed to it, not a *disunited half* brother by the same *father* only, except on failure of the rest."

From this (*so explicit in itself*) *Jagannat'ha infers*, that a *half* brother cannot take the estate, *unless he return to the family*, but that a *uterine* brother, though *not reunited*, may take the estate. He concludes, "If there be *half* brothers, one of whom is, and the other is not, reunited, the *disunited* half brother is *not* heir. The *equal* claim of a *reunited half* brother with a *reunited whole* brother, has been *already denied*—the *equal* claim of a *disunited half* brother with a *reunited* half brother is *now* denied."

He goes on to say that *Jemutavahana* expounds this text, "a half brother who is not *reunited* shall not inherit the estate;" thus "a *half* brother *being reunited*, shall take the estate, not a *disunited* one, but a *whole* brother even though *not reunited* shall succeed, not *solely* the *reunited half brother*."

As applicable to what I have already quoted, I shall not venture to introduce, or to exclude any meaning; because I conceive it lies fairly open to every reader's own construction.

I shall however, add a few further quotations from the *Digest*, and I

shall do so not for the purpose of giving instruction in any thing, except the uselessness of endeavouring to extract certainty from the books of *Hindoo* law. Those whose duty it is to administer justice to the *Hindoos*, may nevertheless read over their law books with some advantage, for by a perusal of them such persons cannot but learn the necessity of caution, and the dangers which beset them when they may suppose they are standing upon fixed and established principles.

The following text from *Catyayana* is given by *Jagannat'ha*. "On failure of nearer claimants, *reunited brothers* must be considered as heirs to those who are *disunited*, for they reciprocally share the estates, if they have no progeny."

Jagannat'ha comments upon this text—and whether or not, in doing so, he is consistent with *himself*, I shall leave others to judge.—He says, "*Brothers* who are *not reunited*, take not the shares of those who die after *reunion*; but *disunited* brothers must be considered as the heirs of those who *die disunited*. 'On failure of nearer claimants,' that is, in default of a wife and the rest—the *last terms* of the text are *joined* in the *apposition* called *dwandwa*—so *Chandeswara*. These terms are added to show the *reason of the precept*; the meaning *therefore* is, *because* they are competent to take each other's shares when they have no issue. *This also some lawyers affirm*. By expressing in *general terms* that *reunited* brothers are heirs of their coparceners, it is *intimated* that a *reunited* brother of the *whole blood*, succeeds to the exclusion of one who *remains separate*. *Vachespati Misra* also observes that *uterine* brothers who are *not reunited*, do *not* take the heritage; *consequently*, if there be *whole* brothers, one of whom *is*, and the other *is not*, a coparcener, the *reunited* brother by the *same mother* has the *sole* right of *succession; by consent of many authors*. But if *two reunited* brothers, one by the *same*, and the other by a *different*, mo-

ther claim the succession, what is the rule in that case? To this *Chandeswara* replies, the *meaning* of the text is this: on the competition of brothers of the *whole*, and *half*, blood; the whole brother *alone* shall take the estate. Accordingly *Vrihat Menu*, "If a brother by the *same* mother be living, one by a *different* mother shall *not* take the estate." This is *reasonable*, for it is said by *Jimutavahana*, if one has *two* claims, as brother by the *same* mother, and as *reunited*, he bars all other claimants; *therefore*, the *reunited* brother of the *whole blood* is *sole heir* to the estate of the deceased; but on failure of him, the *disunited* brother *by the same*, and *reunited* one by a *different* mother have *equal* claims; *because* one is brother of the *whole* blood, although *disunited*, the other *reunited*, though brother of the *half* blood—and *Chandeswara* remarks, "*thus it* is shown that relation by the *whole* blood, is a *ground*, on which even a *disunited* brother may take the inheritance;" *since* there are *arguments* on which *both* may claim the succession, it is *therefore* declared, that *both* shall inherit; and *Misra* observes, that "a brother by a *different* mother, having *reunited* himself to the family, *shall take* the estate of his *half brother*, but *not unless* he *reunite* himself." An *uterine* one however, *may* take the inheritance, *even* though he do *not reunite* himself to the family (*interpreting* the *text* by *connecting remote* terms.)"

If a connexion of remote, or a disjunction of connected, terms, could form a rational mode of interpretation, we might indeed well expect a true construction of texts from the commentators upon *Hindoo* law. Upon the subject in question, the *reasoning* of *Jagannat'ha* is not by any means satisfactory, yet he makes a disclosure of his *opinion*, and he does not, in this instance argue towards his own confutation.

I shall conclude this chapter with another quotation from his *Digest*. After telling us on the authority of *Jimutavahana*, that the *reunited half* brother shall *not solely* succeed; he goes on—"But others thus comment

upon both texts of *Yajnyawalcya*; if there be *whole* brothers, some of whom are, and others are *not*, reunited, the legislator says, 'a *reunited* brother shall take the heritage of a *reunited* one.' If the *whole* brothers *remain separate*, he says, 'an *uterine* brother shall take the heritage of an uterine one.' In that case, if there be a *reunited half* brother, what shall be the consequence? The legislator replies, 'a brother by a *different* mother, if he return after partition, to the family, *shall take the estate*.' Since both have claims to the succession, they shall inherit *equally*: but a *half* brother who had not *reunited* himself, shall *not* succeed. This the lawgiver declares, 'not any *other half* brother.' If an *uterine*, and a *half* brother have returned to the family, what shall be done in that case? To remove the doubt whether *both* shall inherit under the *vague* expression of the text 'a *reunited* brother *shall* inherit the estate of a *reunited* one;' the legislator says, 'the *reunited* brother by the *same father only*, shall *not* take the inheritance.'"

"Some lawyers affirm that a *reunion* of parceners is not a ground of succession: for, were it so, it might be supposed, that a son who is owner of separate wealth, and a brother's son, would *not* jointly inherit the property possessed by a paternal uncle *reunited* with his nephew. *On the contrary*, inheritance positively rests on other claims. Thus, succession in right of fraternity being established, the *reunion* of *one*, bars any other, brother. In like manner, if there be a *whole* brother *not reunited*, since HE *alone* has a claim in right of affinity by the *whole blood*, he *alone* shall inherit; *not a half brother* EVEN *though* REUNITED. *Thus*, the text above cited relates to *uterine* brothers *only*; and the legislator *denies* the claim of a *half* brother in the subsequent text, 'a brother by a different mother, whether *reunited* or *not*, shall *not* inherit the estate of his *half* brother'—but on *failure* of *uterine* brothers the legislator adds, 'a *reunited* half brother, *not any other* half brother, by the *same father* only, shall inherit the estate.'"

Jagannat'ha says, "*That is wrong;* since it contradicts all respected authors, and is *inconsistent* with the REASON of the law; for why should not *reunion* be a cause of a brother's succession, as well as relation by the *whole blood?* If it be said, since a son, a wife, and the rest confer benefits on the *proprietor*, in *another world*, there is no *parity* between *that* claim, and one founded on *reunion*, but a *uterine* brother confers benefits by offering the double set of oblations for the *mother;* the *answer is*, a *reunited* brother also defrays the expense of religious ceremonies, by means of *his property* thrown into parcenary. ON FAILURE *either* of a *disunited whole* brother, or of a REUNITED *half* brother, the OTHER *is his heir;* in the *one* case, if there be *half* brothers, *one* of whom is, and the *other* is *not, reunited*, the *reunited* brother has the *sole right* to the inheritance, not the *disunited* one; *for* the text of *Yajnyawalcya* expresses, 'a *reunited* brother shall receive the estate of a *reunited* one.' On failure of *both* these *prior* claimants a *disunited* brother by a *different* mother shall inherit, *because* he *also* is brother by the same *father*. *Since* a mother also claims the *funeral cake*, and other oblations, which are given by the *uterine* brother in the *Sradd'ha* performed with a double set of oblations, the *whole* brother is superior to one by a *different* mother, because he offers the double set of oblations for the *mother* of the late proprietor.—*Since two* brothers living in the *same* house, afford reciprocal support, preserve each other's property, confer mutual benefits by the acquisition of wealth, and respectively earn religious merit at the expense of wealth acquired by each other, they are *nearer*, the *one to the other*, than a *disunited brother*."

Here then we have the law, whatever is to be made of it. On *failure* of a *reunited* brother of the *whole* blood, "the disunited brother by the *same*, and the *reunited* one by a *different*, mother have *equal* claims." Speaking of a *disunited* brother of the *whole*, and a *reunited* brother of the *half* blood, it is again declared, "Since *both* have claims to the succession, they shall inherit *equally*." Again, "Since there are arguments on which

both may claim the succession, it is *therefore* declared that *both* shall inherit." Now what follows? "In *like manner* if there be a *whole* brother, NOT *reunited,* since he *alone* has a claim in right of affinity by the *whole* blood, he *alone* shall inherit; not a *half* brother EVEN *though reunited.* Thus the text above cited relates to *uterine* brothers *only;* and the legislator *denies* the claim of a *half* brother in the subsequent text, 'a brother by a *different* mother, whether *reunited* or *not,* shall *not* inherit the estate of his *half* brother.'"

What *Jagannat'ha* professed, we are not distinctly told, but he did not possess authority to decide between contending legislators; and as we cannot say of him "*ex umbrâ in solem eduxit,*" it may be lamented, that he has perplexed perplexity, if he was unable to make obscurity less obscure.

While I wish for amelioration, I trust I shall not be misunderstood. I deprecate every evitable interference with the feelings of our *Hindoo* fellow-subjects, and I abhor coercion. They ought, in my opinion, if they themselves do not wish for a change, to be left in peaceful possession of their own religion, their own laws, their own usages, and their own prejudices—I would relieve them from the thraldom of a priestcraft which they may desire to resist—I would take from the expounders of their law, the power of legislation—and, as opposite doctrines ought not to be co-existent, I would wish, in our decisions, to see those which are the most likely to prove beneficial, prevail, those which are the most conformable with justice, preferred.

I am far indeed, from desiring the introduction of any new laws. It will be enough, if by giving those of which the *Hindoos* are in possession, all practicable consistency, we protect them from the despotism of construction, from those dangers which are equally menaced by the ignorant and the corrupt, from the evils to which they must be exposed if their privileges and property are to be left amidst the jarring of irreconcilable authorities, or to hopes of relief from the interpretation of a *Pundit.*

OF ADOPTION.

WITH a view to futurity it is necessary for a *Hindoo* to be represented —and it is this necessity which has made it a duty in default of male issue, to adopt a son.*

There are four classes or tribes of *Hindoos*—first, the *Brahmana*—second, the *Cshatriya*—third, the *Vaysya*—fourth, the *Soodra.*

In noticing the three first classes, I shall in future, use an orthography corresponding with the common pronunciation; viz. *Brahmin, K'hettry* and *Boice.*

There are many distinctions between the rules of adoption relating to the three first *castes,* and those relating to *Soodras,* and the neglect of authors to attend to these distinctions has caused much confusion.

Formerly the adoption of a son belonging to a different *caste* from that of his adopting father was permitted. It is now absolutely prohibited. Yet the writers of more modern compilations have treated the subject as if the old law were still in existence; although in fact the rights of adopted sons, depended, in many instances, upon the circumstance of the adopter, and the adopted, being of the same, or of different *castes.*

* "A son of any description must be *anxiously* adopted by him who has none."—*Menu.*

Nareda, as we have it in the *Dattaca Nirnya*, distinguishes, as to their relation, the sons which may be adopted by *Soodras*, from those which can be adopted by men of the *Brahmin*, *K'hettry*, and *Boice castes*. A *Soodra* may adopt a sister's son, which the others cannot do—but in other parts of my work, I shall have occasion to notice this subject more particularly, and to give some instances in the way of illustration.

By *Vachispati* it is said that "*Soodras* are incompetent to affiliate a son, from their incapacity to perform the sacrament of *Homa*, and prayers prescribed for adoption"—but this *dictum* is abundantly contradicted by *Saunaca*, and others. And indeed the authorized practice of every day is a sufficient acknowledgement of the *right*, and is in itself enough for the confutation of *Vachispati*.

Devanda Bhatta gives the following quotation from *Yaska*:—"A person of the *same* class *must* be adopted as a son. Such a son performs the oblations, and *takes the estate; in default of him, one different in class*, who is regarded merely as *prolonging the line*. *He* receives food and raiment only, from *the person succeeding* to the estate."—"The *participating* in the inheritance, of one *unequal* in class, is *impossible*."

In the present age we need not be very solicitous about the meaning of this; for it is quite certain that none but one of the *same class* can now be adopted. Nor is it *necessarily* to be inferred from what has been said by *Yaska* and *Devanda Bhatta*, that one of a different class from the adopter, could at any time have been *adopted as a son*. Such a person might, it would seem, have been *employed* for the purpose of *prolonging the line*, but he could not succeed to any part of the estate, and was entitled to food and raiment alone for his services.

Speaking then of the prohibition against adopting a sister's or a daugh-

ter's son, he says, "this prohibition, against the daughter's son, and sister's son, refers to those *other than Soodras;* accordingly *Saunaca* 'of *K'hittries* in their own class positively, and in default of a *Sapinda* kinsman even in the general family, following the same primitive spiritual guide, *(gooroo.)* Of *Boices* from amongst those of the *Boice* class. Of *Soodras* from amongst those of the *Soodra* class. Of *all,* and the tribes likewise, in their *own classes only, and not otherwise.* But a daughter's son, and a sister's son, are affiliated by *Soodras.* For the *three superior* tribes, a *sister's son is no where a son.*'"

Katyayana, in speaking of adopted sons, says, "If a *legitimate* son be born, the rest are pronounced sharers of a *third* part, *provided they belong to the same tribe:* but if they be of a *different* class, they are entitled to food and raiment only." In some copies the reading is "are pronounced sharers of a *fourth* part."

Devanda Bhatta then proceeds "for the sake of removing *conflicting contradictions,*" to say, "The declaration, in *Vrihaspati's* text, that the real legitimate son succeeds exclusively, to the estate, and that the rest are entitled merely to subsistence, regards such sons of the wife and the rest, who are *unequal in class;* on account of uniformity with the text of *Katyayana,* and *Davala*—and the rule also in the texts of *Nareda* and the rest, for the succession of the *son given* and the rest, to the estate, on default of the son of the wife and the rest, regards their succession to the *whole estate;* and therefore the rule for the *fourth* of the share of the real legitimate son propounded by *Vasisat'ha,* where such son may be born subsequent to the adoption of a *son given,* must be understood as *applying* to a *son given.* So also the rule for succeeding to a *third* share, in the texts of *Devala* and *Katyayana,* must be alleged, to refer to a *son given endued with eminent qualities,* on account of uniformity with the following text of *Menu,* 'of the man to whom a son has been given, *adorned with*

every quality, that son *shall take the heritage*, though brought from a different family.'"

In the *Brahma purana* it is said, "Let the *real legitimate son even who is subsequently born, take the whole estate.*"

Devanda Bhatta undertakes to reconcile the different opinions of these *holy saints.* This he does in a manner, satisfactory no doubt, to himself, but as I do not consider it worth transcribing, I shall pass it over and come to his conclusion, which may be offered as evidence of his self complacency at least. He says, "And thus, the objection of variation, from the *son given*, being *enumerated higher, and lower* in the order of *inheritance*, and so forth, by *different holy saints* respectively, is obviated by the *distinction as to his qualities* GOOD OR BAD."

It will appear that this *distinction* by which all differences between the holy saints are to be reconciled, is now laid aside. We cannot indeed conceive, how it ever could have been more than theoretic; or that in practice it could have furnished a criterion by which the claims of competitors could have been rationally decided.

Menu says, "By the eldest, at the moment of his birth, the father having begotten a son, discharges his debt to his own progenitors."

"That son alone, by whom he discharges his debt, and *through whom he attains immortality*, was begotten from a sense of duty: all the rest are considered by the wise, as begotten from love of pleasure," and yet in the *Dattaca Mimansa* it is laid down that a man having *two* sons only, cannot give *one* of them for the purpose of being adopted. The prohibition is founded upon the danger to which a man who has but one son is

exposed. The author in enforcing his argument seems indeed to have pushed it somewhat too far. He reduces to nothing, that in which *Menu* had made all to consist, and by his doctrine, we are taught, if something is to be done "from a sense of duty," that still more is to be achieved "from a love of pleasure."

In endeavouring to prove that he who has *two* sons only, ought not to give *one* of them for the purpose of being adopted, *Nanda Pandita*, in his *Dattaca Mimansa* says, "For, the speech of *Santanee* to *B'hishma* expresses 'He who has only one son, is considered by me *as one destitute of male issue*, oh descendant of *Kuru*—one who has only *one* eye, is, as one destitute of *both*: should his *only* eye be lost, he is *absolutely blind*."

"By a son" says *Menu* "a man obtains victory over all people; by a son's son, he enjoys immortality; and, afterward, by a son of that grandson, he reaches the solar abode." Again, "Since the son *(tráyaté)* delivers his father from the hell named *put*, he was therefore called *puttra* by *Brahma* himself," and again, "A *son given* 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 funeral oblation is extinct."

I have been favored by my friend *Mr. Blacquiere*, with a translation which he made from the *Sanscrit* on the subject of adoption. This work I am sorry to say is still in manuscript. It is more concise, and less unintelligible, than any *Hindoo* law tract that has fallen into my hands.

It begins "*Sri Nat'ha Bhatta* having collected together the texts of different *Munis*, and considered the opinions of the learned, expounds the law respecting the son given in adoption, (i. e. *Dattaca*) under the title of *Dattaca Nirnaya*."

"First, as to the superiority and inferiority in point of qualification for adoption."

"*Nareda*—The son of one who is allied by the funeral cake is the best; on failure of him, one allied by family; and on failure of him, even one of a different family is taken as a *Dattaca* son."

"Among those allied by the funeral cake, the brother's son is the best."

"*Menu.* If among several brothers of the whole blood, *one* have a son born, *all of them* are pronounced *fathers* of a male child."

"The appellation of a son being given to a nephew, it is to be inferred that he is best qualified to be a *Dattaca*."

It is a rule that an *only* son cannot be given or received in adoption—*Menu* declares that the son of one brother *is the son* of all the brethren. Let me here observe that this does not apply to *Soodras*, but to the three superior orders exclusively.

Upon this particular point, the sum of all I have been able to collect out of books, or from living authorities, is, that in the three superior classes, if there be *brothers of the whole blood*, a son of *one* of them, will, *for religious purposes*, be the son of *all;* and that while this son exists, the childless brothers by the same father and mother, need not adopt one for the performance of *sacred rites.* But, that in a secular point of view, a male child is not considered as the son of his father's brethren—and that to take the heritage *as a son* of his uncle, he must be adopted; that spiritually considered he confers benefits as a son, upon his uncles; that temporally considered, he does not, as a son, derive any benefits from

them—and that the son of a brother is *recommended*, in preference to all others, for adoption.

I find this explained, and I think satisfactorily, in an opinion given by *Goverdhana*, some time since a *Pundit* of the Supreme Court. He quotes *Vrihaspati* as follows:—If among several *uterine* brothers, *one* have a son born, the *whole* are considered as fathers. These authorities declare a nephew even as a son to a childless uncle—*effecting as a son would do*, the relief of his soul from the hell called *put*. It therefore follows that the adoption of any other son, during the existence of such nephew, *ought not* to take place, and that *he ought* to be preferred. *It must not* however, be inferred, that because such nephew be equal to a son in *this one respect*, that he is so in *any other without being qualified by adoption*—as, according to the following stanza of *Yajnyawalcya*, *his title* to *inherit* his uncle's estate, comes *after* that of the widow, daughter, daughter's son, *father*, mother, and uncle—whereas, *were he adopted*, he would *precede all these*.

The translator of the *Dattaca Mimansa* informs us in his annotations, that a fraud has been attempted in the *Kalika purana*—and that "an extract authentically made from that work would tend to establish the converse of the position, in favour of which it is adduced." I must say, that the story in its present state, to which this note applies, appears to me to be in conformity with the law which has been declared by *Menu* himself. The story is as follows; and if it cannot be instructive to any, it may yet prove entertaining to some—"And accordingly in the *Kalika purana*, an indication of *Vetala* and *Bhairava*, sons of *Siva*, becoming *both fathers* of male issue, *by means of the same son*, is thus found: 'The sages said, there is no salvation for one destitute of male issue. This is recognized in the world and the *Vedas*. *Vetala* and *Bhairava* formerly went to a mountain to perform devotion. Previously to that, they were unmarried,

nd sons of them are not mentioned, (as having been born or not born. If sons were born, O excellent of the regenerate,) we much wish to hear the particulars concerning them—*Markandeya* replied; salvation both in the next world and in this is not for one destitute of male issue: O excellent saints, those who are fathers of male issue, by means of their *own sons*, nd those of *brothers*, attain heaven. Having in this world attained great perfection, when *Vetala* and *Bhairava* reached the abode of the great deity, they were happy on the hill *Kailasa*. Then, O twice-born men *Nandi*, by order of *Siva*, as one consoling, addressed them in private, in the following *true*, and *instructive* speech. He said, 'Do you sons of *Siva*, destitute of male issue, exert yourselves in the production of *a son*. By one to whom a son is born, every where salvation is easily attained.' *Markandeya* continued—'Having heard these words of *Nandi*, they became elated in their hearts and said to him; we will make *one* son only. Accordingly *Bhairava* at some time, connected himself with *Urvasi*, a celestial nymph, and procreated a son, named *Suvesa*—*Vetala* also, affiliated him as his son: and in consequence, by means of this son, *both* attained heavenly salvation."

I shall now return to the *Dattaca Nirnaya*.

"*Narada* prohibits the adoption of a *sister's* son as a *Dattaca*, viz. The daughter's son, and sister's son, are considered as *lawful sons* among the *Sudras*, but among *Brahmuns*, and those of the three (superior) classes, the sister's son never attains filiation."

"Now, respecting the giving, and taking, a son into adoption—*Vasishtha*. A son formed of seminal fluids and of blood, proceeds from his father and mother, as an effect from its cause; *both parents* have power to give, sell, or desert him. *Let no one give or accept an only son*, since he must remain to raise up a progeny for ancestors. *Let not a woman give*

or *accept* a son, unless *with the* CONSENT *of her lord.*" "The prohibition of donation of an *only* son, is mentioned here to show the *sin* of so doing, and *not* the *invalidity* of the *act.*" "The donation or acceptance of a son by a wife, *without the consent of the husband,* is invalid." "The gift of an *eldest* son is *prohibited.*" "*Menu:* by the eldest, at the moment of his birth, the father, having begotten a son, discharges his debt to his own ancestors." "The donation of an *eldest* son, must therefore be attended with great sin."

The ceremonies to be performed at the time of adoption are then 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 the *castes;* and they may be said to be general only, and not indispensably applicable to any one *caste.*

In 1795, the cause of ***Kullean Sing*** v. ***Kirpa Sing*** and ***Bholee Sing*** was decided by the ***Sudder Dewannee Adawlut.*** It began in the ***Zillah*** Court of ***Tirhoot***—was taken to the provincial Court of ***Patna,*** and finally to the ***Sudder Dewannee Adawlut.*** In all the Courts there was judgement for the defendant ***Bholee Sing.*** I do not know why ***Kirpa Sing*** was made a party to the suit. He does not appear by the report to have had any interest in the question, or to have taken any part in the proceeding.

Soodee Sing left widows, and as their attorney, ***Kullean Sing*** instituted this suit. ***Soodee Sing*** a short time before his death made a ***verbal declaration,*** in the presence of several persons, that ***he adopted*** the ***Defendant Bholee Sing,*** but ***no religious ceremony*** was observed on the occasion. After the death of ***Soodee Sing,*** ***Bholee Sing*** performed the obsequies, and was acknowledged as the heir, and a turban was bound round his head by direction of the eldest widow, in token of his succession.

Upon these facts being established, *Soodee Sing* had judgement in the *Zillah* Court of *Tirhoot*.

In the provincial Court of *Patna*, this judgement was affirmed.

There was then an appeal to the *Sudder Dewannee Adawlut* where it was insisted that *sufficient forms* to *constitute adoption had not been observed*—and at all events that *Bholee Sing* could not take both the hereditary and acquired property of the adopter. The *Pundits* declared that *the adoption was valid*—and *that all Soodee Sing's property*, real or personal, hereditary or acquired, devolved exclusively upon *Bholee Sing*.

My purpose is to confine myself to the *Hindoo* law *as it is current in Bengal*. I therefore mention that the above decision took place by authority of the law as it prevails in *Mit'hila*. I think it however, not inapplicable, because I have been assured that it is a great relaxation of strictness in the doctrine which formerly prevailed by authority of the *Mit'hila* school.

The law of *Bengal* is in many respects *substantially* different from that which prevails in other parts of *India*. In other parts, the widow of one of an undivided family will be entitled to maintenance only—in Bengal she will succeed to her husband's share of the estate; but I need not multiply instances.

Whether the Courts throughout our dominions will imitate each other in their spirit of administering the law, remains to be seen. Where the *right* is in question, the *lex loci* ought to prevail; but in their efforts to get rid of superfluous forms—to remove mere ceremony out of the way of Justice; and to secure to every man that which he is entitled to by the laws of his birth place, the courts I should think, ought to be consistent, and guide themselves by the same liberal rules.

The above, it is true, was a *critrima* adoption; but no *religious ceremonies were observed*—and the parties adopting and adopted *ought to have previously bathed* according to the strictness of law.

There are various, and contradictory opinions, concerning the rights of an adopted son *(Dattaca.)* Some say that he is *heir generally* to the *kinsmen* of his adopting father, and others that he is heir to the *adopting father*, but *not to his kinsmen.* This difference of opinion will be found fully displayed in the answers given by *Pundits* to questions which were propounded arising out of the case of *Gourbullub* against *Juggernotpersaud Mitter & al*, lately decided by the Supreme Court.

By *Menu*, *twelve* descriptions of sons have been enumerated. Some authors reduce the number to *eleven*, and some extend it to *thirteen*—but the discordancy of *opinion* seems chiefly to arise from the order in which they are, and the order in which it is alleged they ought to be, arranged. Some say that *Menu's* collocation of them has been altered, and others that it now stands as it originally stood. It is however, admitted, that the first six as they have been, or as they are supposed to have been, placed by *Menu*, are *heirs of kinsmen*, and the others not. This rule must be inoperative, unless the collocation of *Menu* can be proved. Evidence is not now to be procured, and assertions, equally confident if contrary to each other, are equally inconclusive.

As the adopted son has been rendered by his adoption, incapable of heirship to his own natural family, and as he stands in the relation of a begotten son to the father adopting him, it seems reasonable that all the rights of a begotten son, which are not expressly taken away, should be enjoyed by him—and this is the prevalent opinion.

In the *Mitacshara* it is said, "A given son must *never claim the family*

and *estate of his natural father.*" And in the case of *Srinath Serma* v. *Radhakaunt*, it was expressly held that one son, *(Kewulram)* who had been adopted into another family, was thereby excluded from any share of the estate to which he would have been entitled, (together with his own natural kindred) if he had not been so adopted. In the case of *Dutnarian Sing*, *Ajeet Sing* and *Bukshee Sing* v. *Rughoobeer Sing*, it was decided that *Bhoop Sing*, was excluded from taking any share of his natural father's estate, but that he was to take the share of *Buktawur Sing*, by whom he had been adopted. The first of these cases was decided in the *Sudder Dewannee Adawlut* in 1796. The other in the same Court in 1799.

The order, or supposed order, of *Menu's* arrangement, has been very much relied on in the opinions which were given in *Gowrbullub's* case. Of the *twelve* modes of affiliation enumerated by *Menu*, *ten* are generally exploded, and the son *begotten*, and the son *given*, are the *only two* recognized in this degenerate, or *Kali* age of the world. But we might nevertheless be satisfied as to the rights of a *son given*, by the place in which he stood upon *Menu's* list, if *Menu's* collocation could be ascertained.

Vrihaspati speaks "of the *thirteen* sons, who have been enumerated by *Menu* in their order." And with reference to this we find in the *Dattaca Chandrika*, "of these however, *in the present age*, all are not recognized. For a text recites, 'sons of many descriptions, who were made by the *ancient Saints*, cannot now be adopted by men, by reason of their deficiency of power;' and against those, other than the *son given*, being substitutes, there is a *prohibition* in a passage of law, wherein, after having been premised—'The adoption, as sons of those other than the *legitimate* son, and the son *given*,' it is subjoined, 'This rule, sages pronounce to be avoided in the *Kali* age.'" Upon the words, "in a passage of law" there is the following note; "This passage, which is frequently cited, is

attributed to the *Aditya purana*, and in its complete state is thus, 'The adoption, as sons of those, *other* than the *legitimate* son, and son *given*; the *procreation* of issue by a *brother-in-law*; the assuming the state of an anchoret; these rules, sages pronounce to be avoided in the *Kali* age.'"

Upon this subject, *Jagannat'ha*, is in his commentary, much more distinct and satisfactory than he usually is. He says, "among the *twelve* descriptions of sons, begotten in lawful wedlock, and the rest, *any others, but the son of the body* and *the son given*, are FORBIDDEN in the *Kali* age.* Thus the *Aditya purana*, premising, 'the filiation of any but a son *lawfully begotten*, or *given in adoption by his parents*'—proceeds; 'these parts of *ancient* law, were abrogated by wise legislators, *as the cases arose*, at the beginning of the *Kali* age, with an intent of securing mankind *from evil*,' that is, with an intent of *preventing the guilt* of mankind; the term bears the sense of prevention, as in the phrase, 'smoke made as a precaution against gnats,' for that is one of the senses ascribed to this term, in the Dictionary of *Amera*. The meaning *therefore* is, mankind would be *culpable*, if the practice of raising up a son on the wife of a kinsman, and so forth, were *now* followed. So *Vachespati Bhattacharya* expounds the phrase; but others explain the terms 'for the sake of preserving mankind; the word used signifies 'intend' as in the phrase 'wood intended for a post to be erected as a memorial of a sacrifice performed.' *Consequently* the meaning is this; mankind would *perish*, if the practice of raising up a son on the wife of a kinsman, and so forth, were *now* followed. *Formerly*, men proceeded, *without* amorous dalliance, to *procreate issue on a brother's wife*, (who is similar to a mother or a daughter-in-law) with the *sole view* of *raising up offspring to a brother: now* men being governed by *lust*, and *grovelling appetites*, and their passions being excited, by *simply* looking on

* I have seen in manuscript the opinions of several eminent *Pundits* upon this point, and they concur in saying, that in this (the Kali) age the son begotten in lawful wedlock, and the *Dattrim*, or son given, are the only two known.

the face of a woman in private, they would *repeatedly* approach a brother's widow under *pretence* of raising up issue to him; mankind would thus be *culpable*, and *perish* through the prevalence of *sin*. In *like manner sufficient* reasons may be assigned for the prohibition of appointing a daughter, and so forth. Again, by the term 'powers' in the text of *Vrihaspati*, is meant, not only devotion, but the consequence of it, namely, command over the senses;—among these *twelve* descriptions of sons, we must *only now* admit the rules concerning a son *given in adoption*, and *one legally begotten*. The law concerning *the rest*, has been inserted to complete that part of the book; as well for the use of those, who not having seen such *prohibitory* texts, *admit* the filiation of *other sons*. Thus in the country of *Odra* (Orissa) it is still the practice with some people to raise up issue on the wife of a brother."

In the *Adytya purana* we find, "The filiation of *any* but a son *legally begotten*, or *given* in *adoption* by his parents, is a part of ancient law *abrogated* in the *Kali* age"—and *Jagannat'ha* upon this says, "the son lawfully *begotten*, and the son *given* in adoption, are approved in the *Kali* age."

I think we have sufficient to justify the conclusion, that there are now two descriptions only of sons, namely the son *begotten*, and the son *given*, recognized by the *Hindoo* law—and admitting that the establishment of this fact, does not fix the rights of a son given in adoption, it may still be affirmed that he has the balance of authorities, as well as the reason of the thing in his favor. *Jagannat'ha* says, "But in fact, *all sons*, whether born of a twice married woman or the like, or *given* in *adoption*, and so forth, *are heirs to kinsmen*, as well as to their own fathers. Yet, *if void of good qualities*, they *shall not take the heritage of a kinsman*;"—again, "It appears to be the *present* practice for a son *given in adoption*, who performs the

acts *prescribed to his class,* whether *constant, occasional,* or *voluntary,* such as sacrifice, consecration of pools, and so forth, to take the *inheritance* of his *paternal uncles, and the rest. This we hold to be proper.*"

I must observe, although *Jagannat'ha,* in one place, speaking of adopted sons, says, "*if void of good qualities they shall not take the heritage of a kinsman;*" in *another* he affirms that "the filiation of a son *given in adoption* being admitted by the *Adytya purana* in the *Kali* age, *eminent devotion* is *not required* for the adoption of *such a son, any more* than for *a son legally begotten.* The *son given,* like the son *begotten in lawful wedlock,* is therefore superior to the rest."

From all this, and what follows, we may conclude, that there are two descriptions of sons only, now known to the *Hindoo* law. One a son begotten in wedlock, the other a son *given in adoption.* That a man cannot adopt a son from any *caste* but that, to which he himself belongs—and that a son having been adopted, his rights no longer require an *eminence* or *transcendency* of *virtue* for their confirmation.

Śri Natha Bhatta has collected the authorities for and against the right of the *son given,* (i. e. Dattaca) to inherit as heir of *kinsmen.*

He says, "Now as to the point whether the *Dattaca's* title to inherit, extends to the property of kinsmen allied by the funeral cake, or only to that of the father, or whether he be totally precluded from a right of inheritance, the learned differ on this point, from the existence of authorities at variance with each other."

I shall here observe, although texts are to be found which go to a total preclusion of the *Dattaca* from the right of inheritance, that the only question at all contestable, is, whether his right of heirship shall be confined

to his adopting father, or extended to that of the adopting father's *kinsmen* also.

Sri Natha Bhatta has placed the *son given* (*Dattaca*) the *third* in *Menu's* enumeration, wherein he is said to be a *kinsman* and *heir*. I do not know upon what authority it is that the genuineness of this collocation is either affirmed or denied. Transposition may have taken place by the carelessness or design of copiers; and the art of printing having not come into use when the original manuscript was lost, it became difficult, if not impossible, either to correct an error, or to prove the fidelity of transcribers. The prescripts of *Menu* would be received with submission if they could but be ascertained.

Of *twelve* sons, he has said, six are, and six are not, heirs. This is not doubted: but the question is, has he placed the *son given* among the first six, or the last? I should think it incumbent upon those who dispute the arrangement laid down in one copy, to show that there is an arrangement inconsistent with it laid down in another of equal authenticity, or to adduce some reason, whereby we may be justified in rejecting one classification, before we are desired to substitute another.

We cannot but suppose that the copy from which *Sir William Jones* translated the ordinances of *Menu* according to the gloss of *Culluca*, was selected as authentic. In the translation we find, "Of the *twelve* sons of men, whom *Menu* (sprung from the self-existent) has named, six are kinsmen and heirs; six not heirs, *except to their own fathers*, but kinsmen." "The son begotten by a man himself in *lawful wedlock*, the son of his wife, begotten *in the manner* before described, A SON GIVEN TO HIM, *a son made, or adopted*, a son of concealed birth, or *whose real father cannot be known*, and a son rejected by his *natural parents*, are the six *kinsmen and heirs*." "The son of a young woman *unmarried*, and the son of a pregnant bride,

a son bought, a son by a twice-married woman, a son self given, and a son by a *Sudra*, are the six kinsmen but *not heirs* to collaterals." This, if it be authority at all, is conclusive. *Sri Natha Bhatta* adds, after having enumerated the authors for and against the right of a *Dattaca* to heirship—"Upon this point some hold that as the *Dattaca is entitled* to offer the cake at the *Parbana Sraddha* under the authorities quoted from *Menu*, &c. *his title to inherit the property of kinsmen follows*—others *denying* the title of the *Dattaca* to offer the cake at the *Parbon Sraddha*, under the authorities quoted from *Sanc'ha*, *Lic'hita*, &c. who rank the *Dattaca* among the inferior order of sons, *deny also his right to inherit* the *property* of *kinsmen*, but allow his title to inherit that of his father. This contrariety of opinion is *displeasing*, and we call your attention to a mode of reconciling the matter. Where one passage of the *Veda*, is at variance with another, the *applicability* of the *case* is to be considered. Where the *Veda* and codes of law are at variance, the *Veda* prevails. From a parity of reasoning, considering the texts of *Menu*, &c. as applicable to the superior descriptions of *Dattaca* son, adopted by a man himself during his life time, and of equal class, viz. 'He whom his father or mother gives to another under the ceremony of pouring water, provided the *donee* have no issue, *if the boy be of the same class and affectionately disposed*, is considered as a *Dattrim* son (i. e. son given)' and the texts of *Sanc'ha*, &c. as applicable to a *Dattaca* of *inferior* order, *not* of equal class, and adopted *by the wife; Yajnyawalcya* saying, 'That son whom his father or mother gives to another, shall be considered as a *Dattaca' without* any *specification of equality in point of class; Apastambee* also, pointing out a distinction where an adoption is *made by the wife*, the *apparent* contrariety no longer exists, and the *justness* of the *present* mode of *reconciliation* is *fully established*. *Bhava Deva Bhatta* speaking on the subject of *Dattaca* sons, adopted by the wife, with the consent of kinsmen, inheriting the property of *kinsmen* quotes *Apastambee*, 'The *Dattaca* who is adopted with the consent of kinsmen, allied by the funeral cake, by a wife *who*

has received her husband's direction, shall inherit the *property* of *kinsmen, otherwise* the property of the father, if with his consent'—*otherwise*, signifies adopted without the consent of kinsmen, and by the wife under the consent of the husband."

I must acknowledge that my perspicacity does not enable me to discover how a reconciliation has been established by *Sri Natha Bhatta.*

The following quotations I have taken from the *Dattaca Mimansa*—"On this subject *Atri* says, 'By a man *destitute of a son only*, must a substitute for the same always be adopted'"—"a man destitute of a son *(aputra)* is one to whom no son has been born, or whose son has died: for a text of *Saunaka* expresses, 'One to whom no son has been born, or whose son has died, *having fasted for a son, &c.*' Since it is shown by this, that the being so destitute, is a cause; in *omitting to adopt* a son, an *offence* even is *incurred;* for the precept enjoining the production of a son being *positive*, it results that the contravention of it, is the *cause* of an *offence;* and on defect of any son in general, *exclusion from heaven* is declared in the text 'Heaven awaits not one destitute of a son,' &c. And further, in the following passage, also, a son in general, is shown to be the cause of redemption from debt. 'A *Brahmana* immediately on being born, is produced a debtor in *three* obligations: to the *holy saints* for the practice of religious duties; to the *gods*, for the performance of sacrifice: to his *forefathers*, for offspring—or he is absolved from debt, who has a son: has performed sacrifices: and practices religious duties.'" "*Menu* also '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.'" "As for the instance, appearing, of the adoption as sons of *Devarata* and the rest by *Viswamitra*, and others, *although possessing male issue:* that from its repugnancy to the revealed law, as contained in passages before quoted must be understood (in the same

manner as eating the haunch of a dog, and so forth,) not to imply the existence of a revelation authorizing the act." "'By a man destitute of a son;' the word *son* here used is inclusive also of son's son or grandson, for through these the exclusion from heaven, denounced in such passages as 'Heaven awaits not one destitute of a son,' is removed: since it is declared in the text subjoined, that, the mansions of the happy are attained through the grandson and the other. 'By a son, a man conquers worlds; by a son's son, he enjoys immortality: and afterwards by the son of a grandson, he reaches the solar abode.'" The words 'by *a man* destitute of a son' are recited, and it is added, "From the *singular* number being here used, it follows; that the *same* son must not be adopted by two or three persons." It is then suggested that this would contradict the law respecting 'sons of two fathers' and answered. "It is not so: for, the state as son of two fathers, imports both a natural, and an adopting father; and the prohibition regards two adopting fathers. Thus, there is no contradiction."

From what has been already said, I conclude that *two* men could not, at any time, have *adopted* the *same son.*

The person adopted continues to be the son of his adopting father, even although a son or sons, should be begotten by him, after the adoption—but there is a difference of opinion respecting the share of the estate, which the son adopted shall, in such a case, receive. Some of the opinions turn upon the supposition of the person adopted, being of a class, *different* from that of the person adopting. No doubt can at present exist upon *that ground,* because the adopter and adopted must be of the *same class.* It is said by some, that if after the adoption of a son, a son be begotten by the adopting father, the son adopted shall have one-fourth, and the son begotten, three-fourths of the property—but *Davala* (with whom I believe a great majority of living authorities concur,) lays it down that the adopt-

ed son shall in this case, take *one-third*, and the begotten son *two-thirds* of the estate. *Mr. Sutherland*, in a note at the end of his translation of the *Dattaca Chandrika* (speaking of the adopted son's right to a *quarter* share) says, "This rule is founded on texts of *Vasisht'ha* and *Katyayana*, the latter of which however, is variously read—'a *third* part' is substituted by some for the more prevalent reading 'a *fourth* part;' the *difference* being adjusted with reference to the *qualities* of the claimants."

The general, if not universal, opinion among *Pundits*, is, that the adopted son is entitled, if a son be begotten by the adopter, to a *third* part of the estate. *Jagannat'ha*, after a great deal of contradictory *argumentation*, comes to this conclusion, "Consequently that text relates to a son given, and others *deficient in virtue*, and it shows, that if any one of six sons, namely, the son of the body and the rest, exist, he has a right to take a full share, and to perform the obsequies, and the *son given* or *other adopted* son, shall have a *third part* for his maintenance." If all this should prove tiresome to the reader, I shall only beg that he may endeavour to imagine what it must have been to the collector and writer of it.

To those who have made the *Hindoo* law any part of their study, it cannot appear strange that it is so unsettled and contradictory. Many of the opposing writers, are, in point of credit, equal to each other; and in regardlessness of consistency, texts are adopted by each for the purpose of sustaining his own particular doctrine. The obsolete, is confounded with the acknowledged, law. The context is often omitted, and passages which ought to be relatively considered, are quoted as if they were absolute and independent in themselves. We cannot therefore wonder that so little satisfaction is to be obtained from authority,—nor can we but lament that some effort has not long since been made to distinguish and separate those which are, from those which are not rules of action.

Mr. Colebrooke, in the preface to his translation of the *Daya-bhaga* and the *Mitacshara*, speaking of *Jagannat'ha's* Digest, says, "In the preface to the translation of the Digest, I hinted an opinion unfavorable to the arrangement of it, as it has been executed by the native compiler. I have been confirmed in that opinion of the compilation, since its publication; and indeed the author's method of discussing together, *the discordant opinions maintained by the lawyers of the several schools, without distinguishing in an intelligible manner which of them is the received doctrine of each school, but on the contrary, leaving it uncertain whether any of the opinions stated by him, do actually prevail, or which doctrine must now be considered to be in force, and which obsolete, renders his work of little utility to persons conversant with the law, and of still less service to those who are not versed in Indian jurisprudence, especially to the English reader, for whose use, through the medium of translation, the work was particularly intended.*"

Again, "In a general compilation, where the authorities are greatly multiplied, and the doctrines of many different schools and of numerous authors are contrasted and compared, the reader is at a loss to collect the doctrines of a particular school, and to follow the train of reasoning by which they are maintained. *He is confounded by the perpetual conflict of discordant opinions, and jarring deductions; and by the frequent transitions from the positions of one sect to the principles of another.*"

Of this, every person who has read for the purpose of gaining information upon any point of *Hindoo* law, must have had ample experience—"*natii sua forma manebat.*"

That Mr. Colebrooke should have been prevented from completing his own compilation, is greatly to be deplored. There is no man so well qualified for the performance of such a task. I have proceeded far enough to be satisfied of my own incompetency to the work which I have under-

taken—and from what I have already said upon the subject of adoption, the difficulty of laying down rules concerning it, cannot but have been sufficiently apparent—I have taken great pains by enquiry, and the collation of opinions, to ascertain the law—but the reader ought to be informed, that in some instances, I have been obliged to arbitrate by my own very fallible judgement, between contending authorities.

The following note of Mr. Colebrooke, which is to be found in his translation of the *Mitacshara*, may throw some light upon the subject of adoption in general: "*Raghunandana* in the *Udvaha-tatwa*, has quoted a passage from the *Calica purana*, which with the text of *Vasishtha, constitutes the ground work of the law of adoption, as received by his followers.* They construe the passage as an *unqualified prohibition* of the adoption of a youth or child *whose age exceeds five years*, and especially one whose initiation is advanced *beyond the ceremony of tonsure.* This is not admitted as a rigid maxim, by writers in other schools of law, and the *authenticity of the passage itself is contested by some*, and particularly by the author of the *Vyavahara mayuc'ha*, who observes truly, that it is wanting in many copies of the *Calica purana.* *Others allowing the text to be genuine, explain it in a sense* MORE CONSONANT TO THE GENERAL PRACTICE *which permits the adoption* of a RELATION *if not of a stranger*, more advanced both in age, *and in progress of initiation.* The following version of the passage conforms with the interpretation given of it by *Nanda Pandita* in the *Dattaca Mimansa*, 'Sons given and the rest, though sprung from the seed of another, yet being duly *initiated by the adopter under his own family name, become sons of the adoptive parent.* A son having been regularly initiated under the *family name of his natural father, unto the ceremony of tonsure,* DOES NOT BECOME THE SON OF ANOTHER MAN. When indeed, *the ceremony of tonsure*, and other rites of *initiation are performed* BY THE ADOPTER *under his own family name, then* ONLY can sons given and the rest, *be considered*

as issue: else they are termed slaves. *After their fifth year,* O king, *sons are not to be adopted.* But, having taken a *boy five years old,* the adopter should first perform the sacrifice for male issue.'"

It must be recollected that I here confine myself to the *Dattaca* form of adoption, and to the law concerning such adoption, as it prevails in *Bengal.*

In the law of adoption, there are some important distinctions made between the three superior classes, and the fourth class, or *Soodras.* In the three superior classes, a boy cannot be adopted after having been invested with the *poitah* or string, characteristic of this caste. In the fourth class, there is no such investiture, or characteristic distinction.

Mr. Colebrooke, in a note to his translation of the Digest, says, "*Upanayana,* investiture with the marks of the class, performed in the *eighth* year from the *conception* of a *Brahmana,* but it may be anticipated in the FIFTH, or be delayed to the *sixteenth* years."

The following is a note of *Mr. Sutherland* to his translation of the *Dattaca Chandrika:* "Different seasons are prescribed for the performance of the *Upanayana,* or rite of investiture, of the characteristic cord, and other peculiar marks on a *Brahmana, Kshetriya,* and *Vaisya,* respectively. These seasons are indicated in the following text of *Yajnyawalcya,* translated according to the commentary in the *Mitacshara,* "The *Upanayana* rite of a *Brahmana* takes place in his *eighth* year from *conception* or the eighth year of his age; of *Kshetriyas* in the eleventh; of *Vaisyas* in the twelfth year from their conception or birth respectively, some hold according to the custom of the peculiar family of the individual." Another text of the same author, relative to the extent of the period for the performance of this rite occurs—"The period for the performance of this *Upanayana* rite, of a *Brahmana, Kshetriya,* and *Vaisya* respectively, ex-

tends to the sixteenth, twenty-second and twenty-fourth years. Subsequent thereto should the rite be unperformed, they become outcasts, and uninitiated persons, excluded from participation in religious rites, and incapable of being taught the *Savitri*; except on the performance of a sacrament denominated *Vratyastoma*."

In these three castes the ceremony of *Chundacarana* or tonsure, must be performed before the *Upanayana*, or investiture with the *poitah*, and investiture with the *poitah* must take place before any of them can be married. Tonsure may, and it is said ought to, take place at the age of two years—so that it is not *necessarily* to be immediately followed by investiture with the *poitah*; but as this investiture cannot take place earlier than the age of five years, the consequence is, that marriage cannot be contracted before the attainment of the fifth year.

Soodras may be married at any period of life, however early, but tonsure must previously take place.

I shall now proceed to lay down such rules as I conceive to be established by the *Hindoo* law, as it is prevalent in *Bengal*.

1st. A *Hindoo* cannot be adopted after his marriage. This rule applies generally to all the classes.

2d. Adoption cannot take place in any of the classes after the ceremony of tonsure shall have been performed.

3d. Adoption cannot take place in any of the classes, after the party to be adopted shall have completed his *fifth* year. N. B.—There is a decision which must be attended to with reference to this rule. It has been decided by the *Sudder Dewannee Adawlut*, that a boy of the age of *eight*

years may be adopted, provided the *shunkshkar* or initiatory ceremonies (which include tonsure) *have not been* performed in the family of the *natural*, but *have been* performed in the family of the *adopting*, father. The legality of this decision has certainly been questioned; and the *Pundits* to whom I have spoken upon the subject, declare that adoption cannot take place after the age of five years has been completed, by the boy to be adopted. It must however, be admitted that it is better to abide by any determination than to have the law entirely unknown.

In the *Sudder Dewannee Adawlut* Reports for 1806, I find the case of *Kerutnarain* v. *Mussummut Bhobinisree*, cause 22. By this decision it would appear that adoption cannot take place if the ceremony of tonsure *has been* performed in the *natural* father's family; or if it is *not performed* in the family *of the adopter*. In the "Remark" upon this case it is said, if the adoption be of a *near relation* on the *paternal side*, it will be valid although the age of the person adopted exceed *eight years*, but it is not any where affirmed that adoption will be good, or can take place, after tonsure performed in the *natural* family.

The cause was first brought on, in the *Zillah* Court of *Dacca Jelalpore*; and it appeared that the boy, who had been adopted with the usual legal solemnities, was about the age of *eight* years at the time of his adoption. The legality of this adoption was questioned—and on a reference to the Court *Pundit*, he said, "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 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.*"

It is added "that *tonsure* and *other accompanying ceremonies*, were *ascertained* to *have been performed* SOLELY in the *family of the adopter*, and NOT

in that of the natural father." This adoption was established by the *Zillah* Judge.

There was an appeal to the Provincial Court of *Dacca*, and there the *Pundit* gave it as his opinion, *that the adoption of a child above the age of five years is illegal*—and that the opinion of the *Zillah* Court *Pundit* was WHOLLY ERRONEOUS. The decree of the *Zillah* Judge was accordingly *reversed.*

From this reversal, there was an appeal to the *Sudder Dewannee Adawlut*, the *Pundits* of which Court said, that according to the law of *Bengal*, the adoption of a boy above *five* years of age, though the selection be *not laudable*, is valid, provided the *shunkshkar*, or initiatory ceremonies, *have been performed in the family of the adopter*, AND NOT IN THAT OF THE NATURAL FATHER. The Court determined that this adoption at the age of *eight* years, *was valid.*

From the "*Remark*" upon this case, I give the following quotation—"A passage cited as an authority of law by the *Hindoo* 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 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 practiced, the settled doctrine is, that the boy's age must be such, that

his *initiation, the principal ceremony of which is tonsure, may be yet performed in the adopter's name and family.*"

This report would have been more satisfactory, if it had stated whether the boy adopted, was, or was not, related to the adopting family. We have the authority of the *Zillah* Court *Pundit* and of the *Sudder Dewannee Adawlut Pundits* confirmed by the *Sudder Dewannee Adawlut* Court, for saying that although it is not laudable, it is legal, to adopt a boy of the age of *eight years.* In the *Remark* it is said that a boy nearly related in the *paternal* line, may be adopted at a period of life *exceeding eight years* —and there is no reason to conclude that the boy in question was, *paternally* or otherwise, related to the adopting family. We must therefore, I think, take the decision to have been that *any boy related or not,* may be adopted at the age of *eight years,* provided the *shunkshkar remains to be performed,* and *is performed in the adopting family.*

The Provincial Court *Pundit* gave it as his 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." This is certainly in conformity with the general way of thinking, and with a great majority of the written authorities, on the subject— and in the case of *Gopeemohun Deb,* although he was a nephew, a *brother's son* of the adopter, I know it was the opinion of all the *Pundits* who were consulted on his behalf, that proof of his being under the age of *five years* at the time of his adoption was indispensable.

But supposing the decision of *Kernarain* v. *Bhobinesree* to be conclusive authority, we must now take it to be established that a boy of the age of *eight* years is eligible to adoption, provided the initiatory ceremonies have *not been* performed in his *natural,* and *have been* performed in his *adopting,* family.

Instructive and otherwise useful as the *Remarks* on these decided cases may be, I do not know that they are received as authority.

Those who are against an extension of the age from five to eight years, appear to have some reason on their side. They say that a child cannot be taken at too early a period of life, into adoption. That he may be so taken at the moment of his birth. That as he is to make one of his adopting father's family, he ought to enter it with a mind completely unoccupied, and ready to receive all the notions, impressions, and peculiar sentiments, of that family of which he has become a member. That he ought not to continue with his natural family until his affections are fixed and cannot be transferred to the family adopting him. This is all true, but we must recollect that adoption is a voluntary act, and that it is in the option of the adopter to take, or not to take, a son under such disadvantages.

These considerations however, do not in any manner affect public policy, but are confined in their application to the parties alone. One may retain his son in his own family, if from any motive, he feels an inclination to do so. The other will not receive him if he is not satisfied that his expectations will be fulfilled by the adoption. In such a case, I look upon certainty to be the great *desideratum*—and I wish, *because it has once been so decided*, that henceforth, the age of *eight* years, may be acknowledged as the period of life at which a boy can be adopted.

I shall now lay down a fourth rule; premising that I do so, because it is asserted with confidence in a remark upon the case I have noticed; and because I find upon enquiry, that *with respect to age*, a distinction between those who are, and those who are not, related *on the father's side*, is recognized by some authorities.

4th. If the adoption be of *a near relation on the paternal side;* as, of a *brother's son,* or *other nearest* relation of the husband, it will be valid, although effected at an age, exceeding that of *five* years.

I am aware that the above rule is not definite, but I cannot venture to make it so. In the remark it is said, that, such a relationship existing, the adoption "would be unquestionably valid at an age *much exceeding that specified,*" i. e. five years.

The report of this decision and the remark by which it is followed in the *Sudder Dewannee Adawlut,* do not go so far as we could wish, or as we might perhaps, have expected. It is not stated whether or not the tonsure of such a person as is mentioned in the 4th rule, must have been unperformed in the family of his natural father, and must be performed in the family of his adopting father, and in his adopting father's name. I conceive, if that ceremony had been performed in the natural father's family and name, that the boy could not afterwards be adopted.

But if the decision of the *Sudder Dewannee Adawlut* be admitted as law, we must in the 3d rule read *eighth* instead of *fifth* year—and if the 4th rule be considered as law, upon the authority of the remark on that decision, we must look upon it as an exception to the generality of the 3d rule—as the 3d rule now stands. The 2d rule, I believe, from the best information I have been able to obtain, does not admit of any qualification.

5th. In this age of the world, the adopter and the adopted must belong to the same class—a man of one class, cannot take a boy of another, into adoption.

6th. A man having a son born of his body, cannot take a son in adoption—but see rule 23.

7th. The gift of an *eldest* son in adoption is forbidden as sinful.

8th. The gift of an *only* son in adoption is absolutely prohibited—an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable *piacle*.* It is indeed said that an only son *may be so given*—but it might be said in the same sense, that a man *may* perpetrate any wickedness if he be content to forego all hopes of salvation, and be condemned to everlasting punishment.

See the case of *Veerapermal Pillay* v. *Narain Pillay*, as it is noticed towards the end of this chapter. The Recorder of *Madras* therein says, "The *general* rule of the *Hindoo* law certainly is, that an *only* or *eldest* son, ought not to be given in adoption; because he has the obsequies of his natural ancestors to attend to; *and adoption as completely transfers him from his own family, as though he had never belonged to it.*"

There was no question as to the legality of giving an *only* son in adoption before the Recorder—but he lays it down *extra-judicially*, that an only son may be legally so given and received.

By the gift of an only son, the very deficiency, which the power of adoption is intended to prevent, must necessarily be occasioned.

Nothing in the *Hindoo* law is more peremptorily interdicted than the gift of an *only* son in adoption. Even the gift of an *eldest* son, is forbidden as sinful.

The crime of giving an *eldest*, has never been considered so heinous, as that of giving an *only*, son. In the one case a *Hindoo* retains, in the other he casts away, the means of salvation. Considering the precepts, and in-

* I hope I shall be pardoned the introduction of this antiquated word; but none occurs to me at present, so applicable to my purpose.

junctions both positive and negative upon this subject, we must be convinced that he who gives his *only* son in adoption, is little less than an apostate from the *Hindoo* religion.

I shall have occasion to comment more at large upon the case of *Veerapermal Pillay* v. *Narain Pillay*. The Recorder appears to rely much upon the authority of *Jagannat'ha*, and that I believe is not generally received as oracular.

The *Pundits* with whom I have conversed, and who have told me that *usage* might justify a *Hindoo* in giving away his *only* son, have added that he could *not be entirely disposed of by his father*, but that it *still* would be his duty to perform the religious ceremonies of his *natural*, as well as those of his *adopting*, family.

A disconcerted expounder of the *Hindoo* law is sure to cast about for a place of refuge in his emergency—and so it was with my informants. When a manifest absurdity is the direct and immediate consequence of a *Pundit's* solution, any thing will be preferred by him to resiliency ; yet it generally happens, as it happened in this case, that an escape cannot be made from the dangers of one conclusion, without an exposure to others which are inevitable--and thus, although it is unquestionably true, that adoption *with respect to the performance of religious ceremonies*, (for the Recorder lays down his position somewhat too broadly,) transfers a son from his own natural family completely, yet those who contend for the right of giving him away, are compelled to qualify the doctrine by saying, that he may still perform the obsequies of his own natural ancestry. That is, he may, although he cannot, be given in adoption; *because* he may still perform those rites, from the performance of which he is utterly debarred by his law and his religion.

9th. The nearest relation in the male line ought to be adopted in pre-

ference to one more remote—but any person of the same caste or class is eligible. This however, in its *fullest extent* is applicable to *Soodras* only.

10th. In the *Brahman*, *Khettry*, and *Boice* castes, a child whom it would have been incest to beget, cannot be adopted. The son of a sister, or of a daughter therefore cannot be adopted by a *Brahman*, *Khettry*, or *Boice*. The son of a wife's sister may be adopted, because the marriage of one man to several sisters is permitted. The adoption of a brother's son is recommended, in preference to the son of any other. This however, if the old law by which a *Hindoo* was required to raise up a son by his deceased brother's widow, be considered, will not be found inconsistent with the general rule.

11th. A *Hindoo* having a grandson or a great grandson, cannot adopt a son; but although he has a great great grandson he may and ought to adopt a son. The great great grandson may, in this case, be properly adopted by a *Soodra*, but not by a *Hindoo* of either of the three superior classes. See Rule 23.

Mr. Sutherland in his synopsis says, "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 *grandson*, 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."

From the mention of *grandson* as well as *son's son* it would appear that

a man having a *grandson* by a *daughter*, cannot adopt a son : and I conceive that a man having a *great grandson* will be prevented as effectually from adopting, as he could be by having a grandson. " In default of the son, the grandson takes the inheritance ; and failing him, the *great grandson*. But a grandson whose father is dead, and a *great grandson*, whose father and grandfather are dead, participate equally in the inheritance with the son, for *they* WITHOUT DISTINCTION confer *equal benefits on the deceased owner of the property, by the presentation to him* of FUNERAL OFFERINGS *at solemn obsequies*."—*Daya-crama Sangraha.*

12th. The son of a sister, or of a daughter may be adopted by a *Soodra*. As to the three superior classes, the rule is, that they cannot adopt a son whom it would be incest to have begotten, and conversely, that they may adopt a son if without incest they could have begotten him.

The *reverend Saunaca Muni* (as he is called by *Goverdhana*) says, *Brahmins* should adopt sons from among their own *Sapindas*—and in failure of *Sapindas* from among those not *Sapindas*. Among *Sapindas* the brother's son is to be considered as the best. If a brother's son does not exist, a *Sapinda* who is also a *Sagotra* is to be chosen. If such is not to be found, a *Sapinda* not a *Sagotra*. If such is not to be found, a *Sagotra* not a *Sapinda*—and if such is not to be found, one neither a *Sagotra*, nor a *Sapinda*. *But in no case*, a *sister's son*, or a *daughter's son*, or those whom *common sense* prohibits the *adoption of*, such as a *brother*, a *paternal* uncle, or a *maternal* uncle. Among the three classes, i. e. *Brahmin*, *Khettry* and *Boice*, adoptions should be made of one of the same class. *The son who was not the first-born* is to be given in adoption. Among the *Soodras*, the adoption of a *sister's* son, and *daughter's* son is *valid*.

13th. If a son be adopted, and the adopting father afterwards have a son of his body ; the adopted son shall take *one-third* of his (the adopting

father's) estate; and the begotten son *two-thirds*. This is the proportion, in which I am satisfied, they are entitled to share.

14th. The rule, as I believe it to be, is that the begotten son or sons, shall take one share more than the son by adoption—or rather, that the begotten son, or sons, shall take two shares, and the adopted son one share. Thus, if one son be begotten after the adoption, he shall take two shares, and the adopted son one share, of the estate. If two sons be begotten after the adoption, the whole estate shall be divided into five parts, of which the adopted son shall take one, and the begotten sons two each. If three sons be begotten after adoption, the estate shall be divided into seven parts, of which the adopted son shall take one, and each of the begotten sons two. This rule will apply whatever number of sons may be begotten by a man, after he shall have taken one in adoption. I have had much trouble in endeavouring to ascertain the law upon this point, and the above rule is the result of my researches.

15th. *It is said* that a man by the adoption of a son, does not lose any of the power which he would have had over his estate, if he never had adopted—or in other terms, that a son having been adopted, shall not, in virtue of his adoption, have any *special claim* upon his adopting father's property—that a man's power, as to the disposal of his estate, is not affected by his having adopted a son, any more than it would have been by his having had sons of his body only. I had understood the rule to be otherwise, and believed that the right of an adopted son to the whole of his adopting father's estate, if no son should be begotten, was *indefeisible* —or indefeisible as to his *proportion*, if a son or sons should be begotten, after the adoption. This right, was as I conceived, founded upon a principle of justice, by which he who had been taken away from his own natural family, and who had thereby been deprived of the rights he was born to; was protected against the effects of that partiality, which might be

supposed to operate in favor of a begotten son. In the books, I cannot find any thing expressly upon the subject; and I am told that the distinction which I believed to have existed, does not exist, in favor of the adopted son. I still entertain much doubt upon this point, although I have been assured, that the right of an adopted son is equal to, and no greater than, that of a son begotten—and that whatever may be done by a father to prejudice the one, may, in like manner be done by him, to prejudice the other. I have sought for authorities in vain; but to me it appears that the claims of the adopted son upon the person adopting him, are founded in reason. I shall add the case of *Goopeemohun Deb* v. *Raja Rajcrishna* to this chapter. That case may be said to have involved the question, and I am sorry that there was not an opportunity of deciding it, expressly upon that ground.

16th. A son adopted, is considered as not being any longer a member of, or related to, his own natural family; except in so far as the families out of which, and into which, the adoption was effected, were theretofore related by blood. This principle seems applicable to *inheritance* and the *performance* of religious *ceremonies* only—for a boy adopted, cannot intermarry with any female of his *natural* family, if she be within the degree of consanguinity termed a *Sapinda;* or if he might not have married her, had he never been adopted.

N. B. *Sapindas* include seven, i. e. *three* in *ascent*, and *three* in *descent* from the party himself. He stands in the middle, and makes the *seventh* —but marriage is prohibited to a much greater extent of consanguinity; for a *Hindoo* cannot marry the direct descendant of a *paternal* ancestor within the *seventh*, or of a *maternal* ancestor within the *fifth* degree. This prohibition is extended *downwards* to the same extent. The same consanguineous restriction continues to bind the adopted son in his own natural family, and must regulate his marriage in the family into which he has been taken for adoption.

"The relation of *Sapinda*, is next considered. This extends to *three* degrees, in the family of the *natural* father, by reason of consanguinity: and in that of the *adopter*, through connection by the funeral cake. This *Karshnajini* declares, 'As many as there may be degrees of forefathers: with so many, their own forefathers, let *sons given* and the rest associate the deceased. In order, their sons with two forefathers, their grandsons with one, should do the same. The *fourth* degree is excluded. This relation of *Sapinda* extends to three degrees.'"—*Dattaca Chandrika.*

"But the connection by funeral oblations, of the *absolutely adopted* son, obtains in the family of the *adoptive father only*—on account of the extinction of the funeral oblation of him, who hath given away his son, intimated in the following text of *Menu* before cited; '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.'"—*Dat. Chan.*

"The *son given* must never claim his *natural* father's *family*, and *estate*. Thus the obsequies, that is, the funeral repast which *would have been performed by the son given*, fails of him, who has given away his son. The author of the *Chandrika* thus explains, 'By this it is declared, that by the act alone, creating the filial relation, property of the son given in the estate of his *adopter* is established, *and connection to him as belonging to the same family, ensues.* But through extinction of the filial relation, from *the mere gift*, the property of the son given, in the estate of the *giver* is *extinguished, and connection to the family of the giver annulled.*' But although by the text of *Menu* connection to the family of *the natural parent is annulled*, what proof is there of the connection to the family of the adopter being established? On this point *Vrihat Menu* declares, '*Sons given*, purchased, and the rest, retain relation of *Sapinda* to the *natural* father as ex-

tending to the *fifth* and *seventh* degrees; like this, their general family, which is also that of their adopter.' The relation as *Sapinda* of *sons given*, purchased, and the rest to the *natural parent* continues: by gift and so forth, *that does not fail*—for by reason of consisting in connection *through containing portions of the natural father*, IT IS NOT POSSIBLY TO BE REMOVED, *while the body lasts. By this it is declared, that the relation of Sapinda in question* IS THE CONSANGUINEAL CONNECTION ONLY—*and not connection* by the *pinda or funeral cake;* for that the latter is barred is shown by this passage—'Of him who has given away his son, the obsequies fail.' Anticipating a question as to the extent of this relation as *Sapinda*, the author adds, 'extending to the *fifth* and *seventh* degree, &c.' The meaning is this, 'extending to the *fifth* degree' *completing five*, that is, *embracing* five degrees. So of the expression to the *seventh* degree. *Gautama* says, 'with the kinsmen, on the side of the *father*, viz. the *procreator* beyond the *seventh degree;* and with those on the *mother's* side beyond the *fifth, &c.*'"—*Dattaca Mimansa.*

The author *Nanda Pandita* reasons very much at large—but I cannot say that I have either discovered his object, or comprehended his arguments. He writes as if he would "confute; change hands, and still confute." The result, as I understand it, is, that the *Sapinda* relation, as applicable to the performance of exequial rites, extends to three upwards and three downwards; and as applicable to marriage, that it includes *seven* on the *paternal*, and *five* on the *maternal*, side. That the adopted son is to perform the religious rites of the family into which he is adopted, not those of that from which he was taken for adoption—but that with respect to marriage, he is restricted alike in his natural and in his adopting family. This is confirmed by living authorities.

Nanda Pandita, after having quoted a text from *Parijata*, proceeds—"with respect to the *sons given, and the rest, being sons of two fathers*, this

text, and that of *Satvashadha* are authority. *With the same intent*, it is declared also, in the *Pravara manjari*—'For the most part sons *given*, purchased, and made; the son of the appointed daughter and so forth, belong to both general families, with *connection to the patriarchal saints* of *each*.' From this alone, on the *occasion of the marriage* of those, appertaining to two families, both families, with each of which their connection to the patriarchal saints is involved, *must be avoided*."

17th. It is *proper* to adopt the nearest relation in the male line, but this is not absolutely enjoined. The son of a brother, is to be *preferred* for adoption. A *Sapinda* in the male line, *ought*, if procurable to be adopted. The nearer relation is preferable to the more remote; yet any person of the same *caste* is eligible. The restrictions in the three superior classes must be remembered.

18th. If a man, not having male issue, shall omit, in his life time, to adopt a son; the widow or widows, may, in *pursuance of his instructions*, adopt one after his death.

19th. Adoption, by a widow, or widows, *without instructions from the husband* for that purpose, is a mere nullity. This I lay down with confidence as the law. *Vasishtha* says, "let not a woman either give or receive a son in adoption, unless with the assent of her husband." After the death of her husband, the widow is not competent to *give* one of his sons in adoption. It appeared in the case of *Gowrbullub* against *Juggernothpersaud Mitter*, and others, that *Rajah Rajebullub*, the father of *Mocundbullub*, by whose widow *Gowrbullub* was adopted, had been prevented from adopting a son, whom he had selected for the purpose, in consequence of the boy's father having died after the boy had been fixed upon for adoption—after his father had consented to give him in adoption, but before

the ceremony had been actually performed--and yet one writer (a commentator on the *Mitacshara*) contends for the *right* of a widow, both to give, and to receive a son in adoption. Another writer, admitting that a widow adopting, must have the sanction of her husband's kindred for the purpose, affirms that she may adopt a son without having had the authority of her husband. In truth there is not any rule, however it may be sanctioned by principle, or confirmed by duration, that is not denied or contradicted by some writer on the *Hindoo* law.

20th. The widow, or widows adopting, *ought* to guide themselves by the rules which are prescribed for the husband, and elect a child for adoption from among *his* relations, in the male line, as he himself (had he adopted in his life time) ought to have done,—but in the case of a widow or widows, the same latitude is allowed, which would have been permitted to the husband—yet as the widow's power to adopt, is entirely derived from her husband, his directions, if special, must be strictly pursued; and if his instructions be confined to the adoption of a particular boy, no other individual can be adopted by his widow.

The three following rules are laid down upon the authority of the *Sudder Dewannee Adawlut* reports.

21st. Two widows may, after the death of their husband, *if duly authorized by him,* adopt in succession to each other. That is, after the death of one widow, and the son who had been adopted by her, the surviving widow may adopt, and her adoption will be valid. This was so decided between *Shamchunder & al.* v. *Narayni Dabee & al. Sudder Dewannee Adawlut* reports 1807, cause 4. The particular nature of the authority given by the husband in this case, is not set forth in the report.

22d. A *Hindoo* may give authority to his wife to adopt a son condition-

ally. He may authorize her to adopt in the event of *the death of a son* whom he leaves surviving him;—but, if his own son should live, he cannot empower the widow to adopt, in case of a *disagreement* between her and the son.—Sud. Dew. Adaw. Rep. 1811, cause 5. ***Solukhna*** v. ***Ramdulol Pande & al.***

23d. A *Hindoo having adopted* a son on account of his eldest wife, may authorize his other wife to adopt a son *for herself;* and if this other wife do adopt a son for herself, after her husband's death, the son adopted by him for the eldest wife, still being alive, this adoption by the second wife, will be good, and the two sons so adopted will take the inheritance jointly.—Sud. Dew. Adaw. Rep. 1814, cause 12. ***Gourepershad Rai*** v. ***Jymala.***

I shall have occasion to notice these three cases more at large.

24th. The widow or widows authorized to adopt, are not bound to do so, within any given time; but the adoption *ought* to take place, as soon after the husband's death, as a child proper for the purpose can be procured.

25th. A child adopted by the widow or widows, will stand in the same relation to the deceased husband's family, as he would have done, had he been adopted by the husband himself, in his life time.

26th. If there be no son, begotten or adopted, the widow (for she is held to be related by the funeral cake) is to perform the ***Sradd'ha***, or obsequies of her husband; and, if her husband had been an *only* son, she is to perform the obsequies of his (her husband's) father and grandfather also. But this is confined to the ***Ecodisto***, or ***Sradd'ha*** on the death, and ***Saum-bustur***, or annual ***Sradd'ha***. The ***Parb'hun***, or monthly ***Sradd'ha*** cannot be

performed by a woman—and if there be not a begotten son, grandson, or great grandson, or a son adopted, this ceremony must be suspended.

27th. *Sradd'has* are to be performed by the nearest male relation in *descent*, whether the relation be by blood or by adoption. The widow may perform certain rites, being, as I have already observed, related by the funeral cake, or *Cheeta-pinda*.

28th. The widow is to perform such rites as she is competent to perform, until the son of her husband's body, or the son adopted by him or her, shall have attained a proper age for the purpose of performing them. This proper age, is supposed to be about five years, or when the boy is capable of enunciating articulately, the appropriate mystical words.

29th. If the widow, having been directed by her husband to do so, shall adopt a son during the life time of her husband's father, or after his death, he (her husband's father) having survived her husband, and having then died, not leaving either child or widow surviving; the son, so adopted, shall succeed not only to the estate of her husband, but to the estate of her husband's father also. To entitle a son so adopted, to succeed to the estate of the adopting widow's late husband's father, it does not seem necessary that the assent of the husband's father shall have been obtained to the adoption, but the directions of the adopting widow's husband, delivered in his life time, are indispensable. This rule, of course supposes, the husband of the adopting widow to have been the *only son* of his father.

I take it to be established, and indisputable, that the previous directions given by her husband for the purpose, are essential to the validity of an adoption made by his widow after his death. That with such a sanction she may, and without it she cannot, make a valid adoption. It is admitted that such an adoption will entitle the son adopted to the pro-

perty of the deceased, whose widow had, by his directions, adopted. Nor do I think, after what has been already set forth, it will be going too far to say, that a son, so adopted, becomes *heir to the kinsmen* of the person, by whose directions he was so adopted.

The principal question raised in the case of *Gowrbullub* v. *Juggernothpersaud Mitter and others*, was, whether or not *Gowrbullub* had a right to the estate of (the person who was called in the arguments) *his adopting grand-father*. The person so called (whether properly or otherwise) was *Rajah Rajebullub*. He had an *only child*, a son, called *Mocundbullub*—*Mocundbullub* married *Joymonee Dossee*, by whom he had not a child. Before his death, he had desired *Joymonee* to adopt a son—*Mocundbullub*, died three years before his father *Rajah Rajebullub*, and a short time after he had desired his wife *Joymonee* to adopt a son. She did not adopt until after the death of *Rajah Rajebullub* her husband's father. It was said, and found in an issue, that *Rajah Rajebullub* having heard of the instructions given by *Mocundbullub*, to *Joymonee*, to adopt a son, acquiesced in those instructions—but the consent of *Rajah Rajebullub* could not have affected the case. When it was expressed, he did not know who the boy to be adopted was. It is certain, as I take it, that *his* directions alone could not have authorized an adoption made by the widow of his son—the directions of *her husband* or *lord* being *necessary*—on the 24th of March, 1824, it was decreed that *Gowrbullub* (who had been adopted by *Joymonee*, in pursuance of instructions given to her for that purpose by her husband *Mocundbullub)* was entitled to the estate of *Mocundbullub*, and also to the estate of *Rajah Rajebullub*.

The case was in Equity—between *Gowrbullub*, complainant, and *Juggernothpersaud Mitter*, *Cosinot'h Mitter*, *Golucknot'h Mitter*, and *Gopeenot'h Mitter*, defendants.

The defendants were nephews (i. e. sons of the sister) of *Rajah Rajebul-*

lub, who died possessed of a very large property. They were the *heirs* of *Rajah Rajebullub*, and would have been entitled to his estate, had *Gowrbullub* not been adopted.

It has already been stated that *Rajebullub* had an only child, *Mocundbullub*, his son—*Mocundbullub* died in the Bengal year 1202, leaving a widow *(Joymonee Dossee)* but no child surviving him. A few days before the death of *Mocundbullub*, he directed his wife *(Joymonee)* to adopt a son. *Rajebullub* (the father of *Mocundbullub)* survived his son about three years, and died in the Bengal year 1205. He did not leave either widow or child surviving him. *Joymonee*, after the death of *Rajebullub*, adopted the complainant *Gowrbullub*, in pursuance of the instructions which she had received from her husband, *Mocundbullub*, in his life time.

In the course of the proceeding, as some importance seemed to have been attached to the fact of *Rajebullub* having confirmed the instructions which had been given by *Mocundbullub* to *Joymonee* relative to the adoption, and as one issue was to try whether *Gowrbullub* had been adopted as *Mocundbullub's* son, I enquired of the Court *Pundits* if it was necessary, that *at the time* when *Gowrbullub* was adopted, it should have been declared, at *whose instance* the adoption took place—or that he was adopted *by the desire* of *Rajebullub*, or of *Mocundbullub*, or of *both?* The *Pundits* answered, that it was perfectly *unnecessary*—because nothing but the desire of her *own husband*, could sanction the adoption of a son by *Joymonee*—that *without this sanction*, the adoption would have been *utterly void*—and that with it, the declaration *would be superfluous*, inasmuch as the boy *must necessarily* be adopted *as the son* of the adopting widow's *late husband*, and that it could *not possibly be otherwise.*

Three issues, in which the complainant *Gowrbullub*, was ordered to be plaintiff, were directed to be tried.

1st. Whether *Joymonee* (the widow of *Mocundbullub)* had authority from *Mocundbullub* to adopt a son?

2d. Whether *Joymonee* (the widow of *Mocundbullub)* did adopt *Gowrbullub, as the son of Mocundbullub?*

3d. Whether *Rajebullub* (the father of *Mocundbullub)* did authorize, and assent to, the adoption of a son by *Joymonee?*

All these issues were found in the affirmative, or in favor of the plaintiff *Gowrbullub.*

The question of *Hindoo* law then arose, viz. Whether *Gowrbullub,* having been so adopted, became by his adoption, entitled to the estate of *Rajebullub,* his *adopting grand-father*—for it was admitted that he did, by his adoption, become entitled to the estate of *Mocundbullub,* his *adopting father.*

Upon this point, the two *Pundits* of the Supreme Court differed in opinion—one holding that *Gowrbullub* was entitled to the estate of *Mocundbullub* only—the other holding that he was entitled to the estate of *Mocundbullub,* and the estate of *Rajebullub* also. The *Pundit* who confined the right of *Gowrbullub* to the estate of *Mocundbullub,* delivered to me a paper (of which the following is a copy) in justification of his opinion.

"*Sancha* and *Likhita, Harita, Yajnyawalcya, Vishnu, Nareda* and *Devala,* are the seven sages that have ordained that a *given son,* that is, an adopted son, is *not* an heir to *kinsmen,* but that he is such only to his adopting father; and *Menu, Goutama,* and *Baudhayana,* are the three sages that have declared that he *is heir* to his adopting father *as well as to his father's kinsman.*

"In order to reconcile these contending passages, the authors and compilers of law treatises have advanced, that where such texts occur, they *intend* an *adopted son of transcendent merits*, and as such a meritorious son cannot be found in the present (*Cali*) age, the author of the *Daya-bhaga* has placed him among those who do *not* inherit kinsmen.

"*Hence there is no disagreement* between *Menu* and *Jimutavahana*, the author of that treatise, who, in the beginning of it, says, that he has composed the work for the information of such as *lose themselves in contention*, from not understanding the texts of *Menu* and other sages, and thereby makes appear the *superiority* of *Menu*, and the utility of *his own* work, in explaining the *intent* and *meaning* of *Menu*. Decisions are not formed *solely* by the texts of *Menu*, *because without* the *assistance of commentators* his *true meaning is not evident*, otherwise why a *sixth* portion or a *fifth* portion of the share of a lawfully begotten son, awarded to a *given son* is not held legal, but only an *one-third* share ordained him by *Devala* and other sages."

It will here be observed that this *Pundit*, has, as many *Pundits* before him, have, relied upon the efficacy of *transcendent merits*, for the purpose of *reconciling all differences* of opinion—but as he himself has informed us, that these "*transcendent merits*" are not to *be found* in the present *(Cali)* age, he has started another topic for controversy. The parties to the contest in question, were *Soodras;* and, as a preliminary to discussion, we ought to be told in what age of the world *transcendent merits* were expected from *Soodras*, or from any but those of the *three superior* classes. Connected with *Soodras*, I find *transcendent merits* in the books, mentioned once only. This point being settled, we are to decide, that *transcendent merit* is to be required, *when it is not to be found; because* it was expected *when it might have been attained.* There are distinctions between *Soodras* and the other three classes, which are perfectly obvious—and one writer

(*Vachispati*) has, as we have seen, denied to a *Soodra* the right of adoption at all, because the *Soodra* cannot perform the sacrament of *Homa*, and the prescribed prayers—and *Jagannat'ha* says generally, without adverting to distinctions of *caste*, that *eminent devotion* is *not required* in an adopted son, any more than in a son begotten. If, as is acknowledged, *transcendent merit* cannot exist in the *Kali* age—it is not easy to conceive how it can, at this day, either create differences, or reconcile them. At all events, if *transcendent merit* be *necessary* to the inheritance of an adopted son—and if transcendent merit is now "*not to be found*," it must follow that the adopted son's right to inherit, is, at this day, absolutely abolished. To this conclusion, such a mode as that which our *Pundit* has had recourse to, for the purpose of *reconciling differences* must obviously lead; and a denial of those rights, which are admitted by every day's practice to exist, and which the *Pundits* themselves (*except in special instances*) never fail to acknowledge, must be the consequence.

As the Supreme Court *Pundits* had differed in opinion, and as the case was of much importance on account of the magnitude of the stake contended for, and on account of the precedent which it was to form, I determined to get the best opinions which were to be obtained. It was submitted to the *Pundits* of the *Sudder Dewannee Adawlut*, put as the case of A, B, and C, and the adopted son. They both declared that a son adopted by C, the widow of B, was according to the statement, entitled, not only to the estate of B, but to the estate of A, the father of B.

After this, *Mr. William Hay Macnaghten*, at my desire, translated the case and circulated it for the opinions of the *Pundits* attached to the Courts in the *Moofussil*. They are all printed in the appendix—I have given them, not from thinking them valuable in themselves; but because an exhibition of them will prove, better than I otherwise could prove, the

nature of information likely to be obtained from the professional expounders of *Hindoo* law. I have not attempted to arrange them according to the side of the question which they favor, but have given them in the order in which they reached me.

No. 1. Benares Court of Appeal,
No. 2. Zillah of Allahabad,
No. 3. Zillah of Banda,
No. 4. Northern division of Bundlekund,
No. 5. Benares City Court,
No. 6. Zillah Jounpore,
No. 7. Zillah Ghazeepore,
No. 8. Zillah Mirzapore,
No. 9. Zillah Goruckpore,
No. 10. Barelly Provincial Court of Appeal,
No. 11. Zillah Agra,
No. 12. Zillah Alligurh,
No. 13. Zillah Barelly,
No. 14. Zillah Cawnpore,
No. 15. Zillah Meerut,
No. 16. Zillah Saharunpore,
No. 17. Moradabad,
No. 18. Zillah Furruckabad,
No. 19. Zillah Etawah,
No. 20. Moorshedabad Provincial Court of Appeal,
No. 21. Zillah Beerbhoom,
No. 22. Zillah Dinagepore,
No. 23. Moorshedabad City,
No. 24. Zillah Rungpore,
No. 25. Zillah Rajshahy,
No. 26. Zillah Bhagulpore,
No. 27. Zillah Purneah,
No. 28. Patna Provincial Court of Appeal,
No. 29. Zillah Behar,
No. 30. Patna City,
No. 31. Zillah Ramghur,
No. 32. Zillah Sarun,
No. 33. Zillah Shahabad,
No. 34. Zillah Tirhoot,
No. 35. Dacca Provincial Court of Appeal,
No. 36. Zillah Backergunge,
No. 37. Zillah Chittagong,
No. 38. Dacca City,
No. 39. Zillah Mymensingh,
No. 40. Zillah Sylhet,
No. 41. Zillah Dacca Jelalpore,
No. 42. Zillah Tipperah,
No. 43. Calcutta Provincial Court of Appeal,
No. 44. Zillah Jungle Mehauls,
No. 45. Zillah Nuddea,
No. 46. Zillah Burdwan,
No. 47. Zillah Midnapore,
No. 48. Zillah Hooghly,
No. 49. Zillah Jessore,
No. 50. Zillah 24-Pergunnahs,
No. 51. Zillah Cuttack.

In the statement which was sent to the Pundits of these Courts, the name *Ramcrishna* was substituted for *Gowrbullub*; the name *Ramhurry* for *Rajeballub*; the name *Ramtoonoo* for *Mocundbullub*, and the name *Hurrypryah* for *Joymonee*.

The case put then stood thus;—"*Ramtoonoo*, (a *Hindoo*,) in his last illness, and a few days before his death, desires his wife *Hurrypryah*, to adopt a son. *Ramtoonoo* dies, leaving his father *Ramhurry* surviving him. *Ramhurry*, (*Ramtoonoo's* father,) lives about three years after *Ramtoonoo*, and then dies, leaving neither widow nor child. A short time after the death of *Ramtoonoo*, *Ramhurry* hears that he (*Ramtoonoo*) had given directions to his (*Ramtoonoo's*) wife to adopt a son, and he approves of those directions. Children of the *brother** of *Ramhurry* were brought to *Ramhurry* in order that he might choose one for adoption. He selected one of the children to be adopted by *Hurrypryah*, (*Ramtoonoo's* widow,) but its adoption was prevented by the death of its father. *Ramhurry*, spoke of his intention to get *Hurrypryah* (the widow of *Ramtoonoo*) to adopt this child, and he, (*Ramhurry*,) after having been disappointed by the death of the boy's father, spoke of his having trusted to *Hurrypryah*, to select a proper person for adoption. *Hurrypryah*, after the death of *Ramhurry*, does select a proper person for adoption. In this case, it is now to be assumed, that *Ramhurry* directed his son's widow (*Hurrypryah*) to adopt a son. *Ramhurry* dies, leaving neither wife nor child, and trusting to *Hurrypryah* to adopt. *Hurrypryah* does adopt a son (*Ramcrishna*) as the son of her late husband *Ramtoonoo*. This adoption took place according to the *Hindoo* law, with the usual rites and ceremonies. The question now is, Does *Ramcrishna*, having been so adopted, become entitled to the estate of *Ramhurry*, or is he to be confined in his claims to the estate of *Ramtoonoo* only?"

The defendants moved for a new trial of the issues—and a new trial

* This is a mistake, which however does not vary, nor affect the question. The children brought to *Ramhurry* were those of his *cousin*, not his *brother*. If he had had a brother, he, and his sons, would have succeeded as heirs, in preference to the defendants, who were sons of *Ramhurry's sister*. The statement of *Ramhurry* having had a *brother* who had *sons*, operates, if at all, against the plaintiff. But the circumstance is not noticed by any of the *Pundits* who have given their opinions.

was granted, the defendants taking the order upon the terms of paying, within a certain time, the costs of the former trial to the plaintiff. These terms were not complied with, and the cause was set down for further directions. On the 24th of March, 1824, it came on to be heard. The defendants did not appear; and the complainant *Gowrbullub* was declared entitled to the estates of *Mocundbullub*, and of *Rajah Rajebullub*, and the defendants decreed to account with him accordingly.

No doubt existed with respect to the right of *Gowrbullub*. Nor was there any reason to suppose that a second trial could have produced a result, different from the first—but in analogy to a practice of the Court of Chancery in England, we thought the defendants ought not to be bound by a single trial—considering them as *heirs at law*, who had been *disinherited* by the adoption.

The next case I shall mention, is one to which I have before alluded—one, in which the adoption by a *Brahmin*, of his *sister's* son, was declared valid. This decision, was *manifestly wrong*—and opposite to *all* authority, except the depositions of some *Pundits*, who by their testimony upon oath, led the Court into error. If this decree is to be rejected as law, it ought at least to be retained as a lesson; for it inculcates the danger we incur, by abandoning ourselves to the guidance of *Pundits*, if we wish to do justice between contending parties.

From an extract out of a letter written by *Sir William Jones*, which I have given in my Preface, it will appear that he thought a confidence in native lawyers was perilous "*when they could have the remotest interest in misleading the Court.*" Experience has proved that his fears were well founded—and as he has given us to understand that however vigilant the Court may be, the native lawyers might *without much difficulty* practice deceit; we ought not perhaps to blame the Judges before whom the cause of *Ramchunder Chatterjea* v. *Sumboochunder Chatterjea*, was tried.

The case was this,—The parties were all *Brahmins*, and *Punchanund Chatterjea*, being childless, adopted *Ramchunder Chatterjea* who was the son of *Ramlochund Bonarjea*, and *Seebsoondaree Dabee*. *Seebsoondaree*, being the *sister* of *Punchanund*, the adopting father. *Sumboochunder Chatterjea*, the brother of *Punchanund*, upon *Punchanund's* death, took possession of his property. In 1809, the adopted son, *Ramchunder*, then an infant, (by his next friend who was *Ramlochund Bonarjea* his natural father) filed his bill against *Sumboochunder Bonarjea* for a partition and account of the estate which had been joint between *Punchanund* (the adopting father of *Ramchunder*) and *Sumboochunder—Sumboochunder*, by his answer, relied, first, upon the insanity of *Punchanund*, which he alleged, rendered him incapable of performing any act by which he (*Sumboochunder*) ought to be bound. This part of the defence, seems to have been afterwards forsaken. But he relied, secondly, upon the *Hindoo* law by which, he averred, that the adoption, by a *Brahmin*, of a *sister's son*, was forbidden, and the act therefore invalid, and of no effect. It was upon this ground, that the adoption was contested—*Ramchunder*, the complainant, had been adopted by *Punchanund*, in August, 1804;—*Punchanund* did not die until February, 1807. The bill, as I have already stated, was filed in 1809. In November of that year, an issue was directed to try whether or not *Ramchunder*, the complainant, was the adopted son of *Punchanund*. In July, 1810, a verdict was found in favor of *Ramchunder*, by which verdict the adoption was confirmed. On behalf of *Sumboochunder* (the defendant) *the law was relied upon* throughout. In August, 1810, the cause coming on for further directions, the complainant *Ramchunder*, was declared to be the adopted son of *Punchanund*, and entitled to his (*Punchanund's*) share of the joint estate.

The *right* or the *wrong* having been thus declared, no further proceedings were had in the Supreme Court—and *Ramchunder* having been able to satisfy the Judges that a *Brahmin* might legally take the son of his

own sister in adoption, *Sumboochunder* might well be distrustful of the Judicature. There were not any further proceedings at law. *Sumboochunder* acquiesced in the decree, which declared that the adoption of *Ramchunder* was valid—and the rest was adjusted by arbitration.

Gunganarain Chatterjea was the father of *Punchanund* and *Sumboochunder;* and it was for *Punchanund's* share of the estate which had descended from *Gunganarain*, that *Ramchunder* filed his bill, claiming it as *Punchanund's* adopted son.

Sumboochunder, whatever are his rights, may now be shut out from his remedy. Upon this question it would not become me to speculate—but although many *Pundits* upheld the validity of that adoption by which he was defeated, I do not believe one, except while a suit was depending, could be found to declare, that an adoption of his sister's son by a *Brahmin*, is an act to be sustained by the *Hindoo* law.

The doctrine which prevailed in the case of *Ramchunder Chatterjea* v. *Sumboochunder Chatterjea* has been, I may say, overruled by a subsequent proceeding in the Supreme Court.

This proceeding is curious in itself, and as it involves many considerations relating to the *Hindoo* law, a concise statement of it may be thought desirable.

Luckinarain Tagore (a *Brahmin*) died possessed of considerable property, *movable* and *immovable*. Mostly, I believe *ancestorial;* but that circumstance was not relied upon in any stage of the cause. Three wives, viz. *Sree Mootee Taramonee Dabee, Sree Mootee Bhagabuttee Dabee*, and *Sree Mootee Dugumbaree Dabee* survived him; and at the time of his death, he had not a child.

Luckinarain made a will, by which he left 5000 rupees to each of his wives, and 1000 rupees, in addition to the 5000, to his second wife *Bhagavuttee.*

In his will he recited the pregnancy of his youngest wife *Dagumbaree,* and declared that her child *(son* or *daughter)* should be the possessor of his wealth. He constituted *Juggomohun Mullick* his executor—*Juggomohun Mullick* some time after this died, having made a will, and constituted *Bustom Doss Mullick* his executor. In this state of things, it was assumed, and received as a matter of course, that *Bustom Doss Mullick* became the executor of *Luckinarain Tagore.* I am particular in noticing this, because it may serve to show the extent to which the wills of *Hindoos* are recognized in the Supreme Court.

Juggomohun, as executor of *Luckinarain* had possessed himself of *Luckinarain's* property—and *Bustom Doss,* as executor of *Juggomohun,* possessed himself of it, after *Juggomohun's* death.

On the 7th of November, 1814, and thirteen days after the death of *Luckinarain Tagore,* his youngest wife *Dagumbaree* was delivered of a *son.* This son died in seventeen days after his birth.

If *Luckinarain* had died intestate, this son must have succeeded to his property as *heir at law;* and *Dagumbaree,* his mother, surviving him, would incontestably have succeeded to the property as his heir—*Luckinarain* however, made a provision by his will, in case of the death of this child with which his wife was *ensient.* In the event of its death, he directed that his *widows* should *adopt a son.* If they could not *all* agree in the selection of a boy for adoption, he directed that one should be chosen by his *first* and *second* widows, *Taramonee* and *Bhagabuttee.* If the *first*

and *second* widows could not agree in the selection, he then directed that a boy should be chosen by his *second* and *third* widows *Bhagabuttee* and *Dagumbaree*. It will be seen that the *second* widow *Bhagabuttee*, was in any case, to have a voice in the selection of a son for adoption. From this provision, and from the additional thousand rupees which he gave to her, it clearly appears that she was the favorite, and the one in whom he had most confidence.

In 1818, *Dagumbaree*, the youngest widow, and mother of the child, of *Luckinarain*, filed her bill against *Taramonee* and *Bhagabuttee*, the other two widows, and against *Bustom Doss Mullick*, the executor of her husband's executor.

By this bill the complainant *Dagumbaree*, affirmed her right to the estate of her late husband, in consequence of her having had a son by him, whose heir she stated herself to be by the *Hindoo* law. She prayed an account and to be put into possession of the estate of her husband *Luckinarain*.

To this bill an answer was put in by *Bustom Doss Mullick*, admitting that as executor of *Juggomohun*, who was executor of *Luckinarain*, he, *Bustom Doss*, did possess himself of *Luckinarain's* estate, and that he was then in possession of it. He admitted also, the birth of a son, and his death, as the bill set forth; but he denied that the complainant was entitled to the estate of *Luckinarain*—and he *relied upon the will*, by which the adoption of a son was directed. He denied the complainant's right to an account of *Luckinarain's* estate, and insisted that no person had a right to such an account, except a son to be adopted *according to the terms of Luckinarain's will*. The other two defendants put in a joint answer, to the same effect with that of *Bustom Doss Mullick*.

The will was established, and directions were given for the adoption

of a son according to its provisions. Such vexation as might have been foreseen, was the consequence. The widows could not be brought to concur in the selection of a boy for adoption. A reference was then made to the master, who was directed to enquire and report to the Court, concerning the fitness of a boy to be adopted as the son of *Luckinarain Tagore*. The master reported in favor of *Turacomar Surmono* who had been nominated for adoption by the *second* widow *Sree Mootee Bhagabuttee Dabee*. *This boy was the son of Bhagabuttee's* UNCLE.

The Master's report was confirmed, and this furnished matter for further contention. The boy *Turacomar* was to be adopted—but the question was, which of the three widows had a right to *receive* him in adoption. The law is clear, and was undisputed. The boy could not be received by the *three widows jointly*. He must be received by *one* of them—and would then be considered as the son of *Luckinarain and the widow by whom he had been received*—about this there was not, because there could not be, any dispute.

Had it not been for the *natural* relation in which the child stood to *Bhagabuttee*, the second widow, the Court, considering the preference which had been given to her by her husband, might probably have declared her the properest person to act as adopting mother. But it was a family of *Brahmins*, and her claim was impugned upon the ground of relationship, it being argued that she could not, without incest be the mother of her uncle's son. The argument was supposed to be conclusive, for she withdrew her pretensions.

There was no dispute as to the eligibility of this boy. He might have been adopted by *Luckinarain* himself, *but not as the son* of *Bhagabuttee*, who was his first cousin.

The first widow, *Taramonee*, founded her claim to receive this child upon seniority. The *third*, *Dagumbaree*, founded hers upon the fact of her having borne a son to her deceased husband.

The Master reported in favor of the *first* widow, and the Court confirmed his report; not from a *conviction* of its having been right, but because it was not opposed, and because it did not appear that the *third* widow ought to have been preferred.

I have added the will of *Luckinarain*, the Master's report, and the opinions which were given by the *Pundits* in his office, to the appendix. If these opinions do not impart knowledge, satisfy curiosity, or remove doubt, they will at least prove the deplorable state in which ministers of justice are placed, when they have recourse to *Pundits* for an exposition of the *Hindoo* law in a depending cause.

Those who acted for the *second* widow would have held fast by her claim, if they had not known it to be untenable—among the parties to this contest, there was not any inclination to concede, or to accommodate—and if the managers for *Bhagavuttee* were right in relinquishing her pretensions, the Court's decision in the case of *Ramchunder* v. *Sumboochunder*, must have been wrong.

Incest, was the ground upon which the objection rested in each case—and it would be absurd to say that a man might be the adopting father of his sister's son, yet that a woman could not receive the son of her uncle in adoption. If the latter case may be said to have been decided, the former must be admitted to have been overruled.

The bill of the *third* widow *Dagumbaree* was dismissed; and the will of her husband *Luckinarain* was established as to all its provisions.

I now hear that the right of *Bhagabuttee* to *receive the child in adoption*, was not abandoned by her advisers ; but that *Dagumbaree* having been excluded, she (*Bhagavuttee*) was contented with the preference given to *Taramonee*.

This may be so—but I can affirm (the whole proceeding having taken place under the will of *Luckinarain)* that the Court was inclined to prefer *Bhagabuttee* to either of the other widows, and would have preferred her, if it had not been deemed that she was disqualified by her relationship to the child.

I know that *Bhagabuttee* contended before the Master for this right—that the Master reported in favor of *Taramonee*—and that *Bhagabuttee* did not oppose the confirmation of his report.

I have however conversed with a gentleman who was professionally employed on behalf of *Bhagabuttee*, and he tells me that his client did not renounce her right, but voluntarily gave up the contest when she found that *Dagumbaree* was to be excluded. He said that the advisers of *Bhagabuttee* did not think her disqualified to receive the child on account of her relationship to it, the adoption being in fact *Luckinarain's;* and as there was not any relationship between him and the child which could have prevented him from adopting it, the competency of any one of his widows to receive it *as his*, could not be disputed.

If *Luckinarain* had been related, as *Bhagabuttee* was, to the child in question, it is not said that he himself could have adopted it, or that it could have been adopted as his after his death.

That *Luckinarain* might have adopted this child, related as it was to *Bhagabuttee*, is admitted—but does it follow that he could have adopted it *as hers?*

It is usual, but not necessary, to adopt a boy as the son of its adopting father *and one of his wives.* I do not assume any thing when I say that *Bhagabuttee* could not after the death of *Luckinarain receive* this child as his; if, he in his life time, could not have adopted it *as his by her.* The child being adopted after *Luckinarain's* death, is adopted as his to all intents and purposes, as it would have been, had the adoption been made in his life time by himself---and the *widow* who *receives* a child adopted after her husband's death, is, in relation to the child, exactly as a *wife* would have been to one who had been adopted as hers, by her husband in his life time. The question then is this—could *Taracomar Surmono* have been adopted as the son of *Luckinarain* and *Bhagabuttee?*

It appears to me that for the purpose of qualifying him to adopt this boy *as hers,* or for the purpose of qualifying *her* to *receive* it after the death of her husband *as his,* we must go the length of denying that the prohibition is founded upon *natural* relationship, or make it evident that incest is permitted as to females, although prohibited as to male.

It is upon *natural* relationship alone, that the restraint is placed. The boy is supposed to have been *born of the wife,* or the *widow* by whom he is *received* in adoption. Could he then have been begotten without incest by the man whose child he naturally is, upon the woman who receives him in adoption? This must be the criterion unless we discard the principle as it may affect females. Unless we say that a woman may guiltlessly be the mother of a child by her uncle, although a man cannot, without crime, be the father of a child by his aunt.

Viewing the case in this light, and admitting that the individual might have been adopted by *Luckinarain* himself, or by his widows in pursuance of his will; I am satisfied that *Bhagabuttee* could not either in the life time of her husband, or after his death, have received this boy as his mother, in adoption.

I have a great respect for the opinion of the gentleman who thinks differently—and I felt myself bound to rectify my own statement when I discovered it to be erroneous.

I did conceive that the claim of *Bhagabuttee* had been abandoned as untenable, and when I discovered that this was not the case, I thought it proper to state some of the reasons, for which it ought, in my judgement, if insisted upon, to have been rejected.

Taracomar, the boy who was thus adopted, is since dead. In speculating upon the consequences of his death, many considerations have presented themselves, which had not formerly occurred, to my mind.

If a woman be empowered by her husband to adopt a son, and if she does adopt one accordingly; it has never, I believe, been declared by any writer that this power can go beyond the adoption of one, or, *without special authority from the husband*, be extended to the adoption of another, if the first adopted should die. The power is not enlarged, by being derived from a will—and the testator's *intentions* cannot prevail, if they are found to be inconsistent with the law.

From what has taken place in the *Sudder Dewannee Adawlut*, it must be admitted that a man may confer upon his wife the power of adopting *provisionally*; but we must bear in mind that *Luckinarain* did not make any prospective arrangement extending beyond *one* adoption. This one was to take place if the child with which *Dagumbaree* was pregnant, should die. The child with which she was pregnant did die, and one was adopted according to the power which had been given by *Luckinarain* to his widows. The child so adopted is dead, and can he now be replaced by another adoption, under the provisional authority by which his wives were empowered to adopt one child?

By the authority of one case *Luckinarain* might lawfully make the provision which he made for the adoption of a son—by the authority of another case, he might (as I conceive) have empowered each of his widows to make a separate adoption—by the authority of a third case, he might have empowered the adoption of a second son, even if a son adopted by himself in his life time, had continued in being. All this we have authority for saying a man may do by an express and specific declaration of his will.

Is it to be presumed, if a man desires one son to be adopted, that this is clearly expressive of his wish to be at all events represented, and that the adoption is therefore to proceed *toties quoties* until this object shall have been finally accomplished? We have, if such a presumption be introduced, to ask how far it is to be extended? If the boy who was adopted on the death of *Dagumbaree's* son, had lived until he attained the age of sixteen years and then died, would the widows of *Luckinarain* have been authorized to adopt another in his place? Or if he had died at a more advanced period of life, leaving daughters only surviving him, would the authority to adopt still have continued to the widows? Or if he had left sons, would the power of the widows to adopt have revived, upon the death of those sons?

Every *Hindoo*, must, for the purpose of his redemption from the hell called *put*, be supposed desirous of being represented by a son. Yet adoption is not permitted even if he is *known* to be so—nor tolerated if he does not give *special instructions* for the purpose.

Presumption will be strengthened or invalidated by circumstances, and in this case *Luckinarain* was not anxious about a male representative, for if his wife had produced a daughter, adoption was not to have taken place.

I shall not obtrude any opinion of my own upon the reader, but content

myself with giving such information as I can collect from the reports of the *Sudder Dewannee Adawlut.*

In the case of *Shamchunder* and *Rooderchunder*, appellants, and *Narayni Dabee* and *Ramkishor Rai*, respondents, cause 4 of 1807, the circumstances were these—*Kishenkishor Rai*, having a considerable property, died without issue, leaving two widows surviving him. The two widows were *Ruttun Mala* and *Narayni Dabee*—*Ruttun Mala* adopted a son, *Nundkishor*—and she and *Nundkishor* both died. After their death the other widow *Narayni Dabee* adopted *Ramkishor Rai*. It is to be regretted that the report does not state the terms of the authority which was given by *Kishenkishor* to his widows, but in most other respects, the case is satisfactorily reported.

Kishenkishor had had a brother named *Gopalkishor*—and he *Gopalkishor* had adopted a son named *Joogulkishor*. This *Joogulkishor*, upon the death of *Nundkishor*, claimed *one-half* of the estate of *Kishenkishor*, he *(Joogulkishor)* being the adopted son of *Gopalkishor*, the brother of *Kishenkishor*. It would appear that he admitted the right of *Narayni Dabee* as surviving widow of *Kishenkishor* to one-half of his estate. This suit was instituted in the *Zillah* Court of *Mymunsing*, and Judgement was given in favor of *Joogulkishor*, by which he obtained one-half of *Kishenkishor's* estate.

The appellants then instituted a proceeding in the same Court, alleging that *Narayni Dabee* had not been duly empowered to adopt a son, and that they, upon the death of *Nundkishor*, (who had been adopted by *Ruttun Mala,)* were, as nephews of *Kishenkishor*, heirs to the whole of his estate. The appellants were sons of *Kishenkishor's half brother Luckhinarain.*

In the former action brought by *Joogulkishor*, the power of *Narayni* to adopt came in question. It was said to have been verbally given to her by *Kishenkishor;* but it was not thought to have been sufficiently proved —and *Joogulkishor* would have failed in his suit if the adoption of *Ramkishor* by *Narayni* had been deemed valid.

The *Zillah* Judge conceived the decision which had taken place in the suit commenced by *Joogulkishor* to be conclusive against *Shamchunder* and *Rooderchunder*, (the appellants) and judgement was given against them with costs.

Against this judgement, *Shamchunder* and *Rooderchunder* appealed to the provincial Court of *Dacca*, and the result (as it relates to the present question) was, that the *Dacca* Court was satisfied with the evidence which had been given in the *Zillah* Court respecting the authority of *Narayni* to adopt a son, *and held* that *Ramkishor's adoption by her was legal and valid* —therefore that *Shamchunder* and *Rooderchunder* were not entitled to any part of *Kishenkishor's* estate; and their appeal was dismissed with costs.

The case now stood thus—the authority of *Narayni* to adopt was denied by the *Zillah* Court, and admitted by the provincial Court of *Dacca*. It was because *Ramkishor* was held *not to have been duly adopted*, that *Joogulkishor* was decreed one-half of the estate of *Kishenkishor* by the *Zillah* Court—and I should have supposed that *Ramkishor* must have been considered as entitled to the whole of *Kishenkishor's* estate, when he was declared by the *Dacca* Court to *have been duly adopted.*

It is true that he ultimately succeeded to the whole of the estate of *Kishenkishor* his adopting father—but he did not succeed to it all as *Kishenkishor's* heir; for he took half as the heir of *Nundkishor* who had been adopted by *Ruttun Mala*, and *Nundkishor had died before the adoption of*

Ramkishor took place. This is a most material fact; and we cannot understand the principle upon which the final decree of the *Sudder Dewannee Adawlut* turned, without knowing particularly the instructions which were given by *Kishenkishor* to his widows. If authority had been given to *each* to adopt *severally* a child, then the question whether one of the children so adopted, would be heir to the other, might have fairly arisen—but if *Kishenkishor* had given authority to *one* of his wives to adopt, and *the son adopted by her failing*, then authority to the other to adopt, I cannot conceive why *Ramkishor* did not take the whole estate as heir of *Kishenkishor*, or how he could take one-half of it, as heir of *Nundkishor*.

It appears *probable* that these were the powers which were given by *Kishenkishor*; for we must suppose, if the widows had each the power of adoption concurrently, that each would have exercised the power soon after her husband's death. We may well believe that *Ruttun Mala* did not allow much time to elapse before she adopted a son. We are not told when *Nundkishor* the son adopted by her, died—but she survived her husband twenty years, and it was not until after her death that *Narayni* adopted a son. This is certainly extraordinary, if her power to adopt had been concurrent with that of *Ruttun Mala*—but we are left in the dark as to this important fact.

Shamchunder and *Rooderchunder*, having been defeated in the provincial Court of Dacca, appealed to the *Sudder Dewannee Adawlut*. I shall give the proceeding there in the words of the report;—"the pleas set up by them against the foregoing decrees were, 1st. that the adoption of the respondent *Ramkishor*, being a second adoption in the family of the same man, was illegal;—2d. that even admitting two adoptions to be legal, *one adopted son could not succeed* to *the property of the other adopted son*, as the collateral heir. The questions of *Hindoo* law, connected with the

case, were proposed by the Court to their *Pundits* in the following form —after the death of *Kishenkishor*, *Zemindar* of the *four-ana* estate, without issue, his elder widow having adopted *Nundkishor*, and when the elder widow and *Nundkishor* died, his younger widow having adopted *Ramkishor*, and claims to the estate having been preferred by *Ramkishor*, by *Joogulkishor* the adopted son of *Kishenkishor's* brother, and by *Shamchunder* and *Rooderchunder*, sons of *Kishenkishor's* half-brother, which of the claimants is heir at law to the property? And in the case of two adopted sons of a common adoptive (adopting) father, can one on the decease of the other, succeed to his property as the collateral heir? In answer to this reference it was stated by the *Pundits* that if, after the death of *Kishenkishor*, his elder widow, *duly authorized*, adopted a son, that son was proprietor of the estate—and if, after the death of that son, the younger widow also adopted a son *under due authority*, then, provided the adopted son of the elder widow left no issue, or *brother by the mother who adopted him*, his property would devolve on the adopted son of the younger widow of *Kishenkishor*, and not on the adopted son of *Kishenkishor's* brother, or on the sons of his half-brother. *The succession of one adopted son is vested in the other adopted son, as being the nearest collateral.* The Court of *Sudder Dewannee Adawlut* agreed with the provincial Court of *Dacca* with respect to *the adoption* of *Ramkishor* by *Narayni Dabee being proved to have been duly authorized;* and, as under the above opinion of the *Pundits*, it appeared that two adoptions in the same family are valid, that an adopted son succeeds collaterally as well as lineally in the family of his adoptive (adopting) father, and that *Ramkishor* was the rightful heir of the whole *four-ana* estate in contest, the claim preferred to it by the appellants was pronounced inadmissible. The appeal was in consequence dismissed by the *Sudder Dewannee Adawlut* with costs."

The following "Remark" is added to the report:—"The right of a son by adoption to inherit from his collaterals in the family of his adoptive

(adopting) father, was established by the decision of this cause, *as well as the lawfulness* of *two successive adoptions*, by *the widows of the same person, under authority for that purpose, from their husband.*"

The next case I shall mention, does not entirely supply the defect of statement in the one above mentioned—but it does so in part; for it shows that several children may be adopted, in virtue of authority given by a *Hindoo;* or even more, that his wife may adopt a child after his death, if authorized so to do although the child adopted by himself in his life time, be living when the second adoption takes place.

It does not indeed tend to show, that a woman related to a child within the prohibited degrees, can receive it in adoption; but it is given as the opinion of a *Pundit* (whose opinion however was afterwards overruled) that there is *not any authority* for a *husband* to *adopt* on *account* of *a particular wife,* and *that a son adopted by him renders service to all the wives.*

This is the case of *Goureepershaud Rai,* appellant, and *Jymala,* respondent.

Mussummaut Jymala on the part of her infant son *Sheopershaud,* a minor, brought an action in the *Zillah* Court of *Dacca Jelalpoor* for the recovery of land. The plaintiff sued for a *four-anas'* share of the *pergunnah Cusimpoor.* She stated that *eight-anas'* share of it had been the hereditary property of her husband; who had another, and a senior wife named *Parbutee.* That he, being childless, had in the Bengal year 1199, given permission to *each of his wives to adopt a son,* and that he had himself in pursuance of this permission, adopted (the appellant) *Goureepershaud on account* of *his senior* wife *Parbutee.* That he (the husband) died in the year 1204, and that in consequence of the permission she (*Jymala*) had received from him, she in 1208 adopted *Sheopershaud upon her own account,*

and that he (*Sheopershaud*) became thereby entitled to one half of the *eight-anas* share of the *perguanah* which had belonged to her husband.

The Defendant (now appellant) answered that *Jymala* had not got permission from her husband to adopt a son; and that *under any circumstances the second adoption was illegal.*

The *Zillah* Judge without enquiring as to the disputed facts, put the following question to his *Hindoo* law officer:—"Supposing the adoption of *Sheopershaud* to have taken place as stated by the plaintiff; that is *subsequently to the adoption of Goureepershaud*, and to the death of her husband, *though agreeably to his permission;* is such subsequent adoption valid, and does it entitle the person so adopted to share in the estate or not?" The answer was as follows:—"If a childless person adopt a son for the sake of his obsequies, *the adopted son* becomes like a son of the body; he may also, if unable to adopt a son himself, authorize his wife to do so—and if (*with a view to having more than one son at the same time*) *he authorize his two wives* EACH *to adopt a son*, it is legal. But in this instance it is stated, *that the husband himself adopted a son on account of his first wife. There being however, no authority* for his adoption on *account of a particular wife*, the son adopted by him *renders service to all his wives;* and *hence*, any previous permission given by the husband is *annulled by his own subsequent act.* During the life time of a son so adopted, the wife cannot adopt another. But the son adopted by the father should make a suitable provision for his widow." Upon the authority of this opinion the Zillah Judge dismissed the suit of *Jymala* with costs.

She appealed to the provincial Court of *Dacca.*—And by this Court the appellant (*Jymala*) was desired to establish by evidence, the facts upon which she relied. She accordingly proved that she had authority from her husband to adopt, and that in pursuance of such authority she did

adopt in due form of law. With respect to the authority given for the purpose of adoption, it was proved that the appellant remonstrated with her husband on his having given a son *exclusively to the rival wife*, and *that she had begged permission to adopt one immediately upon her own account*, and that her request was granted; but, that the husband expressed an expectation that she herself would produce offspring, *and requested that she might wait the result of a few years.* The provincial Court being satisfied that authority had been given, and that the ceremony of adoption had been properly performed, put the following case for their *Pundit's* opinion:—" A *Hindoo* had two wives, and gave verbal authority to each of them to adopt a son; afterwards he manifested his intention in favor of his first wife, by *adopting a son for her.* After the death of the *Hindoo*, his second wife under his authority, adopted a son. By the law current in this country, to whom does the estate (movable and immovable) of the deceased person descend, and in what shares?" The answer was, that *the two adopted sons were entitled to inherit the estate in equal proportions*— and the provincial, *reversed* the decree of the *Zillah*, Court. There was an appeal from this reversal to the *Sudder Dewannee Adawlut*, and the judgement of the provincial Court of *Dacca* was *affirmed.* The *Sudder Dewannee Adawlut* declaring that, " if a man having two wives give authority to each to adopt a son, and afterwards, *in concurrence with his senior wife* adopt a son, and after his death, the second wife in pursuance of the authority originally obtained from him adopt a son, the adoption by the second wife *is not legally valid;* BECAUSE, if a person giving permission, afterwards *himself does the thing permitted*, THE PERMISSION GIVEN TO ANOTHER BECOMES BY HIS ACT VOID. All the property of the deceased devolves on the son adopted by him."

The report then goes on—" But it appeared from the evidence of the respondent's witnesses in the provincial Court, that the permission granted originally by the husband, *was confirmed to the second wife after he*

had made an adoption in favor of his senior wife, and that the permission was partly conditional, from his request (founded on the expectation of his second wife's producing offspring) *that it should not be acted upon immediately*. The Pundits were therefore required to state whether these circumstances would alter the nature of the case—to which they replied, that under these circumstances, the desire of the adoptive (adopting) father being *obviously* to have *many* sons (which was a laudable desire) his estate real and personal should be shared by each of the adopted sons in equal proportions. On *consideration of the above opinion*, establishing the legality of two *successive adoptions by two wives* under authority from their husband (which corresponds with the decision of *Shamchunder* and *Rooderchunder* v. *Narayni Dabee* and *Ramkishor*) the decree of the Provincial Court in favor of the respondent, appeared just and proper. It was accordingly affirmed with costs, against the appellant, who was directed to account to the respondent, for half the profits of the estate which had accrued during the period of his sole possession."

This case cannot apply to that which may arise out of *Luckhinarain's* will, for here specific permission to the wife was proved; and the decision seems in a great degree to have turned on the *obviousness* of the adopting father's desire to have *many* sons.

In the case of *Mussummaut Solukhna* against *Ramdulol Pande, Luckhinarain* and *Hureepryah Munee, Sud. Dew. Adaw. Rep.* 1811, cause 5, the Pundits among other things, gave their opinions that "when a woman under authority from her late husband adopts a son, thenceforward the ceremonies must be performed by the adopted son in whom the right vests, and not by the widow," also, "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*, 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 first wife's son. But *provisional authocity to adopt in the event of the* DEATH *of such 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 performance of religious rites, give authority to his wife to adopt a son, such authority, according to the *shaster* and usage of the country, is lawful."

The Court, it appears, did not acquiesce in the whole of this opinion—for the report goes on to state " whether a *Hindoo, having a son of his body,* can, *in any case* authorize the adoption of a son, during the life time of *such son of his body,* appeared to the Court an important question of law, *not fully investigated or settled;* but which, without proof of authority for the adoption having been delegated to *Sogunda,* it was *not necessary to determine in the present instance.*"

It is certain if there be a begotten son, that adoption is prohibited. There are, to be sure, excepted cases; but they all go to prove that if the begotten son be not insane, or otherwise disqualified for a performance of the exequial rites of his ancestors, a son cannot be adopted.

There is something to be found in the books, which countenances an opinion that a son may be adopted *with the consent of him who had been born of his father.* Of this it may be said "*volenti non fit injuria,*" but such a consent is unlikely to be asked, and more unlikely to be accorded. A father, if the son's concurrence in such a case, be necessary, cannot reasonably expect to obtain it. Where there is mental infirmity, or profligacy amounting to a contempt of his religion in the son, the father may adopt of his own authority. In such cases there must be an incapacity to grant consent, or a will to deny it; but the one would be useless, and

the other unavailing. If however the father should be desirous of adopting "*from a wish to have more sons,*" I know not the authority upon which he can effect his purpose—I incline to think there must be a typographical error in the report, that the *Pundits* did not give their opinion in the disjunctive, but said that a person "having a son of his body," may "with the consent of such son" AND "from a wish to have more sons" "give authority to his wife to adopt," &c.

Reading "and" instead of "or," will be more in conformity with the opinion as it related to the case which was submitted to the *Pundits*—and I the more incline to think there is an error of the press from this consideration. We have no provision made by the *Hindoo* law for a son adopted *after* the birth of a begotten son—all that is said relates to sons adopted, *if a son of the body should be born after the adoption.* There is no authority for giving a son adopted *after the birth of a begotten son*, any share of the estate—nor any instance, as I believe, of such an adoption having ever taken place.

But none of the cases I have mentioned, will apply to the question which may arise out of *Luckinarain Tagore's* will—not one of them professes to go the length of authorizing a deceased son, whether begotten or adopted, to be replaced by another, unless special directions have been given for the purpose.

I am possessed of a publication, entitled, "Notes of cases in the Court of the Recorder, and in the Supreme Court of Judicature at *Madras.*"

The work, in its 1st volume, contains the report of a case upon adoption—that of *Verapermal Pillay* v. *Narain Pillay & al.* It was decided in the Recorder's Court in the year 1801.

In this cas e, there are, in my humble judgement, some positions incon-

sistent with the *Hindoo* law, as it is prevalent in any part of *India;* and I have therefore offered such comments on them, as induce me to think the Recorder's decision ought not to be received as a precedent: not by any means arrogating to myself the right of determining, but conceiving it proper to state my objections to doctrines, that militate against those, which an enquiry of some labour has convinced me ought to be received.

Sir Thomas Strange, who decided the case as Recorder of *Madras*, is himself the Reporter of it. The report was published about fifteen years after the decision.

The adoption of *Verapermal Pillay* was according to the *Dattaca* form. And he was declared to have been duly adopted, although he was not related in the *male line* to his adopting father, although he had attained the age of *twelve* years, although it was assumed that he had undergone the ceremony of tonsure, although his father (who was dead) had not assented to the gift of him in adoption, and although his mother who *was* living neither gave him, nor was a party to the gift. She was taken, as it will appear, to have *consented*. The circumstances will be seen more fully throughout the observations which I propose to make on the proceeding.

The Recorder tells us that "among* the witnesses were a number of *Sastrees*, who had been examined to different points of *Hindoo* law, upon which chiefly the suit depended. *There were not fewer than ten or twelve on either side; and their answers* UPON EVERY POINT WERE IN DIRECT OPPOSITION TO EACH OTHER. *From such oracles* (he continues) *an English Court was not likely to derive much satisfaction.* THAT THERE WAS A GREAT DEAL OF CORRUPTION AMONG THEM WAS PLAIN."

* P. 79.

This is indeed extremely probable, and the Recorder adds, "under these circumstances, resort was had to other sources of instruction as to the law, as will appear from the judgement."

The judgement constitutes the entire report; and although the facts may be collected from it, I should have been better satisfied if the case had been distinctly stated by itself.

This suit originated in the will of *Vauyalore Verapermal*, and the two following clauses are the parts out of which the questions that came before the Recorder arose. He says, "The* will in this case therefore, with reference to the parts of it that were in question, *must have been construed as a direction in writing by the testator to adopt—as such it would have been unquestionably good, and the discussion would have turned,* AS IT DID, *upon the construction to be put upon it. The principal point in dispute lay within the compass of* TWO SHORT PARAGRAPHS."

Here they follow:—

"The† garden and *Choultry* situated at *Tandiavaidoo* is to be *given to him that is to be adopted*, and embrace my lineage, and he is to have or bear his second name *Colunda Verapermal Pillay*, and when he comes to the age of maturity, every thing is to be made known to him. You are to see that he is educated properly."

Then, after giving some directions unconnected with the present question, the will proceeds, "You‡ are to give my emerald ring to *Jyah Pillay*. IF *Jyah Pillay* BEGETS A SON, BESIDE HIS PRESENT ONE, YOU ARE TO KEEP HIM TO MY LINEAGE; *and name him Colunda Verapermal Pillay.*

* P. 92. † P. 106. ‡ Pp. 107 & 147.

You are to give *him* a good education and introduce *him* to the best society, GIVING HIM THE JEWELS THAT ARE IN THE HOUSE, THE REMAINING GARDEN, *and* REMAINING VILLAGES." Speaking of this part of the will the Recorder says, "With* a sweeping clause subjoined, that *gives to such second son*, being eventually adopted, *the residue of his property*."

The executors contended for the right of a son to be begotten by *Jyah Pillay*. The adoption of the complainant, was however established, and it was declared that, "He† is accordingly entitled to the garden and *Choultry* situated at *Tandiavaidoo, as well as to one-eighth part of Streehurry Cottah; and there remaining, in consequence of the failure of the particular adoption contingently provided for by the will, a considerable residue of the testator's property undisposed of, which by the Hindoo* LAW WHERE THERE IS NO OTHER SON OF THE DECEASED BELONGS OF RIGHT TO THE SON WHO SHALL HAVE BEEN ADOPTED TO HIM. Refer it to the master," &c.

Two general questions here present themselves—first, whether or not the complainant was properly declared to have been duly adopted as the testator's son. Secondly, (supposing him to have been so) whether or not the residue of the testator's estate was properly declared to belong to him. If the adoption was not legal, there is nothing upon which the complainant's right to any part of the estate, can possibly stand. If it was legal, it then becomes a question whether or not in virtue of it, the complainant could entitle himself to more than "garden and *Choultry* situated at *Tandiavaidoo?*"

The report sets out with stating, that "the‡ property in dispute in this case was considerable, amounting to between two and three hundred thousand *Pagodas*." This may be estimated at £ 100,000. By the decree

* P. 107. † P. 140. ‡ P. 91.

the property followed the adoption. The other executors of the testator and his widows as well as *Narain Pillay*, were defendants to *Verapermal Pillay's* bill of complaint.

The Recorder after having noticed an opinion which is said to have been given by some *Benares Pundits*, proceeds, "Therefore,* according to this doctrine, the complainant, though he may have been at the time *twelve years of age*, AND HAVE UNDERGONE THE TONSURE, yet being of the *same lineage with the person whom he was to represent*, that is being a near relation, he seems *not to have been unfit* ON THIS ACCOUNT *to be adopted*"—meaning I presume, on account of his advanced age, and of his having undergone the ceremony of tonsure.

Again, speaking of tonsure, the Recorder says, "the† *probability* is that he" (the complainant) "had undergone it."

He had before given a quotation from the opinion of the *Sudder Dewannee Adawlut Pundits*, as delivered in the *Tanjore* case. Here it is—"that‡ the restrictions as to purification and age are to be observed only in instances where adoption takes place of those who are not *Sagotras*. That no *Muni*, or divine legislator, has *positively* said so, but that in a number of books of high authority, *the rule is understood to be*, that in cases of filiation by adoption, *provided the adopted be a Sagotra*, the adoption is valid, and the right to inheritance will attach, *though he have passed his fifth year and undergone the purification by tonsure*."

Upon this it may be sufficient to observe, that it is merely declared *as a rule* "*understood to be*"—that no *Muni* has *positively* said so—that the books of *high authority* are not specified—and that the *Pundits* delivered

* P. 135. † P. 136. ‡ P. 133.

their opinion in a cause which was pending—a cause in which the right to great wealth, and high distinction, was to be decided, and one which was espoused on each side by men of property and influence. But the Recorder proceeds—"*the** *strict interpretation* of *Sagotra* is one who has *descended in a direct* MALE *line from one common* MALE *ancestor*. This *certainly would* NOT *comprehend the complainant, who appears to have derived from the common ancestor* THROUGH A FEMALE."

Supposing the opinions of *Pundits* delivered in a pending cause to be authority—supposing such opinions to have operated properly in the *Tanjore* case, I yet cannot conceive how they were calculated to sustain the claim of *Verapermal Pillay*—for the Recorder having defined the term *Sagotra*, declares that it does *not* comprehend the complainant; and, as it is said that such restrictions need not be attended to, *if the parties are*, I should think it may be inferred that they must be attended to, *if the parties are not*, *Sagotras*.

The Recorder does not refer to any book in which it is laid down that a child may or can be adopted, after having undergone the ceremony of tonsure. The *Pundits* admit that "no *Muni* has positively said so." No writer is quoted on the subject—and when pundits speak of *high* authority, we well know that they elevate the character in proportion to their own purposes. When we are told of what a rule is *understood* to be, we need only have recourse to our experience, and it will satisfy us that there is but little credit due to an unsupported assertion even as to the actual existence of a rule.

The opinion of the *Benares Pundits* is brought forward by the Recorder. It states that in* *Bengal* and the *Deccan*, children may be adopted,

* P. 134.

although they have *undergone the ceremony of tonsure.* In a remark upon the case of *Kerutnarain* v. *Bhobinesree*, before noticed; it is laid down, that in *Bengal*, "THE SETTLED DOCTRINE is, *that the boy's age must be such*, that his INITIATION, *the principal ceremony of which is* TONSURE, *may be yet performed* in the ADOPTER'S *name and family.*" This is quite sufficient to disqualify the *Pundits* of *Benares*, and indeed I believe their doctrine will be denied by every *Hindoo* lawyer in *Bengal*, so far as it relates to that province. As their opinion relates to the *Deccan*, it may be enough to compare it with that which was delivered in the *Tanjore* case, to satisfy ourselves that it does not stand upon authority.

The Recorder again says, "*But* whatever may be the obligatory force of this limitation, I am satisfied, as well from the general genius of the Hindoo law, as by particular authorities,* THAT IT RESPECTS ONLY THE THREE SUPERIOR CASTS, *and that the passage cited from the Datta (Dattáca) Mimansa to prove that the complainant in this case was exempt from it,* IS TO BE RELIED UPON."

In a note given by *Mr. Colebrooke* on the *Mitacshara* (which is held to be of authority at Madras) he says, "The following version of the passage conforms with the interpretation given of it by *Nanda Pandita* in the *Dattaca Mimansa*, 'Sons given and the rest, *though sprung from the seed of another*, yet being duly initiated *by the adopter, under his own family name*, become sons of the adoptive parent. A son having been regularly initiated *under the family name of his natural father*, UNTO THE CEREMONY OF TONSURE, *does not become the son of another man.* When, indeed, *the ceremony of tonsure, and other rites of initiation are performed by the adopter under his own family name*, THEN ONLY can sons given and the rest *be considered as issue: else they are termed slaves.*'"

P. 137.

This is clear and distinct—cited from the very book relied upon by the Recorder himself—and it perfectly corresponds which all the information which I have been able to obtain either from books, or from men, upon the subject.

The authority of the *Dattaca Mimansa* would indeed, carry the Recorder very far beyond his purpose. The only passage I find in it, which can tend to show that *Verapermal Pillay* was *exempt from the rule,* is taken from *Vachespati* and is as follows: —"*Soodras are incompetent to affiliate a son, from their incapacity to perform the sacrament of Homa, and prayers prescribed for adoption.*" That this is not law, every day's practice demonstrates; and if it were, it would be fatal to the adoption of *Verapermal Pillay*—for he was a *Soodra,* and the passage in question, if it be to operate at all, must necessarily exclude him from adoption, however young, or however uninitiated, he might have been.

To prove that the limitation *applies to the three superior castes only,* the authority of a *Salsette Pundit* is produced by the Recorder, and this *Pundit* it seems states, "the* proper age for adoption to be before the time of the *Vratabandham,* or taking of the *Jandyam* or thread, which, he says, is from five to eight years. *It extends,* he says, *to the three superior castes only.*"

This, I confess, does not make any approach towards satisfying me, that a *Soodra may be adopted after tonsure.* The *Mimansa,* if it did any thing, would prove that he could not be adopted at all. And, because none of the three classes which are to be invested with the thread, can be adopted after their investiture; it surely does not follow that a *Soodra,* who cannot be invested with the thread, may be adopted after the ceremony of tonsure shall have been performed.

P. 138.

It is true that a boy belonging to one of the superior classes cannot be adopted after his investiture with the thread—but, it is also true that he cannot be adopted after *tonsure;* and that the objection after tonsure is as applicable to the *Soodra* as it is to any of the others, and to any of the others, as it is to him. That no boy can be adopted after tonsure, I take to be the established law, extending equally to the *four* classes—and if it cannot now be said that the propriety of adopting after tonsure has never been asserted; it may yet be affirmed that up to the time of the Recorder's decision, no distinction as to that ceremony, had ever been made with respect to *castes*—that nobody had ever said, a boy belonging to the superior orders *may not*, and that one belonging to the *Soodras may*, be adopted after tonsure. But, if with respect to adoption after tonsure the *four* castes stand upon the same footing, whatever that footing may be, I am unable to come to the conclusion at which the Recorder has arrived. I cannot infer, because there are three whose adoption is prohibited after having assumed the thread, that a fourth may be therefore adopted after tonsure. This, as it appears to me, is confounding distinctions, and distinguishing where there is not any difference.

The Recorder again says, "this* question of *age* appears to have undergone a good deal of investigation in the late cause of *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; referring to a constant distinction in the texts and glosses upon matters of ritual observance, between those who keep consecrated, or holy fires, and those who do not keep such fires; that is *between Brahmins*, and ANY OF THE OTHER CASTES."

The Recorder has, I fear, been very much deceived by the person who

P. 133.

reported to him the proceedings in the cause to which he alludes. The family of *Rajah Nobkissen* was not one of the caste of *Brahmans*, but of the *Vagesa's*; or as the word is commonly pronounced, *Boice's*—it could not therefore have been in their *Brahminical* character that proof of ceremonies, &c. was required. And as *Gopeemohun Deb* (the person adopted) was a son of the full brother of *Rajah Nobkissen* (the adopter) this case certainly does not show that a *Sagotra* may be adopted at *any age*, or *after* having had the operation of tonsure performed.

Gopeemohun Deb was a *Sagotra* and yet it was deemed necessary to prove that he was under the age of *five* years, and that tonsure had *not* been performed when he was taken by *Rajah Nobkissen* in adoption.

His counsel (of whom I was one) were of course anxious to acquaint themselves with the law, and to be well informed as to the evidence which was necessary, and that which might be dispensed with. We were satisfied from what was said by all the *Pundits* who had been consulted on behalf of our client, that proof of his having been under the age of *five* years, and of his tonsure having *not been* performed in the family of his natural father, was indispensable. It was accordingly proved to the satisfaction of the Court that he had been given by his father, and received by his uncle, in adoption when he was about the age of *four* years; and that his tonsure, together with the ceremonies of adoption, had been performed in the house of his uncle who adopted him. There was indeed collateral evidence, such as his having represented his uncle at certain meetings in the character of an adopted son—and his having been introduced and acknowledged as such by his uncle to several persons, and among them, some English gentlemen—but I venture to say (and I am justified in saying so from what was declared by each Judge upon the bench) that *Gopeemohun 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 adopting, father—and to prove, not only "a giving and receiving" but that all the rites of adoption had been duly observed.

I should indeed have thought that the notoriety of this adoption,—the universal knowledge that the complainant had acted, and been received, as the adopted son of *Rajah Nobkissen*,—the admissions of the *Rajah* that *Gopeemohun* was his adopted son—his having been introduced by the *Rajah* as such, and his having ranked in that character for many years; might have exonerated the complainant from the proof of actual adoption, and of its having been attended with all necessary formalities—but even under these circumstances, evidence of the *minutiæ* was supposed to be indispensable, and was accordingly adduced.

I have mentioned the case of *Kerulnarain* v. *Bhobinesree* more at large in another place. It decides that a person of the age of EIGHT *years may* be adopted, PROVIDED HE HAS NOT UNDERGONE THE CEREMONY OF TONSURE in the family of his natural, *but has undergone it in the family of his adopting, father*. The only use I intend to make of it here, is to show that it does not justify or countenance the adoption of *Verapermal Pillay*. The Recorder refers to it in a note; but it was not decided by the *Sudder Dewannee Adawlut* at *Calcutta*, until five years after his decree in the case of *Verapermal Pillay* had been pronounced. It was *even then* made a question whether the limitation of age to *five* years, *admitted of any latitude of construction;* and said "if the adoption be of a *near relation* on the PATERNAL SIDE"—"as of the adoption of a *brother's son*, &c." no difficulty would occur.

Verapermal Pillay was TWELVE years of age at the time of his adoption. He was *not* related by the *paternal side* to his adopting father. He was

taken to have undergone the ceremony of tonsure in his natural father's family. It was for him to establish his own title; and incumbent upon him (according to "*Rajah Nobkissen's* case") to prove that he had *not* undergone the ceremony of tonsure in his natural father's, but *had* undergone it in his adopting father's family. This was done by *Gopeemohun Deb*, whose adoption was declared upon principles, the very opposites of those, which prevailed in the case of *Verapermal Pillay*. If the doctrines by which the Court of Calcutta was guided, had prevailed at the Court of Madras, it is evident that the dismissal of *Verapermal's* bill must have been an immediate and necessary consequence.

It seems to be admitted by the Recorder, and it must be admitted by every body, that a son could not have been adopted to *Vanyalore Verapermal* without his authority given for the purpose. The estate was clearly disposed of to the son of *Jyah Pillay*, if he should beget one in addition to the son he then had;—*Jyah Pillay* was still alive, and he might have begotten a son. The adoption of another was upheld. The estate accompanied this adoption, and the son of *Jyah Pillay* was for ever excluded from succeeding to the property which had been bequeathed him by the testator.

To justify the decision in *Verapermal's* case, I apprehend it will be necessary to assume that a *Hindoo*, dying childless, is bound by law to make provision for the adoption—not only for the adoption—but, for the *immediate* adoption, of a son.

The Recorder says, "In* fact he (the testator) survived the making of his will for *some years*." It seems that *Jyah Pillay's* wife was pregnant when the will was made—and that she brought forth a son "who† *died in*

* P. 108. † P. 106.

a few days." The testator must therefore have continued to live for some years *after the death of this child*—and yet he made no alteration in his will, nor any other provision for a representative. Now what is the rational inference from this? It must, as I conceive, be that *Vaayalore Verapermal* did *not make his will* solely, because he hoped to be represented by the child with whom *Jyah Pillay's wife was then pregnant*—but that after the death of this child he would have altered his will, and made another provision, if his wish to be represented by a boy who might possibly be born to *Jyah Pillay* thereafter, had not continued to prevail?

The Recorder supposes *Vaayalore Verapermal* "*to* address himself to this effect*"—"Having no son of my own, and anxious for the performance of my *Sradd'ha*, I wish to be represented by adoption, and *would willingly*, prefer for that purpose, a son of *Jyah Pillay;* his wife is *at this moment* pregnant; *they* are also young people. If then, he *begets* another son *(words equally* descriptive of the one of which she was then pregnant as of any *future* one *she might have conceived)* let him be kept to my lineage."

I do not think it probable that the testator could have *addressed himself* in any such manner. Yet if he had done so, as we are told in the parenthesis that his words were descriptive of a child to be afterwards conceived by *Jyah Pillay's* wife, the case would not have been altered by his soliloquy—but we must recollect that the wish was to be represented by a son of *Jyah Pillay;* and not by a son of *Jyah Pillay, begotten on a particular wife.*

The testator himself, had, as we learn from the report, *two wives at least.* *Jyah Pillay* is stated to have been young when the will was exe-

cuted. He might have taken other wives, if he had pleased to do so—and I do not see any reason to believe that *Vauyalore Verapermal* founded his hopes of a representative, upon the issue of that particular woman, who was then the only wife of *Jyah Pillay*.

The Recorder seems to think that the adoption of *a son (individuum vagum)* was the *primary* object—and that the adoption of *Jyah Pillay's* son was a *secondary* consideration.

An ascertainment of the testator's intention in that respect, might indeed be conclusive as to the complainant's right to the *Tandiavaidoo* estate—but I cannot see it in the light in which it appears to the Recorder. The testator first says, "The garden, &c. is to be given to him that is to be adopted and to embrace my lineage"—but who is to be adopted and to embrace his lineage? Any body? No. The son of *Jyah Pillay*, if he should have one. "If *Jyah Pillay begets a son*, besides his present son, you are to keep *him* to my lineage." To me, it appears manifest, that the testator desired to be represented by a son of *Jyah Pillay;* and that he might take another wife, and *his own time* for the purpose of furnishing a representative.

If I am right in supposing that *Vauyalore Verapermal* desired to have a son of *Jyah Pillay* adopted, I then say that no other person could properly have been substituted. He was not obliged to authorize adoption at all—and if he did authorize it, the authority ought to have been specifically pursued. Are we to say, because it is of importance to a *Hindoo* to be represented, that we must therefore, *presume* him to have sanctioned adoption? If this be the doctrine, we ought to enforce an adoption in every case where a *Hindoo* shall die without leaving a son of his body surviving. But if we admit (and it cannot be denied) that a *Hindoo* may or may not at his own mere pleasure, give directions for the adoption of a

son, and that *without his directions no adoption can possibly be made*, how are we to be justified in falling short of, or in going beyond, his instructions?

It is evident that the testator was not in *haste* to be represented, for he desired the adoption of a boy who was yet to be born. His not being in haste, and his inclination towards a child of *Jyah Pillay* are indeed both inferible from the fact of his not having himself, in his life time, adopted a son. He lived *some years* after having made his will—after *Jyah Pillay's* wife had been delivered of a son—after the death of that son—and yet he never adopted one, nor altered his will. Is it then possible to believe *that* the adoption of *any* son, and not the son of *Jyah Pillay*, was his primary object?

As he had ordered the son of *Jyah Pillay*, if he should beget one, to be adopted; the adoption of another, while there was a possibility of *Jyah Pillay's* begetting one, was surely premature at least, if not inconsistent with the will; and must have been so, unless the testator had made provision for the adoption of another in case *Jyah Pillay* should not beget one within a certain time, and unless that time had actually expired.

Let the son of *Jyah Pillay* be born when he may, he will now find himself bereft of the estate. This seems the more extraordinary, because after stating that clause in the testator's will which is supposed to express his wish *generally*, for an adoption of *any son*, the Recorder proceeds: "*It*[c] *is remarkable that the residue of his property is not here* SO MUCH AS MENTIONED." Now it is certain that the residue of his property is mentioned, and given (as the Recorder expresses it) "*with a sweeping clause*" to the son of *Jyah Pillay*, if he should beget one—and yet this residue

[c] P. 106.

has been decreed to a person who was selected for adoption by others, although it was "not so much as mentioned" with relation to him; and taken from the person to whom the testator had expressly directed it to be given.

It is sufficient for my argument, that *Jyah Pillay* might have had, or that he may yet have, a son—whether or not, in point of fact he had, or has, one, I am ignorant. The will was made in 1793, we have authority for saying that he *(Jyah Pillay)* was then* a young man. He appears to have been alive when the decree was pronounced in 1801, and eight years only had been added to his age, from the time of his having been young.

The Recorder again says, "without† adverting to the adoption that has actually taken place, suppose *Jyah Pillay* to have died in the life time of the widows, *not having had another son*—adoption of another son of his, *becoming by this means impossible*, they might, as I shall presently have occasion to show, proceed to the adoption of any other *fit and proper boy*, *notwithstanding the lapse of a year* from the death of their husband."

Supposing the right of adoption to have been given to these widows *after possibility of issue extinct*, there is no doubt but that it might have been executed when the contingency happened—but the case put, admits *ex hypothesi*, that adoption of another could not take place, until death had put an end to *Jyah Pillay's* power of procreation.

If the statement implies that any boy, a son of *Jyah Pillay's* excepted, could in any event, be adopted, it is so far begging the question. If it be meant to assert in the abstract, that widows may adopt "after the lapse

* P. 109. † P. 103.

of a year," the assertion will not admit of controversy—but as the time is in truth unlimited, where was the necessity for adopting another, while it was possible for *Jyah Pillay* to furnish a subject? If *Jyah Pillay* had died "not having had another son"—what then? Why the party aggrieved would not have emanated from him, and the heir-at-law might have complained of an injury.

The Recorder proceeds, " But* grant (what is just as probable considering the duration of the lives of females in this part of the world) grant, that the widows died first, *Jyah Pillay* not having had another son; his having one afterwards would be *of no avail* for the purposes of this will. For I can find no authority for supposing, that *any but a widow* can adopt after the death of her husband; and as to the idea of the executors themselves adopting, as was contended for by virtue of the will, it is *too preposterous* to be entertained for a moment, upon any principle of *Hindoo* law."

This reasoning is either inapplicable, or unnecessary. Inapplicable if the adoption was illegal—unnecessary if the adoption was legal—and if the legality be not previously established, we are to conclude that what, in the Judge's mind, is expedient, may create or control the law. Did the testator make any provision for the event, or did he not? If he did, let it be shown and acted on. If he did not, the Court had no right to supply such a defect.

I now suppose the widows to have died before a son had been born to *Jyah Pillay*; and that no adoption could have been effected after their death. If it be admitted that the testator need not have made any provision at all for adoption, where is the right to extend those provisions which he actually did make? If this can be done, then, in case of intes-

* P. 103.

tacy, the Recorder's Court might have made a will for him. Has it not done so? It has done more. It has made a will for him, although he had made one for himself.

If we admit that the first part of this will has been rightly construed, and that it really conveys authority to adopt any other than the son of *Jyah Pillay*, how is the decision to be accounted for after all? "*The residue is not so much as mentioned*" in the first part of the will.

The testator says, "The garden and *choultry* at *Tandeavudoo* is to be given to him that is to be adopted, and to embrace my lineage." Let us admit that this authorizes an immediate adoption without any reference to the family of *Jyah Pillay*. What follows? Why that the testator had made what he considered a suitable provision for the son so to be adopted, but how can it, by any possibility of construction, entitle him to the residue of the testator's estate?

If it was competent to *Vauyalore Verapermal* to make a will, was he not privileged to dispose of his property by it? Might he not have said, I make a certain provision for the boy who is to be *immediately* adopted as my son, and the residue I give to such son as *Jyah Pillay* shall beget! It may be said that the son of *Jyah Pillay* was not to take *unless he had been adopted*. It is true, and it constitutes the wrong—for by having been cut off from the adoption, he has been cut off from the estate.

The will taken any way, must have intended the residue to go to *Jyah Pillay's* son, and could not have intended that it should go to any one else—even if we admit that it authorized any other adoption.

Had the testator said, "Let a boy, *any boy*, be adopted, and let him

have the garden and *choultry* of *Tandeavaidoo*," he would have expressed himself much more favorably than he has done in support of the Recorder's decree; and yet I believe it will not be said that a boy adopted under these words could claim more than the *Tandeavaidoo* estate.

This is not like the case of a son who had been unconditionally adopted by a man in his life time—a son so adopted would have been heir to his adopting father—but the adopter might have made a special agreement, settling a certain proportion of his property on the boy to be adopted, and retaining a right to dispose of the remainder according to his own pleasure.

I speak here of property which a man holds absolutely, *and as his own*—and if wills be admitted at all, ought not the will in question to have been construed as if the testator in his life time had adopted the complainant, having stipulated to settle upon him the *Tandeavaidoo* property?

By the will all was *in fieri*, and the complainant might have refused to be adopted, or his relations to give him in adoption, if they were not contented with the terms. If the power of making a will be denied to the *Hindoo*, there was then no pretence for allowing of the adoption in question.

This I mention because the right of a *Hindoo* to make his will, is spoken of in the report as doubtful.* The Recorder however admits, that a *Hindoo* has the power of directing an adoption—of directing it in writing—and to take effect after his death—that is, of authorizing it by will. If the right of making a will be doubtful, because it may be "*in derogation of the rights*† *of inheritance*," I cannot imagine why a will should be

* P. 92. † P. 92.

permitted for the purpose of adoption—or how in this case particularly, the will was suffered to operate, seeing that the "*rights of inheritance*" were defeated and destroyed by it.

Upon this part of the case it appears to me that the will, if admitted at all, ought to have operated throughout—and if it was thought to authorize an adoption of the complainant, that he ought not to have been declared entitled to any property except that which is mentioned by the testator in the first clause of his will.

Upon the subject of giving an *only* son in adoption, I need not add much to what I have said immediately after the 8th rule which I ventured to lay down. The Recorder indeed seems to expect that the law as to such a gift* will not again be questioned.

He says, "The† complainant was indeed an *only* son, but he was the *only son* by a *younger* wife, having an *elder brother* by a former marriage living at the time of his adoption." Again, "He‡ was *not* his *only*, or *eldest*, son, *but a younger son.*" It thus appears that no such point was raised before the Recorder—and it may be enough to say that his opinion had been better suspended, until the question had been fully discussed.

That a son may, after a man's death, be adopted to him in virtue of a power given in his life time, cannot be denied or doubted—but I have, I believe already set forth enough to prove that the complainant was not eligible to adoption—that he was disqualified on account of his age, and on account of his having undergone the initiatory ceremonies in his own natural family—and also admitting the exceptions which exist, or which are said to exist, that he, from his relationship to the adopter, did not fall

* P. 127. † P. 125. ‡ P. 133.

within any of them—that he was to be judged of according to the *general rule*, and that by it, he was incapacitated for adoption.

Another, and perhaps a stronger, objection is now to be urged against this decree. The Recorder decided that a boy might be *given* in adoption, *without* the consent of his *father* expressed or implied. Nay, he established the adoption, after having admitted that there was not any ground upon which a presumption of the father's consent could possibly stand, after having declared that there was enough to exclude the presumption of any such consent.

He says, "it* was argued indeed for the complainant" (i. e. the adopted son) "*that the consent of the father ought to be presumed. But there appears* NO GROUND FOR THIS, AS HE HAD BEEN DEAD SEVERAL YEARS *before there is any reason to believe that such an adoption* WAS THOUGHT OF."

From this it would appear that the complainant's Counsel were of opinion that the father's consent was necessary; for looking to the facts, their efforts to have it *presumed* were most desperate.

The Recorder says further "considering† that the son *given* by *the widow* WITHOUT *the consent of her husband* was not his only, or eldest, but a younger son," and goes on to state that the law "*appears to be involved in some doubt.*"

Here, I have in the first instance to observe that this statement is contrary to the fact; and that upon the fact, I intend to found another objection to the Recorder's decree. The boy was not "*given by the widow.*" The Recorder himself had before stated, that "*in*‡ *the present case, the*

* P. 128. † P. 132. ‡ P. 128.

formal gift, as appears by the evidence, was BY THE ELDER BROTHER." This is most important—and it will be seen that the *right* of an elder brother to make a gift of his younger brother in adoption is actually asserted. I hope I shall show that such a doctrine is unfounded—and I am sure every one will concur with me in thinking, that none of a more cruel, or of a more pernicious tendency, can be possibly reduced into practice.

If we admit that a widow's right to give away her husband's son is *no more than a matter of doubt*, we may nevertheless ask if a doubtful law can operate to the disherison of an heir? The Recorder says, "But* the invalidity of their" (the adopting widow's) "act has been argued from objections which would at most, if established, have the effect of *turning them round to proceed to another adoption*; or if *that were not now practicable*, OF VESTING THE PROPERTY UNDISPOSED OF BY THE WILL IN THEMSELVES as the widows of the testator, and *as such* by the *Hindoo* law HIS LEGAL HEIRS in default of sons." He had before said, "the† claim of the *widows* is subject at once to the title of the complainant, and to that *set up by the defendants* for an *unborn son of Jyah Pillay*. Should both these fail, the *widows contend, that as widows, they are entitled to the undisposed residue* notwithstanding their particular legacies. AND THAT THIS IS SO, appears to me (generally speaking) alike certain upon the principles of both codes —the *Hindoo* as well as our own."

Thus if we leave the son of *Jyah Pillay* out of the question we have the "*legal heirs*" disinherited by a law which "*appears to be involved in some doubt.*"

But is it involved in any doubt? That opinions of *Pundits* may be obtained,—that texts or commentaries may be found, in maintenance of

* P. 116. † P. 94.

any proposition, is unquestionable. In this very case there were ten or twelve *Sastrees* examined (upon oath as I presume) on each side, their answers were in *direct opposition* to each other, and it was *plain that there was a great deal of corruption* among them. So says the Recorder.

I am not aware of any thing in the *Hindoo* law less contestable than this, *that a woman cannot give her son in adoption without the permission* of her husband. *Vasishta* says, "Let not a woman *give* or accept a son without the consent of her lord." Upon this *Sri Natha Bhatta* observes, "The *donation* or *acceptance* of a son by a wife without the consent of her husband," is what? "IS INVALID." So that here even the common subterfuge of "*factum valet*" is taken away.

There are authors who go almost the length of denying the mother's relationship to her son. *Baudhyana* says, "From the *predominence* of the *virile* seed SONS are regarded even as *not produced of the womb.*"

In the *Bharata* we find, "The mother is the *fosterer:* the *son* is of the *father—he* is that *that very person* by whom produced."

And in the *Vedas* (speaking of the father) it is said "HIMSELF *is truly born a son.*"

All this, whatever else it may be worth, certainly goes very far towards a denial of the mother's right to give away her son without the father's consent. And *Menu* frequently expresses himself to the same effect.

Generally speaking, *Jagannatha's* authority is received by the Recorder with sufficient deference—but, upon this particular question, our Jurist seems to be introduced without respect, and dismissed without ceremony.

He is thus quoted by the Recorder, who adds a comment of his own; intimating an opinion, somewhat equivocal, so far as it may relate to the integrity of his author.

This is the quotation—"Should* the man be deceased, *the child must not be given by the woman,* WITHOUT *the assent of her husband declared before his death,* AS ORDAINED BY A SPECIAL TEXT." Here follows the Recorder's comment; "He,"† *Jagannatha,* "OMITS *however to give us this special text, or to say where it is to be found,* AND IT CERTAINLY WILL BE LOOKED FOR IN VAIN *throughout the whole of his (Jagannatha's) work,* AS WELL AS IN EVERY OTHER *printed book of Hindoo law to which we have access.*"

The Recorder himself had before given a quotation from *Jagannatha* in these words; "Accordingly‡ a *widow,* though she may perform *acts of religion without* consent previously declared by her deceased lord, CANNOT *without such consent adopt a son given;* FOR THE TEXT OF *Vasishta* EXPRESSES, 'LET NOT A WOMAN GIVE *or accept a son without the assent of her lord,' but if her husband assented she may adopt a son given.*"

Here then is the Recorder's *own authority* that *Jagannatha* had actually cited a special text upon the subject—but this is not all; for in his *work, and in every other printed book upon the subject there are many such texts to be found.*

In *Jagannatha's* work I find the following texts I quote from the *folio* edition.

Page 320 from *Yajnyawalcya*:—"That son, whom his father, or his mo-

* P. 129. † Pp. 129, 130. ‡ P. 121.

ther, *with her husband's assent*, gives to another, shall be considered as a son."

Page 321 from the *Precasa* :—"*Let not a woman* GIVE *a son without the assent of her lord.*"

Page 337 from *Menu*:—"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."

Page 339 from *Culluckhabatha*:—"The father and mother should make the gift with mutual consent."

Page 339 from *Vachespati*:—"Adoption is *only valid*, if the gift be made *by both parents*."

Page 340 in a note:—"According to *Vachespati Misra*, the text should be thus interpreted, *nor let a woman give a son unless with the assent of her lord, nor accept one under any circumstances.*"

Page 350 from the *Aditya Purana*:—"The filiation of any but a son legally begotten, or given in adoption *by his parents*, is a part of the ancient law abrogated in the *Cali* age."

All these texts, as well as the text quoted by the Recorder, are to be found in that part of *Jagannatha's* work which treats of adoption.

There are indeed special cases to which I shall advert, and in which *it is said*, that a woman may give away her son without the consent of her husband—but the case before the Recorder was not one of them, and he

has given a very sufficient reason to convince us that it ought generally to be otherwise.

He says, "*It** *certainly seems unreasonable that the widow should have it in her power without the previous consent of her husband* to do an act by which his ceremonies may be affected. For the elder sons may die; in which event, the son to be given in adoption becomes an important member of the father's family. Nor can it be denied that there *appears great weight of authority* IN THE DIGEST AND COMMENTARY AGAINST THE VALIDITY OF SUCH AN ATTEMPT."

The Recorder, with reference to the case before him, says, "The† *general rule* is, that the consent of *both* parents to the GIVING *as well as to the receiving in adoption, is* requisite.

I shall observe, by the way, that if this be so, we might have expected to hear how the case before him formed an exception.

He goes on—"IT IS SO LAID DOWN BY *Vasishta* WHOSE OPINION IS SUPPORTED BY MANY OTHER TEXTS *in Mr. Colebrooke's book*—and JAGANNATHA, IN REVIEWING THEM ALL *observes that 'in requiring a joint relinquishment on the part of both parents, the texts of sages are liable to no reproach,'* though the *reason* of the observation applies rather to *the necessity of the mother's consent* CO-OPERATING *with the father's, in order to validate the gift.* The reason (he adds) is 'that it is not admitted that one shall be *father* to a son given, *and the wife of another*, his mother.'"

This reason of *Jagannatha*, as it applies to the theory of adoption, is

* P. 129. † P. 127.

intelligible and satisfactory—but the Recorder's reason I cannot so well comprehend. It must be recollected that he was establishing the adoption of a boy, who had been given *without the consent of his father*—and he tells us that the "*reason* of the observation he speaks of, applies to the *necessity* of the *mother's* consent CO-OPERATING with the *father's* in order to validate the gift." This cannot possibly have any meaning, if it does not admit that the father's consent is *necessary* to the gift of his son in adoption —and yet in the case then before the Recorder, he *validated* the gift, admitting that the father's consent neither had been, nor could have been, obtained.

I am unable to conceive, as the father had never consented, how the mother's consent could have co-operated with his; or how *one* can co-operate with *another* if there be but *one party* to the transaction. If the necessity of the father's assent be assumed, it will make sense of the Recorder's remark, and it must necessarily follow, that the adoption of *Verapermal Pillay* was illegal and void.

We have been further told that no such special text as that alluded to by *Jagannatha*, is to be found in any printed book of *Hindoo* law to which WE HAVE ACCESS. The Recorder himself quotes the *Dattaca** (which he calls the *Datta) Mimansa.*

From the *Dattaca Mimansa* I take the following quotations:

"Accordingly *Vasishta* ordains, 'let not a woman either GIVE or *receive* a son in adoption: *unless with the assent* of her husband.'"

"From this the incompetency of the *widow* is deduced, *since the assent* of HER *husband is impossible.*"

* P. 137.

"If it is contended then, that she may adopt a son *with the assent of her kinsmen even; it is wrong:* for the term 'Husband' would become indefinite, and the purpose would not be attained. Now the purpose of the husband's sanction is, *that the filiation as son of the husband* may be complete, even by means of an adoption made by the wife."

"Since the masculine gender is here used, the GIFT of *a son by a woman is prohibited,*—accordingly *Vasishta* says, 'let not a woman either GIVE or *accept* a son' and her *independency* is *not ordained.*"

"*With the husband's assent,* a woman also is competent;—accordingly *Vasishta* adds, '*unless* with the assent of her husband.'"

"Whom his mother *or* his father gives." *Yajnyawalcya.* "His mother *or* father gives." *Menu.* "As for what is contained in these passages *as intimating the equality of father and mother,* THAT IS MERELY WITH REFERENCE TO THE ASSENT OF THE HUSBAND."

"It must not be argued that thus, the *gift* of her son by a *widow, though during the season of calamity* could not take place on account of the *impossibility* of the assent of her husband; *analogous* to her incapacity to *adopt.* For by referring to the instance recorded of *Galava, such gift may be inferred as legal*—and the *singular number, indicating the independence of another is used.*"

This we must observe is an excepted case, and we are told that the singular number is used to indicate independence in the particular instance.

"The husband singly even, and independent of his wife, is competent to give a son."

I have now shown that there are *special texts* in abundance to prove that

a woman *cannot* give the son of her husband in adoption without his assent—and that such texts are to be found in the work of *Jagannatha*, and in a book which was quoted by the Recorder himself. Further I do not think it necessary to go.

It is said in the *Dattaca Mimansa*, that *in the season of calamity*, a *widow* may give away her son—but this is put upon the footing of urgent necessity; and coupled, the husband being dead, with the *impossibility* of obtaining his assent. And in the *Dattica Chandrica* we find, "But by a *woman* the gift may be made, *with her husband's sanction, if he be alive; or even without it, if he be dead, have emigrated,* or *entered a religious order.* ACCORDINGLY *Vasishta,* 'let not a woman either GIVE or *receive* a son, unless with the assent of her husband.'"

It is here obvious, that the law as laid down by *Devanda Bhatta*, is directly contradicted by the authority which he adduces in its support. From a general and peremptory prohibition such as this, we cannot possibly infer the right in a woman to make the gift, even if her husband be dead, unless his assent had been obtained in his life time.

The same author again says, "Now, if there be *no prohibition* even, there *is assent;* on account of the maxim 'the INTENTION of another *not prohibited, is sanctioned.*'"

As to this maxim, it is enough to say, that *intention* to do a thing, implies an *assent* to its being done—and, if an intention be manifested, no prohibition being subsequently expressed, the act may well be said to have been sanctioned.

In the first case therefore, the authority relied upon by *Devanda Bhatta* is against his doctrine. And in the next, his maxim does not dispense

with the assent, which is said by others and admitted even by himself, to be necessary.

The Recorder seems to have assumed, that a woman may *give* a son, although she cannot *receive* one in adoption, without her husband's authority. There is not any foundation that I have been able to discover for such a distinction—*giving* and *receiving* are generally spoken of together; and whenever they are so mentioned, they are put upon the same footing.

The Recorder says, "Hence* *it may be inferred, what appears confirmed by opinions of living Hindoo 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."

He had before said, "*to*† *constitute adoption the consent of the* NATURAL *parent, is as requisite as the acceptance of the* ADOPTING ONE."

Now this is quite enough to convince us, that the consent of a husband is indispensable to the *gift* of a son *out of his family*, unless it can be shown that a woman has the right of *giving*, although she has not the right of *receiving*, a son in adoption—and the Recorder has informed us that the consent of the *natural parent*, is as requisite *in the one case as in the other.*

I may now, I think, safely say, that for the purpose of overthrowing this doctrine, nothing more than the arguments which have been adduced in its support, can be necessary.

A commentator on the *Mitacshara (Balam Bhatta)* has indeed said that "a woman's right of *adopting*, as well as of GIVING a son, is com-

* P. 121. † P. 108.

mon to the *widow*, and the WIFE. This is too nonsensical for refutation. By putting the *wife* upon a footing with the *widow*, he must mean (if he means any thing) that a wife has the right *in the life time of her husband* of giving a son out of his family, or of taking one into it, *without his consent*. He places the *wife* and the *widow*—the *giving* and the *receiving*, upon one footing. They must all therefore stand or fall together. Now by every book, by every decision, by every living authority, by the Recorder of *Madras*, we are taught that a woman cannot *adopt a son*, without the permission of her husband—that his permission is a *sine quâ non*—and, without his permission, that an adoption cannot be valid.

I have spoken to, and had the opinions of, several *Pundits* upon this subject. There is not one who did not (upon general principles) treat the claim of a woman to give away her son in adoption without the assent of her husband, as an unheard of and monstrous proposition.

The Recorder says, "The* *Pundit* of *Bombay thinks* that if either of the parents be dead, the consent of the other is sufficient."

This *Pundit* appears to have *thought* in a case which was depending before the Court of *Bombay*—his opinion is therefore to be suspected—and the *Madras* Recorder's experience was sufficient to assure him that a dozen or a score† of such Doctors might be procured, willing to vouch for the orthodoxy of any doctrine—divided for the purpose of confronting each other, or united by bribery in a league against the truth.

He ought surely to have cast such an opinion aside—(and I now suppose what the *Bombay Pundit* said to have amounted to an opinion)—for in another place the Recorder declares, "considering‡ the *influence of money* over

* P. 131. † P. 93. ‡ P. 96.

those who were likely to be applied to as *interpreters* of the *Hindoo* law *on the spot*, I thought it my duty, very early in this cause, *to be laying myself out* for *information*, concerning the points that have been agitated in it, as well from the highest, as from the *least suspicious*, sources; by resorting to the records of Government, in cases of a like nature, and to the learned *at a distance, having no connection with the parties*, or *knowledge of the existence of such a case.*"

It must be admitted that this was a very provident precaution—but the principle ought, I should think, to have excluded the *Pundit* of *Bombay* as authority.

I have already said all that seems to me necessary on this subject. The rule by which an individual may act in a particular case, certainly does not constitute law—but in the cause between *Gowrbullub* v. *Jugernotpersaud Mitter & al.* it appeared in evidence that *Rajah Rajebullub* had selected a boy to be adopted as his son. That the father of this boy had consented to his adoption by the *Rajah*, and died before a gift of the child had been actually made. The father's death, as the *Rajah* was advised (and he was likely to have the best advice) put an end to the proceeding. The child, as it was thought, could not be adopted by the *Rajah*, because its father did not live to make the gift of his son.

Whether or not the mother of this boy survived her husband did not appear—and we do not know therefore, that the consent of a father thus given, might not have been sufficient authority for the widow to act upon after his death.

It might indeed, have been held after all, that a father's desire while he himself lived, to give away his son, did not amount to an assent upon his

part, that his widow should, after his death, so dispose of the child. It did however appear, that the boy so selected for adoption had *elder brothers*. The *Rajah's* wish to adopt him is unquestionable,—and it was certainly much desired by the family that this child should be adopted as the *Rajah's* son;—yet it does not seem to have occurred to any body, that his elder brother had a right to dispose of him in adoption.

In the case decided by the Recorder of Madras, I have hitherto supposed that the widow (his mother) had given the complainant to be adopted; and objected to her having done so, because she had not had her husband's assent for the purpose. I now object to the establishment of this adoption, because the boy's mother *did not give him away*, either with, or without the assent of her husband.

As to the *necessity* which exists for the parent being an acting party when a son is given in adoption, I refer to the Recorder's authority. He says, "The* only *indispensable* parties to adoption appear to be the *parents on either side*, or the *survivor or their representatives*—a fit and proper boy, and perhaps a priest"—again, "The *operative* part of the ceremony seems to be *giving* and *receiving*."

What is meant by "*their representatives*," I do not know. A mother may be said to be the father's representative—but I am certain there is not any thing written from which it can be inferred, that the gift by a *father himself* if he be alive, can be dispensed with—or that the gift by a *mother herself* can be dispensed with, if she be authorized by her husband to give.

As to the fact, the Recorder says, "In† the *present case*, the *formal*

* P. 117. † P. 128.

gift, as appears by the evidence, WAS BY THE ELDER BROTHER. The father *being dead,* and THE MOTHER NOT ATTENDING, *in her absence,* the elder brother attended the assembly, and *signed the deed of adoption, which runs in the name of the family.* Upon *these facts,* I think the Court is BOUND TO PRESUME the *consent of the mother.* She was living at the time, AND ON THE SPOT. It appears from the pleadings and evidence in the cause, that *adoption was a thing that had been much in agitation among the parties,* and was a measure which the Defendants thought themselves interested to prevent. *Had the consent of the mother been wanting, it could have appeared to the assembly,* as the want of the consent of the Defendants appeared, *and the Defendants would have been able to have shown it in evidence.* THE COURT THEREFORE TAKES THE MOTHER TO HAVE CONSENTED."

We are taught by daily experience that men come to different, and even opposite, conclusions from the same facts. There is nothing therefore, novel in the extravagance of deductions—but from this statement I do not see how reason can infer the mother's consent.

It appears from the pleadings and evidence "that adoption was a thing that had been much in agitation among the parties." It may have been so, but how does this demonstrate the mother's consent?

That the subject "had been much in agitation among the parties" generally; must, I presume, have been proved by satisfactory evidence of particular instances. If it had appeared that upon any one occasion the mother had expressed her consent, her sentiments upon the subject could not any longer have been left to an inference. Taking it then, as we must take it, that there was not any proof of her ever having made a declaration of her mind relative to this adoption, although it "was a thing that

had been much in agitation among the parties." I do not know the rule in dialectics by which we can be justified in supposing that she consented to a gift of her son in adoption.

I never before heard of the vicarious gift of a child in adoption—and we have a full admission that an *indispensable* party, the *surviving parent*, was not present at the ceremony. Was HER representative present? No such thing. This gift was made by the *elder brother*—and he could not have appeared as a representative without a production of his authority from the party whom he was alleged to have represented. How he came to be accredited as a proxy we are not informed, and I cannot conjecture.

This agent did not act in the name of his principal. He took upon himself to convey away his younger brother *in the name of the family*. By what then was the Court *bound to presume the mother's consent?* From what was the Court justified *in taking her to have consented?* The answer is, FROM HER ABSENCE.

There is not a tittle of evidence to show her consent,—and enough to convince us that it could not be proved.

She herself ought to have given away the boy in adoption, and I take for granted that she would have given him, if she had been consenting to the gift. Why did she not officiate on the occasion? There is no reason assigned for her absence. She was an *indispensable* party—"*she was living at the time and on the spot*,"—and as she did not attend, it appears to me that her imprisonment, rather than her consent, ought to have been inferred.

If we get over a want of the father's assent—and a want of the mother's agency—which I conceive to be impossible,—if we suppose that in this

case the boy's condition was to be bettered by his adoption,—if we lose sight of the mischiefs which must follow the introduction of novelties and anomalies into the law; we cannot but be struck with the perniciousness of this particular principle, which, if brought into precedent, may be so easily applicable to the purposes of cruelty and fraud.

"As* to the idea," says the Recorder, "as to the idea of the executors themselves adopting, as was contended for, by virtue of the will, it is too preposterous to be entertained for a moment, upon any principle of *Hindoo* law."

Perhaps it may be so—but why? Because all authorities concur in saying that the widow, duly authorized, is *the person to adopt*. Now whether it be necessary or not, for a husband's consent to be obtained in order that the widow may be enabled to *give* her son in adoption, there is not a single authority, of any description, to be found which goes so far as to sanction the gift of a child (I speak of adoption in the *Dattaca* form) the widow being alive, by any person, herself only excepted—and until the case in question came before the Recorder of *Madras*, I believe it never was affirmed, the widow being dead, that the child of her husband could be given in adoption by any person, or under any circumstances.

If a husband be dead—if he have departed from the country,—if he be incapacitated by insanity—or if he have incapacitated himself by a religious vow, and by having renounced all secular concerns—then *it is said*, that a wife *may, if pressed by irresistible necessity*, dispose of a son without the previous sanction of her husband. These are excepted cases—the doctrine is not universally received—and it is strictly confined to *times of calamity*—but all the *Pundits* declare, that in an ordinary case, it is abso-

* P. 103.

lutely absurd to say that a widow has any right to d ;pose of her husband's son, if she had not previously had his assent for the purpose.

It must be admitted that the testator, by his appointment of executors, proved his confidence personally in them. In point of *Hindoo* law, I venture to say it cannot be shown, that an elder, has a better right to give his younger, brother in adoption, than an executor has to receive a son in adoption, on account of his testator. They are, in truth, equally unauthorized by the law—but in reason and humanity it certainly would not be so preposterous to let the executor adopt, as to tolerate the gift of a younger, by an elder, brother in adoption. In the one case there cannot be any, and in the other there is every, motive to abuse.

If consent of the mother be necessary, (and it seems to be admitted, as well as denied, that it is so) her presence, in an officiating capacity, would at least have afforded the best evidence of her consent. Upon this occasion she was absent from the ceremony—her absence was not in any manner accounted for—there was no proof whatever of her having empowered the elder son to act upon her behalf—he did not even profess so to act. All this time the mother herself was living and *on the spot*. What then was this but a gift of the boy by his elder brother? This is indeed, what it was; and, being so, what has been justified by the Recorder.

The mother's consent would not at all have removed the objection—but there was no reason to *presume* that she had, and good reason to *believe* that she had not, consented—yet this is not all, nor the worst.

The Recorder says, "the* *Pundit* of *Bombay thinks that if either of the parents be dead, the consent of the survivor is sufficient; upon which the*

P. 131.

Recorder of the settlement puts a quere founded upon further enquiries, and DIRECTLY APPLICABLE TO THE CASE BEFORE US. WHETHER WHERE THE SURVIVOR IS THE MOTHER, THE CONSENT OF THE ELDER BROTHER ALSO SHOULD NOT CONCUR." The *quere* was, I suppose, put to the *Shastrees* of *Poonah*. Of its applicability, I must be permitted to doubt—but let that pass for the present. The Recorder proceeds—"And* if the Shastrees of *Poonah* may be depended upon, they *not only warrant the notion of Sir William Syer*† but give a reason FOUNDED IN THE TRUE SPIRIT OF THE HINDOO LAW, that seems to *establish the representative character* of the ELDER BROTHER FOR THE PURPOSE IN QUESTION. IF BOTH PARENTS BE DEAD THE CHILD MAY BE GIVEN BY THE ELDER BROTHER ONLY. *To which they add for a reason in the form of a quotation*—THE ELDER BROTHER IS THE FATHER REVIVED."

We are not told what notion of *Sir William Syer's* was warranted by this opinion, but I very much doubt of its being a sufficient warrant for any notion that any man ever yet entertained.

It strikes at the very root of justice, and lays the most solid foundation upon which interested iniquity can be erected. To sanction such a terrible usurpation we may, I trust, expect something better than "the form of a quotation." We may at least expect to know the author from whom it is taken—to be satisfied that he is of the most unquestionable credit—to see that this *dictum* is applicable to this particular point, and to have an opportunity of comparing it with its context. If after all we shall be satisfied that "the elder brother is the father revived" it will still require much to convince us, that he may therefore give his younger brother away in adoption.

But this is "*a reason founded in the true spirit of the Hindoo law!!!*" Af-

* P. 132. † At that time Recorder of Bombay.

ter its existence had been proved it would have been soon enough to speak in its commendation. We must recollect that *Jagannatha* was charged with having omitted to point out where his *special text was to be found*—this too, after the publication of his book in which many such special texts were collected; and rendered the more conspicuous, although not the more intelligible, by his comments.

Jagannatha was well known as an author. His moral character was unimpeached, and I believe unimpeachable. His reputation was at stake. It would have been lost by the detection of a fraudulent reference—and he could not possibly have had a motive for misleading his readers—but what are we to say of the *Poonah Shastrees?* Their names are not disclosed. They were, I presume, in point of character, upon a par with those of whom the Recorder had spoken. They may have been equally selfish or corrupt. Are they then to be implicitly relied upon?

Let it not be forgotten, that if their opinion had been law, it never could have applied to this question. The Recorder, I admit, has said that "it is directly applicable to the case" before him—but the case before him was one wherein *the mother was alive*—and the answer given by the *Poonah Shastrees* was founded upon the supposition of *both parents being dead.*

There is besides something extremely suspicious in this declaration of the *Poonah Shastrees.* *Poonah* is not far from *Bombay*—and it must be supposed that a cause was depending at *Bombay*, out of which the interrogatory of *Sir William Syer* arose. The answer does not at all correspond to the question, but the *Shastrees* probably returned that which was best suited to the case.

The question was, "Whether, where the SURVIVOR is the *mother*, the

consent of the *elder brother* ALSO *should not concur?*" The answer is "if *both parents be dead the child may be given by the elder brother only.*" Then follows the reason "in the form of a quotation."

If this answer be not given as applicable to the secular authority of an elder brother, it cannot be at all to the purpose. If it is to have such an application, I can only say that I never met, or conversed with any one who ever did meet, a single passage in support of it, in the books of *Hindoo* law. It is indeed contrary to the sense and substance of all *Hindoo* law—nor is there any thing to be found upon record, from which such a *spirit* can possibly be extracted.

Many passages importing that the eldest son is, in a religious point of view, considered as the representative of his father, are to be found,—I have quoted several of them. It is even said that the father "*Himself is truly born a son.*" This however, is expressly with relation to spiritual offices. It is no where said that the eldest son has a right to exercise paternal authority over his brethren. The contrary is every where affirmed. He may manage the estate during the minority of his younger brothers, as their mother may manage during the minority of all—but they are perfectly independent of each other. This is laid down by all text writers, admitted by all commentators, and established by the practice of every day. It is among the few principles in which we find universal acquiescence.

But supposing this jargon not to have been of the *Poonah* manufacture; —supposing every page of every law book to state that "the eldest brother is the father revived." Where is it laid down that his younger brother may be given away by him in adoption? What might be the consequences of this enormous proposition?

I shall requote the Recorder. He says, "*Adoption* as completely transfers him from his own family, as though he had never belonged to it.*" Now let us suppose the case of two brothers, the one an adult, and the other in his infancy, having lost their parents, and having an estate of ten *lakhs* of Rupees in the family. This "father revived" will be desirous of securing the whole to his own use. The design may be easily executed. It may be done by adoption, with as much effect as by death. His elder brother may transfer him as completely from his own family "*as though he had never belonged to it.*" Can any thing be more repugnant to common honesty, to common sense, or to the first and last principles of Justice? If a younger brother so cruelly and so wickedly betrayed, were to file a bill for the purpose of being restored to his natural rights, is there a Court upon earth so profligate or so abandoned as to deny the prayer of his bill—or one that could have the effrontery to deliberate for an hour upon such a question?

To whom is the elder brother a father revived? To his younger brethren—and can he abolish the relationship by that power which he possesses in virtue of the relationship alone? If he has his power in virtue of the union, can he dissolve the union in virtue of his power? Eccentric as some tenets undoubtedly are, there is nothing so outrageous as this to be found in the *Hindoo* law.

That the *Poonah Shastrees* had some cause for giving such an opinion, I am willing to admit—but I deny that it is founded in justice, in reason, or in law.

There is nothing to prevent an infant, however tender his age may be, from coming into a Court of equity by his next friend, and praying that

his share of the estate may be secured for his use. It has often been done in the Supreme Court at *Calcutta*—and an answer that the elder brother had given him in adoption, has not hitherto appeared. I venture to hope that such an atrocious defence would be disposed of without delay,—and (if any reprobation could be condign) with condign reprobation.

From what I have said upon the subject of *Partition*, I greatly mistake if enough will not appear to prove that such a doctrine is utterly inadmissible—and to show that brothers are absolutely independent of each other. That one should dispose of another in adoption, is no more consistent with the *Hindoo* law, than that one should appropriate the fortune of another to his own use. They are one and the same thing.

What says Menu? "The *eldest* brother *may* take possession of the patrimony, and the others *may* live under him, as they lived under their father, unless" unless what? "*unless they chuse to be separated.*"

A boy has been declared to be duly adopted under these circumstances. He was *twelve* years of age. He had undergone the ceremony of *tonsure* in his own natural family. He was not a *Sagotra*. His father, who was dead had not consented to the gift of him, nor did he know that his son was to be sought for in adoption. The adoption was in the *Dattaca* form. It did not take place in the season of calamity or distress. The mother was on the spot. She did not give her son away, nor did she attend at the ceremony of adoption. There was no evidence of her consent, nor any reason assigned for her absence. The elder, disposed of the younger, brother in adoption, by a writing in the name of the family.

Upon this recapitulation of the facts, I am confident that there is not a

Pundit from *Cassee** to *Ramisveram* who would not hold up his hands, and exclaim against such an adoption.

From the nature and object of my own undertaking, I must necessarily be anxious to prevent the diffusion of error—nor can I but be apprehensive that a judgement so elaborately pronounced (it extends over no fewer than forty-eight pages) and so confidently promulgated, may be received with a degree of deference to which it has not any manner of claim.

This report was given to the public, after fifteen years' meditation. The judgement was pronounced in 1801, and published in 1816.

Before its appearance in print, the author had been many years Chief Justice of the Supreme Court at *Madras*—and in his preface he declares that the reports are offered by him "*as a legacy to the bench, and the profession of this*" (*the Madras*) "*Presidency*" and "*to the Company's Courts upon the establishment.*"

I am convinced that the decision will mislead those by whom it may be followed. I am sure that the doctrines which it is designed to inculcate, are contrary to law. I hope I shall be thought to have commented upon them with candour and with justice. I shall not apologize for having done so, without ceremony and without reserve.

With reference to the 14th rule, I shall here notice the proceedings which took place upon *Rajah Nobkissen's* death, he having adopted, and afterwards having begotten, a son. There was not a formal decision—but the opinion of the Court was well known to have been, indeed it was declared to be, that a man who had adopted a son, was not at liberty, by

* P. 98.

his will, to cut off the adopted son from that proportion of the estate, to which, in virtue of his adoption, he was entitled by the *Hindoo* law.

I never heard that an adoption, imposed the necessity of practising economy upon the adopting father—or that it was to prevent him in his expenditure, from exceeding his income—or that it was to interfere with the exercise of his own pleasure, in the use, or in the abuse of his property. In these respects, I have never heard it surmised that a man was to be a less free agent, after, than before, he had adopted a son—but when he comes to a division of his fortune among his family; whether by will, or by distribution in his life time, I very much doubt his power of lessening the share, to which his adopted son is entitled by law. I incline to think that the son by adoption has rights as a *purchaser*, and that they cannot be defeated by his adopting father.

Admitting that a father may make an unequal distribution among his own begotten children, it does not follow that he can diminish the proportion of an adopted son. Their claims stand upon different grounds. If the begotten son has rights, they are confined to *ancestorial* property. If the adopted son has rights, they are extended to the property that has been *self-acquired*.

For the purpose of deciding this question, we must, whatever we ourselves may personally think of them, admit all those notions of which *Hindoos* are possessed, to be rational, or valid. If we fall short of this, we cannot be in a condition to adjudicate.

The son who is taken for adoption, becomes an alien from his own natural family. He foregoes every benefit to which he was entitled by his birth. He dissolves every tie by which nature had bound him to his kindred. He is renounced by his own father, when he is made the son of

another. In his paternal house, every relation, civil, social, and sacred is gone—and although contingencies might have put him in possession of ten times the wealth which he could have hoped for from his transfer, his adoption will operate as a forfeiture. These are great sacrifices, and made for the adopter's advantage—who is relieved from the reproach of orbation,—who gains respectability among his neighbours—all the comfort that could have been expected from a son of his own in this world—and the means of attaining future bliss after death. In this view of the case, I cannot but think that the boy who is taken for adoption ought to be considered as a *purchaser;* and in the case of *Gopeemohun Deb* v. *Rajah Rajcrishna,* he seems to have been looked upon in that light by the Court. For an issue was directed to try the execution of an instrument by which *Rajah Nobkissen* was alleged to have made a settlement upon the boy whom he was about to adopt—and the issue might have been nugatory if it had not been preliminarily determined that a gift in adoption was a *good* and *valuable* consideration, or at least a consideration sufficient for the support of a promise.

Rajah Nobkissen had five wives, but no male issue, when he took *Gopeemohun Deb* in adoption;—*Gopeemohun* was a son of *Ramsoonder Bewertah* one of the brothers of *Rajah Nobkissen.* It is usual, although not necessary, when a man who adopts, has several wives, to adopt the son *as a child of one of them.* The Rajah accordingly adopted *Gopeemohun Deb* as the son of his eldest wife *Heeramonee Dossee.*

The *Rajah* entered into an agreement previous to the adoption, by which he promised, in *consideration* of *Ramsoonder Bewertah* giving his son *Gopeemohun Deb* to be adopted by him *(Rajah Nobkissen)* as the son of his eldest wife *Heeramonee Dossee,* that he (the *Rajah*) would give the whole of his property to *Gopeemohun Deb,* if he did not thereafter beget a son. In case the *Rajah* should have a son born to him, it was stipulated that

he and *Gopeemohun* should share the property equally between them—and if more than one son should be born, that they and *Gopeemohun* should be equal participators in the *Rajah's* estate.

Some years after the adoption *Rajah Nobkissen* had a son by one of his younger wives. This was *Rajcrishna*, who upon the death of his father became *Rajah Rajcrishna*.

Rajah Nobkissen, sometime after the birth of *Rajcrishna* made a will, by which he left his adopted son *Gopeemohun* property to a considerable amount, although but little in comparison with the half of his estate. He made several bequests—and gave every thing not particularly disposed of, to his son *Rajcrishna*.

Upon the death of *Nobkissen*, *Gopeemohun* filed a bill against *Rajah Rajcrishna*, by which he prayed an account, and claimed a moiety of *Nobkissen's* estate. This claim was made as well upon the ground of his having been adopted, as upon that of the agreement which had been entered into by *Nobkissen*.

Rajcrishna did not by his answer, either admit or deny the adoption, nor did he either admit or deny the execution of such an agreement as had been set forth—but insisted, if any such document ever had existence, that it was not intended by *Rajah Nobkissen* to affect the interests of his begotten son, but that it had been given merely for the purpose of pacifying his eldest wife *Heeramonee*, who had been incessantly importuning him to adopt a son for her—and he relied upon the will which *Nobkissen* had made in his favor.

Gopeemohun, upon a hearing of the cause, was declared to have been duly adopted.

I was one of *Gopeemohun's* counsel, and I well remember that we had not a doubt of being able to prove the agreement—and even if we should fail, that we felt confident of our client's success up to the extent of *one-third* of *Rajah Nobkissen's* estate. We never thought of disputing, for there were no grounds upon which we could dispute, the due execution of *Nobkissen's* will, but we were certain, as the law was then understood, that it would not be suffered to prejudice those rights which were *Gopeemohun's* as an adopted son.

If the agreement had been set aside, the question would have arisen, and it must have been judicially determined, whether or not, an adopting father has the power by will, or in his life time by gift (which I consider to be the same thing) in making a distribution of his estate, to withhold from an adopted son, any part of his due proportion.

The agreement which had been entered into by *Rajah Nobkissen* could have been satisfactorily proved—but the parties were advised to come to a settlement of their dispute. This they did upon the footing of the agreement, and thereby revoked the will of *Rajah Nobkissen* as far as it related to the interests of *Rajah Rajcrishna* or *Gopeemohun Deb.*

The will itself, I shall advert to in another place; and here observe that it was fully established by the Court, except in so far as it related to *Rajah Rajcrishna* and *Gopeemohun Deb.*

I believe this cause would have been decided by the Court, as it was settled by the parties themselves—that is, according to the agreement which had been entered into by *Rajah Nobkissen*; but the question is, what would have been done, if such an agreement had never existed? To this I can only answer that the counsel of *Gopeemohun* had not any doubt. From what had been declared upon the Bench, and from the law as it

was understood at that day, we were quite certain that *Rajah Nobkissen* would not have been suffered by his will, to deprive the son whom he had adopted, of his rights—and that our client, if we had failed in proving the agreement, would, notwithstanding the will, have been declared entitled to *one-third* of the estate.

ADDENDA

To the Chapter of Inheritance.

Although I ought perhaps, to apologize for the great defect in point of arrangement, which will be found throughout my publication, I hope an acknowledgement of the fault will be deemed sufficient from a gratuitous labourer—from one whose thoughts must have been chiefly directed to other avocations, and who has hardly had a single day which he could devote to this work with undivided attention.

These following quotations ought to have accompanied the chapter on Inheritance.

The first is *Sricrishna Tarcalancara's* recapitulation *of the order of succession to the property of a deceased man.* It is published by *Mr. Colebrooke* in his translation of *Jimuta Vahana's Dayabhaga,* and a note of the translator (every thing from his pen is valuable) will be found subjoined.

" *Recapitulation by Sricrishna Tarcalancara.*

"The order of succession to the property of a deceased man, is this. "First the son inherits; on failure of him, the son's son; in his default, "the son's grandson. However, a grandson whose father is dead, and a "great grandson whose father and grandfather are deceased, inherit at "once with the son. On failure of descendants down to the son's grand- "son, the wife inherits: and she, having received her husband's heritage, "should take the protection of her husband's family or of her father's, "and should use her husband's heritage for the support of life, and make "donations and give alms in a moderate degree, for the benefit of her de- "ceased husband; but not dispose of it at her pleasure, like her own pe- "culiar property. If there be no widow, the daughter inherits; in the "first place, a maiden daughter; or on failure of such, an affianced daugh- "ter: but, if there be none, a married daughter: and she may be one, "who has, or is likely to have, male issue; for both these inherit toge- "ther: but one who is barren, or who is become a widow having no male "issue, is incompetent to inherit. On failure of the married daughter, a "daughter's son is heir. If there be none, the father succeeds; or, if he "be dead, the mother. If she be deceased, a brother is the successor. "In the first place, the uterine (or whole) brother; if there be none, a half "brother. But, if the deceased lived in renewed coparcenery with a bro- "ther, then, in case of all being of the whole blood, the associated whole bro- "ther is heir in the first instance; but, on failure of him, the unassociated "whole brother. So, in case of all being of the half blood, the associated "half brother inherits in the first place, and on failure of him the unasso- "ciated half brother. But, if there be an associated half brother and an unas- "sociated whole brother, then both are equal heirs. In default of brothers, "the 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; but, in case of reunion of coheirs, and on the supposition "of all being of the whole blood, the associated son of the whole brother is "in the first place heir; and, on failure of him, the unassociated nephew "of the whole blood: or, on the supposition of all being of the half blood, "the associated nephew of the half blood, is the first heir; and, on failure "of him, the unassociated nephew. But, if the son of the whole brother "be separate, and the son of the half brother associated, both inherit to-"gether, like brothers in similar circumstances. If there be no brother's "son, the brother's grandson is heir. Here likewise the distinction of the "whole blood and half blood, and that of reunited parcenery and disjoin-"ed parcenery, must be understood. On failure of the brother's grand-"son, the father's daughter's son is the successor: whether he be the son "of the sister of the whole blood, or the son of a sister of the half blood.* "If there be none, the father's own brother is heir; or, in default of such, "the father's half brother. On failure of these, the succession devolves "in order on the son of the father's whole brother, on the son of his half "brother, on the grandson of his whole brother, and on the grandson of "his half brother. In default of these, the paternal grandfather's daugh-"ter's son inherits; and, in this instance also, whether he be son of the "father's own sister or son of the father's half sister: and, in like manner, "[the whole blood and half blood inherit alike] in the subsequent instance "of the succession devolving on the son of the great grandfather's daugh-"ter. On failure of these heirs, the paternal grandfather is the successor. "If he be dead, the paternal grandmother inherits. If she be deceased, "the paternal grandfather's own brother, his half brother, their sons, and "grandsons, and the great grandfather's daughter's son are successively "heirs. On failure of all such kindred, who present oblations in which "the deceased owner may participate, the succession devolves on the

* The son of the proprietor's own sister, and the son of his half sister, have an equal right of inheritance; according to ACHARYA CHUNDAMANI. SRICRISHNA, *Crama-Sangraha*.

"maternal uncle* and the rest, who present oblations which the deceased "was bound to offer. In default of these, the heritage goes to the son of "the owner's maternal aunt. Or, failing him, it passes successively to the "son and grandson of the maternal uncle.† On failure of these, the right "of inheritance accrues to the remote kindred in the descending line, who "present the residue of oblations to ancestors with whom the deceased "owner may participate; namely to the grandson's grandson and other "descendants for three generations in succession. In default of these, the "inheritance returns to the ascending line of distant kindred, by whom ob- "lations are offered, of which the deceased owner may partake; namely, "to the offspring of the paternal grandfather's grandfather and other ances- "tors, in the order of proximity. On failure of these, the succession de- "volves on the *Samanodacas* or kindred allied by a common oblation of "water. In default of them, the spiritual preceptor is heir; or, if he be "dead, the pupil; or, failing him, the fellow-student in theology. If there "be none, the inheritance devolves successively on a person bearing the "family name, and on one descended from the same patriarch, in either "case being an inhabitant of the same village. On failure of all relatives "as here specified, [the property devolves on *Brahmanas* learned in the "three *Vedas* and endowed with other requisite qualities:‡ and, in default "of such,] the king shall take the escheat, excepting however the property "of a *Brahmana*. But the priests, who have read the three *Vedas* and pos- "sess other requisite qualities, shall take the wealth of a deceased *Brah-* "*mana*.

"So the goods of an anchoret shall devolve on another hermit consi- "dered as his brother and serving the same holy place. In like manner

* The maternal grandfather inherits before his son the maternal uncle, according to the *Daya-tatwa* of RAGHUNANDANA and *Crama-Sangraha* of SRICRISHNA.

† See the note subjoined to this summary.

‡ *Crama-Sangraha*.

"the goods of an ascetick shall be inherited by his virtuous pupil: and "the preceptor shall obtain the goods of a professed student. But the "wealth of a temporary student is taken by his father or other heir. Such "is the abridged statement of the law of inheritance. SRICRISHNA."

"*Remark by the Translator.*

"The son and grandson of the maternal uncle ought to precede the son "of the maternal aunt, by the analogy of the rule of inheritance on the fa- "ther's side. But three collated copies of SRICRISHNA's commentary "agree in stating the order of succession as here exhibited. On the other "hand the same author, in his original treatise on inheritance entitled *Cra- "ma-Sangraha*, exhibits the succession on the mother's side in the following "order: 'first the maternal grandfather; next the maternal uncle; then the "maternal uncle's son; after him, the maternal uncle's son's son; and sub- "sequently the maternal grandfather's daughter's son: [on failure of these, "the maternal great grandfather, his son, his son's son, his son's grandson, "and his daughter's son: again, on failure of these, the maternal grandfather's "grandfather, his son, his son's son, his son's grandson and his daughter's "son.*]' It must be remarked, however, that the text of SRICRISHNA's "treatise, according to some copies of it, interposes the mother's sister's "son between the maternal uncle and his son. But that is an evident "mistake; for the mother's sister's son is the same with the maternal "grandfather's daughter's son; who is placed by the same author after the "maternal uncle's grandson.

"The author of the *Daya-Nirnaya* states the succession differently: v. "'First the maternal uncle; then the maternal uncle's son; next the ma-

* That part of the text which is enclosed between crotchets is wanting in some copies of the *Cra- ma-Sangraha*.

" ternal grandfather; after him, the mother's sister's son; subsequently " the maternal uncle's son's son; and lastly the maternal great grandfa- " ther.' He gives reasons founded on the number of oblations deemed " beneficial to the deceased owner.

" JAGANNAT'HA TARCAPANCHANANA intimates the opinion, that the son " of a son's daughter, or of a grandson's daughter, or of a niece, or of a " nephew's daughter, are entitled to the succession before the maternal " grandfather. *Digest of Hindoo Law*, vol. iv. p. 230.

" I find nothing else upon the subject in other writers of the *Bengal* " school; and, amidst this disagreement of authors, I should be inclined " to give the preference to the authority of SRICRISHNA'S *Crama-Sangraha;* " because the order of succession on the mother's side, as there stated, " follows the analogy of the rule of inheritance on the father's side." C.

The next quotation is taken from the same work in which the former is contained. It is *a summary of succession to the separate property of a woman*, and ought to have been introduced immediately after the note to my 33d rule—page 9.

" SUMMARY.

" The settled order of succession to the separate property of a woman " is as follows:

" In the case of property left by a maiden, the right devolves first on " the uterine brother; or, if there be none, on the mother; but, if she be " dead, on the father.

" It is the same in respect of property left by a betrothed damsel, except-

"ing what was given by the bridegroom: for he has a right to whatever "he gave."

"In regard to the property of a married woman, which was received at "her marriage, her maiden daughter has the first claim; and next, a be- "trothed one: but, on failure of both these, her married daughters, who "have, or are likely to have, male issue, inherit together; or, on failure of "either of them, the other takes the succession: if there be none of either "description, the barren and the widowed daughters have an equal right; "and, on failure of one, the other succeeds. Next the right devolves, "in order, on the son, the daughter's son, the son's son, the great grand- "son in the male line, the son of a contemporary wife, her grandson and "her great grandson in the male line, with this difference, that, accord- "ing to the author of the work (JIMUTA-VAHANA,) the right of the daugh- "ter's son follows that of the contemporary wife's son.

"In the next place, if the property were received at the time of nup- "tials celebrated in one of the five forms denominated *Brahma*, &c. the "order of successors is husband, brother, mother, and father. But, if it "were received at nuptials in one of the three forms called *Asura*, &c. the "order is mother, father, brother and husband.

"Then the husband's younger brother; after him, the son of the hus- "band's younger brother, and the son of his elder brother; next, the sis- "ter's son; afterwards, the husband's sister's son; then the brother's son; "after him, the son-in-law; next, the father-in-law; subsequently, the "elder brother-in-law. In the next place, kinsmen allied by funeral ob- "lations *(sapindas,)* in the order of proximity; after them, kinsmen con- "nected by family *(saculyas;)* and, lastly, such as are allied by similar "oblations of water *(samanodacas.)*

"In the case of property given by the father at any other time but the

"wedding, a maiden daughter succeeds in the first instance; next a son; "then a daughter who has, and one who is likely to have, male issue; "after them, the daughter's son, the son's son, the great grandson in the "male line, the son of a contemporary wife, and her grandson and "great grandson in the male line: next to these, the barren and widowed "daughters inherit together: afterwards the succession proceeds as be- "fore described in the case of property received at nuptials denominated "*Brahma*, &c.

"But, in the instance of property not received at a wedding, and other "than such as is given by the father, the son and unmarried daughter in- "herit together; or, on failure of both of them, the daughters, who have, "or may have, male issue; and, afterwards, the son's son, the daughter's "son, the great grandson in the male line, the son of the contemporary "wife, her grandson and great grandson in the male line, are rightful "claimants in succession; next to these, the barren and widowed daugh- "ters inherit together: and lastly the order is, as before, the same with "that of property received at *Brahma* nuptials. SRICRISHNA."

OF GIFTS, AND UNEQUAL DISTRIBUTION.

I DO not expect to dilate upon this subject with much advantage to others, because I feel that I cannot do so with any satisfaction to myself; —but before the question of *Wills* can be introduced, it is necessary to say something about "*Gifts* and *unequal distribution.*"

Although a man may be permitted in his life time to make a gift, or an unequal distribution of that which he is forbidden to dispose of by will; the converse will not necessarily follow. The power of disposal by Testament may be prohibited; but we cannot conceive it to exist, unless it be founded upon that of alienation during life.

The right of *Hindoos* to give away certain property while they live, is unquestionable; but that of disposal by will has not been expressly conferred upon them by their law.

It has now (if a series of decisions in the Supreme Court can confirm it) been confirmed by authority; yet that Court is not competent to make law—on the contrary, it is enjoined to administer their own laws to the *Hindoos.*

A power to direct the distribution of their wealth after death, has been sanctioned. This however, does not, and cannot, imply that property

over which they had not a control when they lived; may, upon a cessation of life, be disposed of according to their directions.

It is therefore desirable that the extent to which a *Hindoo* in his life time, may give, or make an unequal distribution of, his property, should be ascertained.

I think it clear that he has a right to dispose of his *self-acquired* property, whether *movable* or *immovable*, according to his own pleasure—and that he has the same right as to *ancestorial movable* property. With respect to *ancestorial immovable* property there seems to be much doubt. *The gift of it all to one son* is certainly not authorized by any of the *books* upon *Hindoo* law. *Unequal distribution* may, nevertheless, be allowed—but we can hardly accede to the principle, without knowing the limits by which it is to be bounded. As they have not been defined by those who insist upon the right, it must be admitted that discretion will become in a great measure at least, if not entirely, a substitute for the law.

Most of the doctrines upon this point are contained and condensed in the *Daya-crama Sangraha*. I shall give the law as it is laid down in that work and elsewhere—the decisions which have taken place, and the opinions of Pundits. But after all I very much fear that it will be difficult to come to a satisfactory conclusion on the subject of gifts or unequal distribution of *ancestorial immovable property*.

The following is taken from the *Daya-crama Sangraha*:—

"A partition made by a father of his *own acquired* wealth, is regulated by his *will alone*; but in regard to a division of the *ancestrel* property, the circumstance of the cessation of the mother's courses, must *be associated with the father's will*. This is the difference."

"Thus *Vishnu* declares; when a father separates his sons from himself, his will regulates *his own acquired wealth*."

"But in regard to *ancestrel* property *Gautama* says, after the demise of the father, let sons share his estate, or while he lives, if the mother be past child-bearing, and *he desire* partition."

"*It should not be argued that this text of Gautama is applicable to a father's own acquired property;* for if it be alleged that partition of the father's *acquired wealth* takes place indeed, on the cessation of the mother's courses, it would follow that the text of *Gautama* which declares 'a son begotten after partition takes exclusively the wealth of his father,' would be wholly irrelevant, since no son can be born after the extinction of the mother's courses."

"It must not be asserted, that this last cited text of *Gautama* relates to *ancestrel* property, and is consequently not irrelevant, for supposing such to be the case, a son born after partition would be debarred from participation in the *ancestrel* property, and consequently deprived of subsistence; which is forbidden by the text, declaring, 'They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support, and the dissipation of their *hereditary* property is censured.'"

"Nor should it be said that the son begotten after partition would not be deprived of subsistence, since he would be entitled after his father's death, to that share of the *ancestrel* property, which had been taken by him, for supposing the father to have dissipated the whole of such property, the son would inevitably be deprived of subsistence."

"The fact then is, that this text of *Vishnu*, 'when a father separates his

sons from himself, *his will regulates the division of his own acquired wealth,*' is useful in showing that the father's *will is absolute* in regard to the division of *this* wealth, and accordingly, that the text of *Guatama* which exhibits the concomitancy of the cessation of the mother's courses with the will of the father, is *strictly applicable* to *ancestrel* property. This is correct."

"Hence in a partition made by a father of his *own acquired wealth, he may take as much of it as he pleases,* and divide the remainder among his sons according to the text of *Vishnu* already quoted, and the following text of *Harita:* 'a father during his life distributing his property, may retire to the forest, or enter into the order suitable to an aged man; or he may remain at home, having distributed small allotments and keeping a greater portion. Should he become indigent he may take back from them.'"

"*If a father should give to any one of his sons a greater share, by reason of his good qualities, or of his piety, or of his having a numerous family, or of his incapacity, such a distribution is authorized by law.*"

"*Nareda* says, for such as have been separated by their father, *with equal, greater* or *less* allotments of wealth, that is *a lawful distribution: for the father is lord of all.*"

"*Lord*—that is possessed of the power to alienate at pleasure: consequently, this text *relates to property acquired by a father himself,* by reason of the *impossibility* of such a power as is above described, *in regard to ancestrel wealth.*"

* *Harita* says, "Should he (the father) *lose by some calamity,* what he reserved, he may take back from them (the sons) for his maintenance, what he gave; but he must *give* a portion *to* sons reduced to indigence."

"A father must not however, while afflicted by sickness or disorder, or labouring under distraction of mind, or inflamed with anger, or influenced by partiality for the son of a favorite wife, distribute a less or a greater share to one of his sons, *without the existence of any of the causes* above mentioned: for the text of *Nareda* declares, 'a father who is afflicted with disease, or influenced by wrath, or whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has *no power in the distribution of his estate.*'"

"*Engrossed by a beloved object*—such as excessive partiality for the son of a favorite wife."

"But when a father makes partition of the *ancestrel property*, he may take *two shares for himself, and allot to each of his sons a single share:* for the text of *Vrihaspati* which declares 'the father may himself take two shares at a partition made in his life time,' *relates to ancestrel wealth.*"

"It must not be supposed that this text refers to *the father's own wealth*, since it would contradict the texts of *Vishnu* and the rest, which declare, that what a father may *in such case take, depends entirely upon his own will;* and as he may take a greater or less share, at his pleasure, the restriction of *two shares only, would be useless.*"

"*A father has not the power to make an unequal distribution of ancestrel property*, consisting either of *land*, or a *corody*, or *slaves*, even though any of the causes before mentioned; namely the superior qualifications of one particular son, &c. should exist; and the text of *Yajnyawalcya* which declares 'the ownership of father and son is the same in land, which was acquired by *his* father, or in a *corody*, or in *chattels*,' is intended to restrain the exercise of the father's will; for, although contrary to the received opinion of *equal ownership between father and son*, IT IS IMPOSSIBLE *that, as*

long as the father, the owner of the ancestrel property, continue to survive, HIS SONS SHOULD HAVE OWNERSHIP THEREIN."

"*But the father possesses a power in regard to ancestrel property,* OTHER THAN LAND, *and the descriptions above mentioned, such as pearls, gems,* SIMILAR TO THAT WHICH HE HAS IN THE DISPOSAL OF HIS OWN ACQUIRED WEALTH. *Yajnyawalcya* declares, 'the father is master of the gems, pearls, and corals, *and of all (other movable property,)* but neither the father, nor the grandfather, is so, *of the* WHOLE *immovable estate.*'"

"Here, by the specification in the first instance, of *gems, pearls, and corals,* and afterwards by the use of the word *all,* gold and other effects, *exclusive of the three descriptions* of property, consisting of land, &c. are intended. The word *whole* again which occurs in the second portion of the above text, is made use of for the purpose of showing that a *prohibition does not exist against a gift of immovable property, not incompatible with the due support of the family.* Thus it is stated in the *Dayabhaga.*"

"In like manner a father may at his pleasure, allot to his son, the deduction of a twentieth from his own acquired wealth, *or the ancestrel property. Yajnyawalcya* says, 'If a father make a partition, let him separate his sons at pleasure, and either *dismiss the eldest with the best share, or if he choose,* all may be equal sharers.' Here the first half of this text relates to a father's *own acquired wealth,* and the last *refers to ancestrel property.* This is the opinion stated in the *Dayabhaga.*"

I cannot collect more than I have now given, from the *Daya-crama Sangraha.* It will be seen, that the father has a right to dispose *of his own self-acquired property* according to his pleasure, and that the same right is conceded as to *ancestorial movable property.* Both rights indeed, seem, in their exercise, to be accompanied by moral restrictions. A fa-

ther is clearly authorized by the law to give to any one of his sons a greater share *on account of his good qualities, or of his piety, or of his having a numerous family, or of his incapacity*—but he has no power to make an unequal distribution *if he himself be afflicted with disease, or influenced by wrath, or engrossed in mind by a beloved object, or acting otherwise than the law permits.* That these privileges and restraints apply to *self-acquired immovable*, and to all *movable* property is certain, because it is distinctly laid down that the father, in dividing *ancestorial immovable* property, cannot for any cause, or upon any consideration, distribute it unequally among his sons—although it is said he may take two shares to himself.

This author *Sri Crishna Tarcalancara* has been silent upon a most important point.

We have hitherto seen that an act, although most strictly prohibited, may be valid when done. Here an *unequal* partition (except under special circumstances) even of *self-acquired* property is forbidden. Yet the *right* to make such a partition, at the mere will of the acquirer, is acknowledged.

The *right* to make an unequal partition of *ancestorial immovable* property is unequivocally denied—but will such a partition be valid if made? This is a most momentous question, inasmuch as the law's efficacy or inefficacy must be pronounced according to the answer. Before I conclude the chapter, it will be seen that decisions and opinions have turned upon this single point—that "*factum valet*" has overcome the law. That the whole *ancestorial lands* were given to one son—that the *illegality* of the act was admitted—that it was declared to be *immoral* and *sinful*—but that *having been done*, it was valid.

Every *Hindoo* is morally bound to an obedience of the laws which he

has received from the "*holy saints*" for his direction—but if morality be the only sanction, each man will act according to his will. He may interpret the law as he pleases; and must, in the end, be the arbiter of his own conduct.

In the question now before us we find the same injunction generally applied to partitions of *all sorts* of property—a *right* of acting contrary to the injunction admitted in one case, and denied in the other—and yet we are unable to ascertain a distinction, or to say that an unequal distribution of *ancestorial*, will not in fact, if made, be as efficacious as an unequal distribution of *self-acquired*, property.

There are instances in the books (but they are rare) of declarations concerning the *invalidity* of acts. Generally speaking the law is laid down, and it is for the expounders to declare whether it be obligatory or otherwise—that is, whether a thing done in defiance of the law shall be valid or not. Thus the whole code is left to the discretion of ***Pundits*** and it may be confirmed or annulled at their pleasure.

To distinguish between that which may be enjoined or prohibited in a moral, and that which may be enjoined or prohibited in a legal, sense by the *Hindoo* law, is a matter of very great difficulty. This may be illustrated by the point which we are now considering—an unequal distribution of any property, is, under some sanction or other, forbidden—but what sanction is applicable to each description of property, we are unable to discover. When we enquire, we shall get various answers, as the fancies, or the interests of *Pundits* consulted may chance to prevail. Some will tell us that an unequal distribution, at pleasure, even of self-acquired personal property, is not only immoral and sinful, but illegal and invalid also—and others that such a distribution of hereditary real property, is immoral and sinful indeed, but legal and valid notwithstanding.

In such a state of things, it is not too much to say, that precedent ought not to be departed from without good cause, and that almost any precedent will be preferable to such distracting uncertainty.

Sanc'ha and *Lic'hita* say, "Should the father be incapable, let the first-born manage the affairs; or the next son, experienced in business, if the father assent. *Not without the father's consent, can a partition of the property be made.* If he be old, if his faculties be impaired, or if he be afflicted with a chronic disorder, let the eldest son, like a father, protect the property of the rest; *truly the support of the family depends upon the patrimony;* sons, who have parents living are not independent, nor even after the death of their *father*, while their *mother* lives."

Upon this text *Jagannatha* observes, "Since the text of *Sanc'ha* and *Lic'hita* shows, that partition may not be made without the father's consent, it appears, that partition should be made, if the father choose to divide the estate. Hence partition among sons, even though the father be living, does take place, *but founded solely on the father's choice.*"

Gautama:—"After the death of the father, the sons may divide his estate; or while the father lives, *if he choose to divide it, and if their mother, or any other wife, be too aged to bear more sons.*"

Baudhayana:—"With the father's assent, a partition of heritage may be made." "Wherefore should a father, who lives happily with his sons and the rest, desire partition?" To this *Harita* replies, "A father making a *complete partition* even during his life, may either go to the forest as a hermit, or enter at once into the fourth order, or that of anchoret; or he may divide a small part of his fortune among his sons, and remain in his house, keeping the greater part of it, but without concealing any portion of his wealth."

Nareda:—"Or even the father being advanced in years, may himself divide the estate among his sons, *giving to the first-born the best portion, or in any mode which he shall choose.*"

Here follows the comment of *Jagannatha:*—"'*The best portion*'—a greater portion; the deduction of a twentieth part ordained by *Menu*, or other suitable portion. The same should also be understood in respect of the middlemost and the rest. *This concerns eldest sons and the rest* ENDUED WITH VIRTUOUS QUALITIES. The very same exposition is delivered by *Raghunundana* and others;—*Chandeswara* explains '*best*,' most excellent, greatest. '*Or in any mode, which he shall choose*' he may reserve any part he chooses, or give more to any one of his sons, and less to another." This all refers to the *virtuous qualities* of the sons, of which enough has already been said—and I conceive that it applies to *self-acquired* property alone.

Vishnu:—"If a father make a partition between himself and his sons, he may *give or reserve*, at his pleasure, *any part* OF HIS OWN ACQUIRED WEALTH; *but over landed property left by a paternal grandfather, the father and the sons have equal dominion.*"

Chandeswara:—"*This concerns wealth acquired by the father,* WITHOUT USING THE PATRIMONY *which had descended from his own father.*"

Misra:—"*What has been acquired* WITHOUT ADVENTURING THE PATRIMONY, *a father has power to distribute in equal or unequal shares.*"

Jagannatha:—"And that is reasonable; *for what is gained on the adventure of property left by his father,* BEING CONSIDERED AS AN ACQUISITION OF HIS FATHER *by means of that property adventured is deemed a part of his property.*"

Yajnyawalcya:—"If a father make a partition among his sons, *he may give, at his pleasure,* MORE TO SOME, AND LESS TO OTHERS, or give the first-born the portion of an eldest son, or divide the estate among all of them in equal shares."

Jagannatha:—"Some remark that partition cannot be made at the option of sons, *since they have no property in the estate while the father lives.* Hence, as is observed in the *Dipacalica* the term "*at his pleasure*" denotes, that the DISTRIBUTION should be made *at the pleasure of the father, not of the sons.* The same legislator propounds unequal distribution in another text: hence both opinions may be received under the ambiguous sense of the phrase, since other sages propound both rules. *In none of the three cases is the distribution made at the pleasure of the sons;* and the reason of that is, their want of ownership. THIS HOWEVER, CONCERNS WEALTH ACQUIRED BY THE FATHER HIMSELF; *for a different rule will be propounded in respect of the property descending from the grandfather.* Such is the opinion intimated in the *Ratnacara.*"

Here is the "*different rule*" alluded to; "over land acquired by the grandfather, over a corody out of mines or the like, settled on him and his heirs by the king, and over slaves employed in his husbandry (or over gold and the like; for the word '*Dravya*' is expounded variously) the father and the son, when the grandfather dies, *have equal dominion.*"

I must not omit to mention that there are several texts which put *movable* and *immovable ancestorial* property upon the same footing—but the number and weight of authorities are clearly on the other side.

"Although a father have power to give, at his pleasure, *more to some and less to others,* WHEN HE DISTRIBUTES WEALTH ACQUIRED BY HIMSELF,

still an unequal distribution MUST NOT *be made through partiality, resentment, or the like.*"—*Jagannatha.*

Catayayana :—" If a father during his life, divide the property, he shall not prefer one of his sons, nor exclude one of them from a share, without a sufficient cause."

" '*Without a sufficient cause,*' such as duty and piety, a large family to maintain, or inability to earn his livelihood and the like, (as explained on the concurrent opinions of *Jimutavahana* and the rest) he shall not prefer one son, or distinguish him by assigning to him a larger portion ; nor shall he exclude one of his sons from a share, or disinherit him, without a sufficient legal cause of exclusion, such as degradation and the like, or spontaneous relinquishment of his share. In like manner he should not give the eldest a deduction equal to a twentieth part of the estate or the like, *without a sufficient cause,* NAMELY THE VIRTUES REQUIRED. Consequently, *if there be a sufficient cause,* he may give a greater portion to one of his sons, a deduction of a twentieth part and so forth, to the first-born and the rest, and *no share to an outcast,* an *eunuch* or the like. *But if he do give a greater portion to one son, through partiality, because he was born of a favorite wife, and give less or none to another son through resentment, or give the portion of an eldest son to his first-born* THOUGH DESTITUTE OF VIRTUE, THAT DISTRIBUTION IS INVALID."

It is quite impossible to ascertain whether *Jagannatha* in this comment, supposes the text of *Catayayana* to relate to *ancestorial,* or to *self-acquired* property. Had it not been for his conclusion, I should have thought that he had *self-acquired* property in view ; but when he says the distribution, if unequally made, through partiality, or without a sufficient cause, *will be invalid,* it cannot be supposed that he speaks of property which he himself had repeatedly declared to be disposable at the pleasure of the

possessor. On the other hand, if this comment be relating to *ancestorial* property, it will be perfectly superfluous considering the many texts upon which *Jagannatha* has in other places relied—but such is the satisfaction to be obtained upon a reference to the *Digest*.

Vrihaspati:—"Sons to whom *equal*, *less*, or *greater* shares have been allotted by their father, should maintain such distribution; otherwise they shall be chastised."

Jagannatha:—"According to *Chandeswara* and others, *this text concerns wealth acquired by the father*, WITHOUT CO-OPERATION OF THE SONS, and the text of *Menu* concerns property acquired *with their co-operation*. According to *Jimutavahana* and others, the text of *Menu* should be adduced in the case of partition *demanded by the sons*, and the text of *Vrihaspati* in the case of partition made by the father *of his own accord*." The text of *Menu* referred to is as follows: "If, among undivided brethren *living with their father*, there be a *common exertion for common gain*, the father shall never make an unequal division among them when they divide their families."

In this (the *Cali*) age of the world, as we are told by *Sri Crishna Tarcalancara* and many others, there is not any distinction to be made in the shares of brothers on account of their *qualities good or bad*—and the law of *Menu* upon that subject is now obsolete. We may however yet have recourse to it for the purpose of showing that the division must be equal, as the distinction founded upon qualities, no longer prevails.

Menu then says, "Of all the goods collected, *let the first-born*, IF HE BE TRANSCENDENTLY LEARNED AND VIRTUOUS, *take the best article*, whatever is most excellent in its kind, and the best of ten cows, or the like."

"*But among brothers equally skilled in performing their several duties,* THERE IS NO DEDUCTION OF THE BEST IN TEN, OR THE MOST EXCELLENT CHATTEL, though *some trifle,* as a mark of greater veneration, should be given to the first-born."

"*If a deduction be thus made,* LET EQUAL SHARES of the residue be ascertained and received; *but if there be no deduction,* the shares must be distributed in this manner."

"*Let the eldest have a double share,* and the *next born a share and a half,* IF THESE TWO CLEARLY SURPASS THE REST IN VIRTUE AND LEARNING; *the younger sons must have each a share.* IF ALL BE EQUAL IN GOOD QUALITIES, THEY MUST ALL SHARE ALIKE: thus is the law settled."

The power of exclusion for certain causes is given by *Apastamba,* to a father. He says, "Having satisfied the eldest with one chattel, let the father, who makes a partition in his life time, assign *equal shares to his sons,* BUT EXCLUDE ONE WHO IS EMASCULATED, INSANE, OR DEGRADED."

I shall conclude these extracts by giving what *Jagannatha* has said. "On the distribution made by a father in his life time," and I believe it will be found liable to the same remark which I before made on his comment upon a text of *Catayayana.* He says of the father, "*He may distribute at his pleasure immovable or other property acquired by himself.* In the first place, he may reserve for himself as much as he pleases. Next, having given to his first-born a suitable portion, *according to law,* as a token of greater veneration due to him, let him make an *equal partition* among all his sons. *But if one surpass the rest in piety or the like,* a *greater share should be allotted to him;* or if his conduct be irreverent, a less share; if a *heinous offence* be imputable to one son, such as enmity to his father, or the like, no share shall be given to him, for it is recorded in

the texts of *Yajnyawalcya*, *Vishnu*, and *Harita*, that partition made by a father, *is solely regulated by his pleasure, and that he may reserve a considerable residue*, of which the quantity is not limited. *The double share, assigned to the father, must be understood as restricted to patrimony left by the grandfather:* yet he may distribute the *precious stones, pearls and the like left by the grandsire, in the same mode with property acquired by himself*, agreeably to the text 'of precious metals or stones, or pearls, coral, and other movables, *the father has power to give or sell the whole.*' Such is the opinion of *Jimutavahana* and others. The texts of *Baudhayana* and others, suggest equal partition among the sons, and a greater share for the eldest. In applying the text of *Catayayana*, those of *Baudhayana* and the rest must be excepted in the cases stated by *Raghunundana* and others, when filial piety, a large family to maintain, inability to earn a livelihood, or other allowable circumstance, *justifies unequal distribution;* or when disrespect, or hatred towards the father, or other bad quality justifies total exclusion. It should not be argued that the phrase '*without a sufficient cause*' intends those virtues *which constitute the seniority of sons. A father has power to give greater shares to sons who are eminent for piety or the like,* THOUGH NOT ENDOWED WITH SUCH VIRTUES; for *Nareda* declares a father to be destitute of such power then only, when he is governed by lust, wrath, or the like. But if a malicious father do not call dutiful, a son, however pious, but born of an unloved wife, and on the contrary, call him an enemy to his father, what shall be the rule of decision? SINCE THE FATHER HAS FULL POWER OVER PROPERTY ACQUIRED BY HIMSELF; and since the *greater allotment, in right of duty or piety or the like* DEPENDS SOLELY ON THE OPTION OF THE FATHER, if he do not give it, who shall compel him? But if he exclude his son from a share, calling him inimical to his father, *he must prove that enmity* in presence of the king, or before a public assembly, *and then refuse a share.* EXCLUSION FROM INHERITANCE, ON HIS OWN SIMPLE ASSERTION IS NOT VALID. BUT IF HE WISH TO ALLOT A GREATER SHARE TO THE SON OF A FAVORITE WIFE,

THOUGH NOT DUTIFUL, CALLING HIM PIOUS ON ACCOUNT OF HIS MOTHER, HE CAN ONLY GIVE THAT GREATER ALLOTMENT, AFTER PROVING THE FACT ASSERTED."

How is it possible to reconcile this with what we were told at the outset, namely, that "*he may distribute at his pleasure immovable and other property acquired by himself?*" It is evident that the writer here speaks of *self-acquired* property. And equally evident that what he says, is not confined to direction or advice, or to a declaration of fitness, but that it absolutely declares the distribution which a man *may make at his own pleasure* TO BE INVALID *if his pleasure be the rule by which he disposes of the property.*

Jagannatha proceeds, "*A father has dominion over property acquired by himself. Should he give no share to any one son though guilty of no offence, and give a share to one guilty of offences, who shall punish him?* It cannot be affirmed, that, under the authority of the texts cited from *Catyayana* and *Baudhayana*, the king may punish such a father. *The law propounds the* MORAL OFFENCE *committed by a father slighting such precepts, but ordains no fine;* like the giver of gold to an improper object, thereby committing an offence, but incurring no civil penalty."

Here then we are to conclude, that a distribution of that which a man *may dispose of at his own pleasure*, will, if *unequal*, BE INVALID, *unless the inequality be justified by law*—but that the distributer does not incur a temporal penalty by his act. Our author continues in a strain upon which it is quite needless to make any observation. He says, "*When this seeming difficulty* is proposed, some lawyers reply; *since the son has a title in the father's estate at the very moment of his birth, without any other cause (for the particle is exclusive in the text of Gautama,* 'even by birth alone a man may gain ownership') *a father making an unequal partition without attending*

to the rules prescribed in codes of law, and giving away the joint property to any one person, *shall be amerced by the king*. It should not be argued from the text of *Devala* that they have no ownership while the father lives. *There is no difficulty, if the want of ownership consist in the want of right to aliene such property at pleasure:* and it is seen, that a son is incapable of aliening wealth at pleasure while the father lives, even though he possess several property; as in the text quoted in a former book, the phrase 'they have no wealth exclusively their own,' must be explained to signify only, that they are incapable of aliening it at pleasure: *they are not destitute of ownership* in such wealth; for were it so it would incidentally prevent religious ceremonies defrayed out of their wealth. Let it not be alleged, that since the words '*what they may gain*,' occur in that precept; and since it is necessary to establish ownership, because religious rites could not otherwise be defrayed; therefore it is right to explain the text as signifying *want of dependence:* but in this case, since religious rites may be accomplished with money *furnished by the father*, there is no failure in the performance of ceremonies: *why then take want of ownership as signifying want of independence?* The observation of *Jimutavahana* is therefore justified. Since some title must be established, because the texts of law, *which forbid unequal partition* would otherwise be irrelevant, therefore in this place also, the term '*want of ownership*' *must*, from parity of reasoning, *signify want of independence. Nor should it be affirmed, that the law merely shows a spiritual offence in making unequal partition*, as in neglecting a priest who attends in consequence of an invitation to assist at a *Sraddha* —the priest who attends, *has no property in the food provided for the celebration*, THOUGH IT BE IMMORAL TO WITHHOLD IT. The text of *Nareda* SHOWS THAT IF AN UNEQUAL DIVISION BE MADE BY A FATHER, IT IS INVALID. If unequal partition be erroneously made by the owner, *and his property be immediately divested by his volition, and property vested in all the sons, or in him* WHO RECEIVES THE GREATER PORTION, *what useful*

consequence could follow from the consideration that the father had no power to make such a distribution, WHICH NEVERTHELESS WOULD REMAIN IN FORCE? *Therefore is the title of sons to their father's wealth, even during his life, admitted—but not the power of aliening it at pleasure. Accordingly the text cited in a former book* is pertinent *in its literal sense.* CONCEIVING THAT THE CONSENT OF THE SON IS PRESUMED IN THE CASE OF PRECIOUS STONES, PEARLS, OR OTHER THINGS which have no long duration, being given away by the father, *this is propounded in respect of immoveable property:* and the practice is such. *Nor should it be argued that a son* CANNOT *have property in the estate while the father lives,* since it has been established, that one property resists another concurrent title, lest property by occupancy should arise in respect of *a chattel not abandoned by its owner.* It is admitted that thieves and the like, have property by occupancy even in a chattel which was not abandoned by the owner; or supposing it true, the difficulty is removed by affirming, that one property only resists an incompatible property. The title of three descendants, during the owner's life, is mentioned by *Baudhayana* not as producing property immediately vested in the son, or other heir, but as producing a right, which entitles him to *aliene it at pleasure,* but which *takes effect only, after the father's property has expired. Thus they resolve the seeming difficulty.*"

Let us now see what *Jagannatha* says to this resolution of seeming difficulty. In the first place we must give him the credit of having understood it, and that is a credit in which I cannot pretend to share. He says, "But that is wrong; since there is no authority for establishing such *property within property; and the law of equal partition bears a different import.* For example, *equal partition* may be considered as PRECEPTIVE *like the maintenance of a family out of a man's own wealth.* Thus the support of a married daughter residing in her father's house, (for so the term is explained by *Vijnyaneswara,*) is approved by *Yajnyawalcya* although she have no title to the estate; *and there is no difference* so far as the proof of

property is concerned, *between the enjoyment of a maintenance, and the receipt of a share. Vachespati Bhattacharya* and others also, do not admit of the son's vested title in the paternal estate, during his father's life."

Whether or not, *Jagannatha* has defeated his adversary, I shall leave others to determine, but there cannot be a doubt of his having refuted himself. He first tells us that a father "*may distribute* AT HIS PLEASURE *immovable or other property acquired by himself.*" He then says, "*Exclusion from inheritance on* HIS OWN SIMPLE ASSERTION IS NOT VALID;" and again, "*equal partition may be considered* AS PRECEPTIVE, *like the maintenance of the family out of a man's own wealth.*" That is, he is under a moral obligation by which he may be actuated or not, according to his own will.

In short, we are taught that there is a plain and obvious distinction between the right a man over *self-acquired*, and his right over *ancestorial*, property—and then we learn that his right in each case is precisely the same.

The prevalent opinion certainly is, that a man cannot give the whole of his *ancestorial immovable* property to one son, in exclusion of the rest of his sons—but that he may dispose of every sort of *self-acquired* property, and of *ancestorial movable* property, according to his own pleasure.

From what has been stated, we may, I think, conclude that the *moral restraint* applies equally to every description of wealth, and that an *unequal distribution* of any, is ethically wrong.

The *right* however, is admitted in the one case, and denied in the other —and where the right is admitted, it can hardly be said, that a gift made according to the *donor's will* is to be invalid, *because he has given according to his own pleasure.*

I am aware that a distinction may be made; it may be said that a man shall be at liberty to dispose of his property without any reason—but he shall lose the privilege of free agency by assigning a false or a bad reason for the disposal.

A conversation which I had with the two Supreme Court *Pundits* does not indeed lead me to suppose that such a notion as this is actually entertained, but as it may throw some light upon what follows, I shall give the dialogue with as much fidelity as I can. I took notes as it passed, and made out the whole immediately upon my return home, from the Court house.

The Pundits had declared that a father could *not make an unequal distribution of ancestorial immovable property, without being able to assign a reason for it*—but it appeared to me from the result, that the reason, *if satisfactory to him who makes the unequal distribution, will be sufficient to justify a preference* given to one son. Of that however others may judge; the conversation was in substance, as follows :—

A. The father, you say, may give one son, a larger share of the *ancestorial immovable* property, provided that son shall have treated him (the father) with more respect or affection than the other sons—or, provided he had conducted himself, more than any of the other sons, to his father's satisfaction.

B. Yes, certainly.

A. Then who is to judge of the extraordinary respect or affection, manifested to his father, by the favored son?

B. The father to be sure. There is no other person by whom a judgement can be formed on the subject.

A. Then that leaves it entirely in the father's power at his own mere will, to give any one son, a larger proportion of his estate, than is to be given to the others.

B. No; by no means. If, for instance, it was discovered, that the gift was really made from the father's extraordinary love for the mother of this favored son, the gift would be set aside.

A. Would you set aside the gift made to a son, merely because his mother was the wife, who was the most beloved of his wives, by the father?

B. Certainly not; but the gift would be set aside upon a discovery that it had been made out of affection for the mother, and not on account of the son's own merits.

A. Then if a son really had pre-eminent merits, the gift to him will hold good, although his mother was the most beloved of all his father's wives.

B. Yes; but the mother being the most beloved wife, might create a suspicion respecting the favor shown by his father, to her son.

A. Will it not follow that a son of the most, may stand in a worse situation, than a son of the least, beloved wife? A gift made to the son of a wife not beloved, will be presumed to have been made on account of the merits of that son. Yet a gift to a son of the most beloved wife, will be viewed with suspicion, because love for his mother, and not the son's merits, may be supposed to have occasioned the preference.

B. That may be, in some measure true. Yet still the merits of the son so favored, must be ascertained.

A. But in one case, the gift itself may be *some evidence* of merit—for having

been made without any other apparent cause, merit will be presumed to be the motive. In the other case, a beloved object having been mother of the donee, a presumption, *or a suspicion* will arise, that the gift was made from a love for the mother, and not on account of the son's merits.

B. That may be so, but the decision will depend upon evidence.

A. Then the case stands thus :—The gift will not be invalid, because made to a son of the most beloved wife—but supposing it really to have been made by the father on account of the love which he bore to the donee's mother, how is the fact to be ascertained if the father himself will not acknowledge this cause of preference? Respect or affection on the part of a son towards his father you admit to be a just cause of preference. You also admit that the father himself is to judge of this respect or affection; and there is not any thing to prevent a son of the most beloved wife from being more respectful and affectionate, than any of his other sons, to the father.

B. The son's behaviour may be proved, and if it should appear that he was not, by his conduct, more worthy than the other sons, then the gift will be set aside.

A. Evidence, I admit, may be adduced to prove that a favored son has been worthless or abandoned—but whether he has given more satisfaction than the others have given to his father, the father alone can decide; and I presume that the father's preference is to be justified by the effect which his son's conduct has produced upon his mind.

B. No, that is not so; because the father may judge partially, and be pleased with the acts done by a son of his most beloved wife; although

if the same acts were done by the son of another wife, they would be displeasing to him. This is to be judged of by the law.

A. That might be proper, if there was a law by which it could be judged, and if the facts were such as admitted of adjudication. The end of respect and affection, is to give satisfaction. Is this to be attained by assiduity?

B. Yes; assiduity is one of the means by which that end may be attained.

A. Generally speaking it may be so. But is it not possible, that a son really more desirous than any of the others to please his father, may have studied his humours and discovered that of all things he disliked assiduity the most? If from the very respect and affection which you admit ought to entitle him to preference, he refrains from assiduity, and thus succeeds in giving satisfaction—would you set aside a gift made in his favor?

B. No; not if he acted from kindness and affection, and thereby gave satisfaction to his father.

A. But who is to judge of the motives from which he acted—and if he really gives satisfaction to his father, will you not give him credit for having intended it?

B. It ought to be so, if the contrary does not appear.

A. How is the contrary to appear? He gives satisfaction—and I do not see how it can appear, except from an acknowledgement of his own, that he did not intend it.

B. This may be judged of from circumstances.

A. It is *possible* perhaps that the motives of his conduct may be ascertained by circumstances—but in general the effect produced, will be the most certain test of the intention. It might indeed appear that the nature of a father was such, as to make him pleased with ill usage—but this is not to be supposed.

B. Such a thing is not to be supposed—but if it should appear that the case was so, the gift would be set aside—because there must be merit on the son's part.

A. If there be ever so much merit, the father is not bound to reward it. He may reward it if he pleases.

B. That is very true.

A. Then he exercises his own judgement and rewards what he conceives to be merit. How is he to be controlled?

B. Not unless it appears that he was mistaken.

A. He cannot possibly be mistaken as to having been pleased or otherwise, by the conduct of his son. It seems then to be reduced to the son's motive—and the kindest motive may make him refrain from importunate attentions or open acts of affection. He may be convinced that even a seeming inattention, will be the conduct most pleasing to his father—and so it may prove to be by the preference given to a son, who so conducts himself.

B. Yet if it can be discovered that the son did not act with affection and respect—or that the father was mistaken in preferring him to his other sons, the gift will be set aside.

A. Does it not now come to this? The father may give a preference to that son who has treated him with the most affection and respect—on the degrees of affection and respect the father is to judge. He decides according to his conviction. As to what really pleased himself he cannot be mistaken. It is admitted that extraordinary love for the son's mother will not defeat the claims which he may have, in virtue of his own conduct to his father. He gives more satisfaction than the other sons give. How is it to be shown that he did not intend to do that which he has actually done?

Here the conversation ended; the *Pundits* declaring that they could not say more than they had said.

It is not, I think, easy to conceive how such reservations can qualify the absolute right of making an *unequal distribution*, even if it should proceed from the father's caprice.

I shall now give the substance of an opinion delivered by the *Pundits* to the Master of the Supreme Court on the 5th of April, 1821. The whole will be found, question and answer, in the appendix. The case was one of a father who had *eleven* sons, and property to the amount in value of *ten lakhs* of Rupees: out of this property, he had, in his life time, given an *ancestorial Talook* to the value of one *lakh* of Rupees to one of his sons. The son who received this *ancestorial immovable* property in the life time of his father, shared upon his death equally with the other ten brothers in the residue; that is, he got *one lakh* of Rupees out of *ten lakhs*, and got his proportion of the remaining *nine lakhs*, as he would have done if he had not received any thing from his father, and as if the *nine lakhs* had made the whole estate.

The *Pundits* declared that a father could not give *the whole* of his *an-*

cestorial landed property *to one of his sons, to the prejudice of the others*—but if *one had a larger family than the others, or was infirm,* that the father *might make an unequal distribution in his favor.* That a father might in his life time, give away an *ancestorial Talook to one of his sons,* provided he left at the time of his death, *sufficient for the support,* in a *respectable manner,* of the rest of his family. *That he might give away such ancestorial Talook to one son,* ALTHOUGH THAT SON HAD NOT A LARGER FAMILY THAN THE OTHER SONS, AND ALTHOUGH HE WAS NOT INFIRM, IF THE SON TO WHOM HE GAVE THE *ancestorial Talook,* WAS MORE ATTENTIVE TO HIM THAN THE OTHER SONS WERE. THAT THE FATHER WAS TO JUDGE OF THE ONE SON BEING MORE ATTENTIVE TO HIM THAN THE OTHER SONS, *but that he must judge according to the shastras. That if the father had eleven sons, some of age and some under age,* WHO ALL BEHAVE TO HIM EQUALLY WELL, *he might, in his life time, without contemplating a division of his estate, or his own death, give to his* ELDEST SON, *a Talook, being ancestorial property,* worth a *lakh* of Rupees, *the whole property being worth ten lakhs*—THAT SUCH GIFT IS VALID—*and that it might be made* TO ANY ONE OF HIS SONS, *as well as to the eldest son. That such gift will* NOT DEPRIVE THE SON SO OBTAINING IT, *of his proportion of the remainder of the property, when it comes to be divided. That the extent to which a father may go, in making a gift of his ancestorial property to one son, is not specified. That out of ancestorial property worth ten lakhs of Rupees, a father may give to* ANY EXTENT *to one of his sons,* PROVIDED HE LEAVES ENOUGH FOR THE OTHER SONS. *But that he cannot make such gift, of ancestorial property, to any person not his son,* although he may give a small proportion, about one *biggah,* for instance, out of fifty *biggahs,* for charitable purposes.

Before I conclude this chapter, I shall compare this opinion with that which one of these *Pundits (Tarapershad)* gave to the *Sudder Dewannee Adawlut,* upon a similar question. *Tarapershad* had died, and had been

succeeded by another, between the time when the above opinion was given, and the time of my conversation which has been recited. So far, therefore, as the opinion, and the conversation agree, we may say we have the concurrence of three *Pundits.*

In the *opinion* it is said, that a father may make a gift to *any one son*, if that son was the most *attentive* to him or if all his sons were equally attentive. That he (the father) is to judge of this *attention*, but that he is to judge according to the *Shastras.* From the *conversation* it may be inferred, that a judgement is to be formed by the same criterion—but it appears to me, that the whole difficulty remains. The right of preferring one son to another, depends upon sensation alone, and if that cannot be brought to a standard, the father's own will, or opinion must, as I conceive, be conclusive as to his right.

In the opinion given by the *Pundits*, to the Master of the Supreme Court; there is certainly an apparent contradiction. The Pundits say the father may make a gift to that son who had been *more attentive* to him than his other sons had been. *That he is to judge of the degrees of attention*—but that he must judge according to the *Shastras.* They again say, *if all the sons behave equally well to their father*, (i. e. if they have been all *equally attentive*) that he may make a gift *to any one of them.* Here we have a distinct assertion of the father's right to make a gift to *any one* of his sons, *without assigning any cause for his preference.* How then, can it be said that the father must form a judgement upon the relative attentions of his sons, and that he must form his judgement according to the *Shastras?*

Having gone so far, may I now venture to say that the true, and only intelligible, question is, Has the father, or has he not a right to make *any unequal distribution* among his sons, of *ancestorial immovable* property?

It is trifling to say that he may do so, upon certain considerations, if these considerations be imaginary, or if proof of their real existence cannot possibly be obtained.

However sinful the act may be, it is as I conceive, admitted that a man can legally, give away from his family, or make unequal distribution among them, of *movable* property, whether *ancestorial* or *self-acquired*—and that he may dispose, in the same manner, of *self-acquired immovable* property.

Whether or not his direct descendants, in the male line only, (i. e. his sons, grandsons, and great grandsons,) are protected against his *gifts*, or *unequal distribution* of *ancestorial immovable* property, may perhaps be said, to have been as yet unadjudicated.

I shall hereafter notice the decisions which have taken place in the *Sudder Dewannee Adawlut* respecting the right of a man to make an unequal distribution among *his sons* of *ancestorial immovable* property. In the Supreme Court, this right does not appear to have been ever doubted. Decisions certainly have taken place, in which such a right may be said to have been assumed—and upon one occasion, the Court has declared distinctly, that the possessor of *ancestorial immovable* property, may make an unequal distribution of it among his sons by his will.

In the cause between *Rajkisno Bonerjea & al.* v. *Taraneychurn Bonerjea & al.* (in which the *Pundits* gave the opinion I have spoken of) an issue was directed to try whether or not the *Talook* which had been given to *Taraneychurn Bonerjea* (for he was the son who had received a gift of it from his father) was his separate property. This issue might have raised the question of law, as to the father's right of making such a gift—but it never was tried.

It was directed in August, 1819. In March, 1820, it was, by consent of the parties, referred to the Master to enquire and report *touching the matters in difference.* The issue was to be retained until the report should be made—and if the report should be confirmed, judgement was to be signed accordingly. Among other proceedings in the Master's office, the *Pundits* were examined in April, 1821 ; and in February, 1822, the Master reported (and his report was confirmed without opposition) that the *Talook in question was the separate property of Taraneychurn Bonerjea.* Here the matter rests, and the proceeding has been hitherto acquiesced in.

A case has been decided upon the will of *Soorjeecomar Takoor* in the Supreme Court. This case will be more fully stated in the chapter on Wills.

Soorjeecomar left a widow but no child ; and he made a will by which all his property, consisting in part of *ancestorial immovable* estate, was given to his brothers. By this will he had made a provision, which he considered to be a suitable one, for his widow.

The will set up was alleged to have been forged, and upon that ground alone, it was contested by the widow. It was found to have been duly executed, and here the case ended.

If it had been established as law, that a man cannot make a gift or an unequal distribution of *ancestorial immovable* property to the prejudice of any of his *descendants*, it might not have followed that he, being childless, would be held under the same restraint, when giving to his brothers, where the widow is to be prejudiced by the gift.

In principle however, it appears to me, that a discrimination could hardly be made, without subtility. The parties, in cases which have been

determined, were *descendants,* but a widow, where there are not descendants, is the undoubted heir, although she may not have more than a life interest in the estate. This interest she has in *ancestorial immovable,* as well as in other, property ; and if it be certain that a son cannot be disinherited by his father, it is not easy to conceive how a widow, no son being in existence, can be disinherited by her husband. If there be sons, she is to be provided for, like the sons, upon partition.

I do not know that such a question, as that relating to the widow's rights in this respect, has ever been raised. It was open no doubt, in the case of *Soorjeecomar Takoor's* will, and, as the Court was at the time full, I am sorry that it passed *sub silentio,* for in that, and all other cases the decision of a Court, competent to decide, would certainly have been very desirable.

Upon a comparison of what has taken place in the Supreme Court, with what has taken place in the *Sudder Dewannee Adawlut*—and a comparison of the decisions in the latter court with each other, I fear we shall not be satisfied that the law respecting a right in the possessor to dispose of *ancestorial immovable* property at his pleasure has been finally settled. If the existence of such a right should be recognized, all further enquiry will be superfluous—but if the right shall be denied as it may prejudice descendants, I know not how it can be admitted to the prejudice of widows.

In the present chapter I propose to confine myself to the law as I find it written in the books, and to decisions which have taken place in the *Sudder Dewannee Adawlut.* When I come to the chapter upon Wills, I shall have occasion to notice the proceedings which have taken place in the Supreme Court upon this important subject.

I do not presume to give any opinion of my own—but on this point, as

well as on other points, I have ventured to offer some (having suppressed many) of the observations which occurred to me, in a confidence that they will not be deemed obstrusive, or attributed to arrogance upon my part.

I shall now proceed to the decisions which have taken place in the *Sudder Dewannee Adawlut*, upon this very important subject.

The first case came before, and was decided by, the Supreme Council, then the *Sudder Dewannee Adawlut*. This was in February 1792, and prior to an existence of the *Sudder Dewannee Adawlut*, as it is now established.

The case was that of *Eshanchund Rai* v. *Eshorchund Rai*, and it is reported page 2 of the Sudder Dewannee Adawlut Reports, vol. 1st.

It was as follows—In the year 1781, *Kishenchund, Zemindar* of *Nuddea*, by a deed of gift, executed shortly before his death, reciting that he was infirm, and approaching to his end; that his *Zemindary* (termed by him his *Raj* or principality) had never been divided; and that he wished to prevent quarrels among his sons, respecting it, after his death; *settled the whole Zemindary, with its honors, on Sheochund, the eldest of his four* SURVIVING *sons, with provisions for the three younger sons payable out of the Mohashira*, or proprietary income of the *Zemindary*.

It appears by the report that *Kishenchund* had had *six* sons, but that *two* of them were dead, having left adopted sons, for whom also *Kishenchund* made a provision. By the report, it is not set forth that *Sheochund*, the eldest surviving son of *Kishenchund*, was the *eldest of the family*—yet I should think (considering the opinions of the Pundits,) if either of the deceased sons, had been the elder brother of *Sheochund*, that it might have made a difference in the case.

The report however proceeds: The *eldest son* (i. e. *Sheochund)* was accordingly put in possession of the estate—and was succeeded, upon his death by *Eshorchund* (the Respondent) his son.

In August, 1789, *Eshanchund* (the appellant) *one of the younger sons of Kishenchund,* brought his suit in the *Zillah* Court of *Nuddea,* against his nephew *Eshorchund.*

In this suit *Eshanchund* claimed a fourth part of the *Zemindary.* This claim he made, as one of the sons of *Kishenchund,* on the ground, that by the *Hindoo* laws of inheritance, *each of the sons was entitled to a portion, that the disposition made by Kishenchund was not a gift, and, at all events that he had not by law, the power to make one.* Against this claim *Eshorchund* set up his title to the *whole estate,* upon the deed of gift made by his grandfather, in his father's favor.

The question was, whether or not *Kishenchund* was legally empowered to make the gift which he had made of the *Zemindary.*

Numerous *Pundits,* of different parts of the country were consulted; and by a majority of their opinions, a settlement of the *Zemindary* on *the eldest son, with a provision made for the younger sons,* WAS PRONOUNCED TO BE LEGAL.

The Judge of *Nuddea* decided in favor of the validity of this gift, and the title derived from it by the defendant. *He accordingly declared the defendant to be entitled to the whole Zemindary,* subject to the pecuniary provision which had been made for the Plaintiff—and the *Sudder Dewannee Adawlut,* upon the Plaintiff's Appeal, affirmed the Judge's decree.

The opinion delivered by two distinguished *Pundits (Jagannath* and *Kerperam)* was founded on the following reasons:

1st. According to law, a present made by a father to his son, *through affection,* shall not be shared by the brethren.

2d. *What has been acquired by any of the enumerated lawful means,* AMONG WHICH, INHERITANCE IS ONE, *is a fit subject for gift.*

3d. A co-heir may dispose of his own share of undivided property.

4th. *Although a father be forbidden to give away land, yet,* IF HE NEVERTHELESS DO SO, HE MERELY SINS, BUT THE GIFT HOLDS GOOD.

5th. *Raghunandana* in the *Dayatatwa, restricting a father from giving* LANDS *to one of his sons (but clothes and ornaments only) is at variance with Jimuta Vahana, whose doctrine he espouses, and who only says,* THAT A FATHER ACTS BLAMABLY IN SO DOING.

6th. A principality may lawfully, and properly be given to an *eldest* son.

Of these reasons it will be seen, that the 1st, 2d, 4th, and 5th, *without reference to the nature of the property in question,* declare the father's *right to make an unequal distribution, or a gift, of ancestorial immovable* property. Nay, in the second reason, this right is founded upon the very fact of the property *being acquired by Inheritance.*

The publication of these reports was not begun for several years after the above decision took place—I infer from their heading that the first number could not have been printed before the year 1805.

A remark upon the case has been subjoined to it, which I presume, is from the Judges, or one of the Judges, of the *Sudder Dewannee Adawlut.* It is as follows:

"Admitting the father's disposition of his estate in favor of his eldest son, *to have been an improper exercise of power on his part,* as *possessor of the* HEREDITARY *patrimony, still the* VALIDITY *of a gift* ACTUALLY MADE *by a father, is affirmed by Jimuta Vahana. For since the gift of the entire estate to a stranger* WOULD HAVE BEEN VALID, *(however blamable the act of the giver might be,)* the donation *in favor of one son,* with provision for the support of the rest, would seem to be equally valid, according to the doctrines received in the province of *Bengal.* And, *after extending to the case of sons, no less than to that of strangers, Jimuta Vahana's* position *respecting gifts valid,* THOUGH MADE IN BREACH OF THE LAW, *it becomes necessary to the consistency of the doctrine,* EQUALLY TO MAINTAIN, *that a father's* IRREGULAR *distribution of the patrimony at a partition made by him in his life time,* IN PORTIONS FORBIDDEN BY THE LAW, *shall, in like manner,* BE HELD VALID, THOUGH, ON HIS PART, SINFUL. No opinion was taken from the law officers of the *Sudder* Court in this case. *But it has been received as a precedent* WHICH SETTLES THE QUESTION OF A FATHER'S POWER TO MAKE AN ACTUAL DISPOSITION OF HIS PROPERTY, EVEN CONTRARY TO THE INJUNCTIONS OF THE LAW, WHETHER BY GIFT, OR BY WILL, OR BY DISTRIBUTION OF SHARES."

Thus, as it appears to me, this decision has been adopted, and confirmed by the *Sudder Dewannee Adawlut.*

It must be observed that the law of the *Mit'hila* school, is different from that which prevails, (or rather that which by the above decision seems to have prevailed,) in *Bengal*—and yet the case of *Sham Singh*, appellant, v. *Mussumut Umraotee*, on the part of *Kalee Sur Singh*, a minor, respondent—*Sudder Dewannee Adawlut Reports*—Case 13 of 1813—may cast some doubts upon the law, even as it prevails in *Mit'hila*—for it would appear, that there, a man may *by deed* make a *gift* of property to one son, provided the gift be accompanied *by possession.* At all events, as the doubt

seems to have arisen *upon the ground of the case being one, which ought to be decided by the law as it prevails in Mit'hila*, it may be inferred that it would have been otherwise by the law as it was then supposed to prevail in *Bengal*.

In the year 1804, *Sham Singh* (the appellant) brought an action in the *Zillah* Court of *Bhagulpore* to recover from *Mussumut Umraotee* (the Respondent) one half of the *Talook* of *Bikrampore Chukramy*. It was stated by the plaintiff, that the estate in question descended from *Hurhur Singh* to his two sons *Joyraj Singh* (the father) and *Udbhoot Singh* (the uncle of the Plaintiff.) That *Udbhoot Singh*, being the elder brother, his name was, according to usage, registered in the office of the Collector, but that he and *Joyraj Singh* jointly, shared the profits of the estate. That *Joyraj Singh* having died, his son, (the Appellant) succeeded to his *(Joyraj Sing's)* rights, in partnership with his uncle *Udbhoot Singh*. That during this partnership, *Udbhoot Singh* purchased, *out of the profits of the ancestorial estate*, in his own name, but upon the joint account of himself and the appellant, the *Mouza* of *Jypoor Chohur* and another village. That in the year 1210, B. S. *Udbhoot Singh* died, leaving the respondent, his widow, and two sons; *Kalee Sur Singh*, and *Zalim Singh*. That in the same year a proclamation was issued by the Collector of the Zillah of *Tirhoot*, in which district the estate was *then* situated—*but from which it had been subsequently separated*, and annexed to *Bhagulpore*. That this proclamation required the heirs of *Udbhoot Singh* to come in and make a settlement for the lands, but that the appellant was prevented by severe illness from hearing of the proclamation. That the respondent appeared before the Collector as heir of *Udbhoot Singh*, and procured a settlement of the *whole estate in her own name*. That she wrongfully took possession of it all, and still withheld from the appellant, the half share to which he was entitled, and which by his action he sought to recover.

To this demand, there was a general denial of the truth of the plaintiff's statement—and the defendant alleged that *Hurhur Singh* (the father of *Udbhoot Singh* and *Joyraj Singh)* had a short time before his death *made a gift of the whole estate to his eldest son Udbhoot Singh*, and made a pecuniary provision for the younger son *Joyraj Singh*. That *Udbhoot Singh* accordingly took possession *the year after his father died*, and kept possession until he himself died—*that he took and kept possession as sole proprietor* That, before his death, he *bequeathed* the estate to his eldest son *Kali Sur Singh;* during the period of whose minority, the respondent *Mussumut Umraotee* was to be the manager. That the appellant's father *Joyraj Singh*, had never enjoyed any share of the estate with his brother *Udbhoot Singh*—and that the appellant had not any right to the share which he claimed.

The *Pundit* of the *Zillah* Court declared *the gift by a father of the whole of an ancestorial immovable estate to one of his sons to the exclusion of another (if that other was not necessarily* DISQUALIFIED *for participation, on account of some defect natural, or incurred)* TO BE ILLEGAL. He further stated *that sons were entitled* TO EQUAL *participation in an ancestorial estate.* There was evidence to prove the purchase of *Jypoor Chohur* and the other village by *Udbhoot Singh to have been made on the joint account.* Upon this, possession of the half share claimed by the plaintiff, was decreed to him.

The respondent appealed from the above decree to the Provincial Court of *Moorshedabad*, and the *Pundit* of this Court declared, *that the gift* whereby *Hurhur Singh was stated to have conferred* THE WHOLE OF HIS ANCESTORIAL IMMOVABLE ESTATE ON HIS ELDEST SON UDBHOOT SINGH, WAS VALID. The decree of the *Zillah* Judge was hereupon *reversed, and the appellant was adjudged to be entitled to maintenance only, from the respondent.*

From this reversal, *Sham Singh appealed to the Sudder Dewannee Adawlut*—and there "*it appearing that the estate, to the half of which the appellant laid claim, had been generally considered as* SITUATED IN THE PROVINCE OF MIT'HILA, *and the parties themselves having in answer to a question put by the Court, admitted that their religious ceremonies connected with funeral and marriage, and other observances,* WERE GOVERNED BY THE MIT'HILA SHASTER, *the opinions of the law officers of this (the Sudder Dewannee Adawlut) Court, of the Provincial Court of Patna, and of the Zillah Court of Tirhoot, were required, as to the legality, or otherwise,* (ACCORDING TO THE MIT'HILA SHASTER) *of the alleged gift by Hurhur Singh,* OF THE WHOLE IMMOVABLE ANCESTREL ESTATE TO HIS ELDEST SON UDBHOOT SINGH. *The Pundits of the Zillah and Provincial Courts,* DIFFERED IN OPINION *with regard to the law in this case, such gift being pronounced* INVALID *by the Pundit of the former Court, and* VALID *by that of the latter.*"

The *Pundits* of the *Sudder Dewannee Adawlut*, were then called upon to state, by the *Hindoo* law as current in *Mit'hila, whether the gift set up by the defendant was valid, and whether it would be complete without seizin being given by the donor in his life time.*

The opinion of these *Pundits* was such as to induce the *Sudder Dewannee Adawlut to affirm the decree of the Zillah Judge—and to reverse that of the Provincial Court. Sham Singh* therefore, the appellant, became entitled to half of the property which had descended from *Hurhur Singh*—and also to half of that which had been purchased by *Udbhoot Singh* with the profits arising out of *Hurhur Singh's* estate.

Previously to this decision, and in the year 1812, another decision which I shall next mention, had passed in the *Sudder Dewannee Adawlut*, by which it was declared, that *a gift made by a father of the whole of the ancestorial property* TO ONE OF HIS SONS, IN EXCLUSION OF THE OTHER SONS,

WAS A VALID GIFT ACCORDING TO THE HINDOO LAW AS IT IS CURRENT IN BENGAL.

From what I have already stated, I infer that the *Sudder Dewannee Adawlut* would not have entertained any doubt, if the case of *Sham Singh* v. *Mussumut Umraotee* had depended upon the law as it is current in *Bengal*—but, that the question was *doubtful*, as it depended upon the law of *Mit'hila*.

I shall now give a few extracts from the opinion given to the *Sudder Dewannee Adawlut* by the *Pundits* of that Court, because they appear to admit that *the whole ancestorial* property may be given, (*provided the proper forms, and possession, accompany the gift*) by a father to *one of his sons, in exclusion of the other sons, even according to the law, as it prevails in Mit'hila.*

The *Pundits* say, if a father shall thus express himself with reference to his eldest son, "*He will become sole proprietor on my death, and my younger son will be provided for by him, with a suitable maintenance*" *the gift cannot take place,* FROM THE OMISSION OF THE WORD '*Dan*' (donation) in the expression; which, both according to the *Shasters, and the current practice of the country, is essential to complete the gift.*

They go on to say *supposing the* word '*Dan*' to have been expressed in the above sentence, *still the gift cannot be considered valid; because, a father and a son possess an equal right in ancestorial immovable property—consequently the younger brother's right is established, and the estate becomes joint property, the gift of which is illegal,* AND A VERBAL GIFT UNDER ANY CIRCUMSTANCES, OF IMMOVABLE PROPERTY, UNLESS SUPPORTED BY A HIBBENNAMEH, IS INVALID.

The *Pundits* then say, "The authorities agreeably to which this (their)

bebusta has been delivered are the *Vivada Retnecara, Smriti, Samoochyu, Vivada-chundra, Vivada-chintamoni,* and OTHER TEXTS CURRENT IN MIT'HILA."

The texts cited go to show that the rights of a son, and grandson, to property acquired by the grandfather, are equal—that neither shall have greater nor less than another, and that the son of the deceased has no option to give it away;—also, that this right extends to *movable,* as well as to *immovable,* property acquired by the grandfather. That a *verbal* mortgage is *valid, if the mortgaged property remains in the hands of the mortgagee*—but that A GIFT IS NOT VALID UNLESS THERE BE A DEED EXECUTED BETWEEN THE DONOR AND THE DONEE. Further, that *sale, mortgage, partition, or gift, of immovable property,* IS VALID, *provided a deed be executed to that effect, in which case,* ALL CAUSE OF COMPLAINT IS REMOVED.

In answer to a second question, these *Pundits* say, *Supposing the donor to have made a gift of the above mentioned property,* BUT NOT TO HAVE GIVEN THE DONEE SEIZIN DURING HIS LIFE TIME, THE VERBAL GIFT IS INVALID, BECAUSE THE DONEE HAS NEVER BEEN IN POSSESSION OF IT.

The authorities cited go to prove that a *hibbennameh* executed, and attested by credible witnesses, shall not be valid *unless possession shall have been given.*

Whether or not a *deed of gift, with possession delivered,* would be sufficient in *Mit'hila,* to make a valid title to the property, may be considered but at all events the decision now spoken of, was founded upon the *Hindoo* law of *Mit'hila,* and upon that law alone. It will be seen, that even upon the ground of the *Mit'hila* law, there was a disagreement in opinion between the *Tirhoot,* and the *Moorshedabad, Pundits.*

I now come to the case of *Ramkoomar Neaee Bachesputtee* v. *Kishenkunkar Turk Bhoosun*, Cause 18 of 1812, 2d, Sudder Dewannee Adawlut Reports, page 359.

These parties were *full brothers*. The Respondent *Kishenkunkar*, the elder, and the appellant *Ramkoomar Neaee*, the younger.

In 1803, an action was brought in the Registrar's Court of the *Zillah* of *Nuddea*, by the appellant, to recover from the respondent, *(his elder brother,)* a garden in *Mouza B'hatpara*. The appellant, *(the younger brother,)* claimed this garden as having been part of the estate of *Ramcont'h Soobharn* his father, who, as he (the appellant) alleged, had by a *Danputra*, (or deed of gift) made over *the whole of his property* to him (the appellant.)

The appellant alleged that his father had, in 1795, made over *the whole of his property, real and personal, to him.* That he had since then, been in possession of it all, with the exception of the garden in dispute—and that the respondent had in the year 1801, possessed himself of the said garden.

It will be here observed that on an allegation by the *younger* brother, that his father had made a gift to him of the whole property, this proceeding was instituted for the purpose of recovering a garden, which had been the father's, and which was the *only part of the father's property, not in actual possession of the younger son.* The year 1795, (the period at which the appellant alleged his father had made a gift of all his property to him) corresponds with the *Bengal* year 1202.

The respondent, admitting the garden to have been part of his father's estate, pleaded that he (the father) had in the B. Y. 1191, made over to him, by a deed of gift, *one half of his property real and personal;* and that

afterwards, in the B. Y. 1201, *he had executed another deed of gift, transferring* the remainder of his property *to him (the elder brother,)* averring, that since this latter period, he *(the elder brother)* had been in possession of *the whole of his father's estate,* the garden in question included.

These three several deeds of gift were produced before the Registrar of the Zillah Court of *Nuddea,* who issued a *perwannah to the father of the contending parties,* (for he was still alive) calling upon him to attend in person, or by *Vakeel,* and to declare as to the authenticity of the deeds, produced by the several claimants. The father in his answer, declared that he *had never made over any part of his property* to his *elder* son, (the respondent) who had always behaved undutifully towards him, and that the deed produced by the *younger* son (the appellant) was authentic. The Registrar decreed possession of the lands to the appellant, with costs against the Respondent.

The Respondent appealed from this decree of the Registrar, to the Judge—and further evidence was taken. The father still adhered to his former declaration, and the *Zillah* Judge affirmed his Registrar's decree.

The father, *Ramkaunt,* died, and an appeal against the two former decisions was preferred by the Respondent, to the Provincial Court of Appeal.

This Court passed a decree, reciting, that the evidence on each side, as to the execution of the respective deeds of gift, *was equally entitled to credit.* That the father, from his extreme age, was probably not in the full possession of his reason, and had been persuaded by his sons, alternately, to execute all the deeds. That the deeds, executed under such circumstances, were inadmissible by law, and that, setting them aside, each

party was entitled to share equally in his father's estate. *The former decrees were therefore reversed, and a moiety of the disputed land was adjudged to each party.*

Ramkoomar, dissatisfied with this decree, presented a petition for a *special* appeal to the *Sudder Dewannee Adawlut*. That Court, considering the opposite decisions of the Courts below, that there was no proof of the father's imbecility, when the deed of gift was executed, and that the decision was stated to involve property to the amount of 40,000 Rupees, admitted an appeal.

Upon going into the case, it appeared there was no reason to believe that the father had not been in perfect possession of his senses, when he executed the deed of gift in the B. Y. 1202. The question then was *whether or not the father was justified by law, in having made such a disposition of his property.*

The following question was put to the Court *Pundits*, "If a person of the *Brahmin* tribe *during the life time of his eldest son, transfer by gift, the whole of his estate, real and personal*, ANCESTREL, OR *acquired, to a younger son*, IS SUCH A GIFT VALID, OR NOT VALID, *according to the authorities current in Bengal?*" The *pundits* stated, "THAT SUCH A GIFT WAS VALID, *though*, THE GIFT OF THE WHOLE ANCESTREL PROPERTY BEING FORBIDDEN, IT WAS IMMORAL."

The *Sudder Dewannee Adawlut* passed a *final decree, reversing the decision of the Provincial Court, and affirming the decrees of the Registrar and Judge. Costs of suit in the Provincial Court and in the Sudder Dewannee Adawlut to be paid by the Respondent.*

I shall only add, that the parties, having been *Brahmins*, cannot make

any difference, respecting the law, and that there is a note at the end of this report in the following words : " *This doctrine was followed in* a former case.—*Eshanchund Rai* v. *Eshorchund Rai ; vide Reports, vol.* i. *page* 2, *part* 1*st.*"

These two cases must have been well considered, and the *law in both, was certainly brought fully to the notice of the respective Courts, before which the questions had come.* It was therefore with some surprise, that I found a third, and a subsequent decision, contrary to the former two, and upholding a doctrine opposite to that, which I believed the first decrees had established.

I now speak of the case of *Bhowannychurn Bunhoojea* v. *the heirs of Ramkaunt Bunhoojea,* Cause 15, of the year 1816, vol. ii. Sudder Dewannee Adawlut Reports, page 546.

I shall, in the first instance, give the marginal summary of this case. It is " A *Hissanama,* or deed of partition, made by a *Hindoo* father, in which he allots to his sons portions of his estate, *movable* and *immovable, ancestrel* and *acquired,* but which disposition was not carried into effect during his life time, *is not binding on his sons after his death.* If by the deed, *an unequal distribution be made* of the *ancestrel immovable* property, *such disposition is illegal* and INVALID ; as is also the *unequal* distribution of property *acquired by the father,* and of *movable ancestrel* property, if made under the influence of a motive, which is held in law to deprive a person of the power to make a distribution."

The case itself is thus stated; The appellant brought an action in the *Zillah* Court of the *Twenty-four Pergunnahs, against his father Ramkaunt,* his brothers *Gyaram* and *Ananchund,* and against *Mussummat Taramunee,*

and *Mussummat Parbuttee*, wives of his brother *Lukhinarain*. A short time before the institution of the suit, *Ramkaunt* had executed a *Hissanama*, or deed of partition, allotting shares of his estate *movable* and *immovable*, *ancestorial* and *acquired*, among his sons, for the avowed purpose of preventing disputes among them afterwards.

After deducting a small portion of the estate for his own support, and for charitable purposes, the remainder of the property was stated, and allotted as followed; a statement of it is then set forth.

The deed of partition had been duly registered, but on an attempt being made to carry it into effect, this suit was instituted.

It was stated that *Radhakishen*, the plaintiff's grandfather, left two sons, *Ramram Bunhoojea*, and *Ramkaunt Bunhoojea*, (the latter was plaintiff's father.) That they (*Ramram* and *Ramkaunt*) lived upon the patrimonial property, that *Ramkaunt* was unfit for business, but that *Ramram* acquired separate wealth; that Plaintiff traded under *Ramram*, and made money; that *Ramkaunt* on *Ramram's* death, brought his (*Ramram's*) property into the joint stock, and that the estate was improved by the plaintiff's money. Plaintiff objected to the *Hissanama, because it was written without his knowledge, because his father was eighty years of age and not in possession of his senses; because Lukhinarain's wives could not, while their husband lived, be entitled to a share; because the Hissanama included plaintiff's separate property; because the land had been encreased by his exertions, yet none of it assigned to him; because* 41,000 *rupees were falsely said to be in his hands; and because the deed did not specify the mercantile concerns of the patrimonial estate. He prayed that the deed might be set aside; that he might be exonerated from the false charge of* 41,000 *rupees. That he might have his own several property, and the money he expended in erecting buildings, and one-third of the joint ancestorial estate, it having been improved by his exertions.*

To this *Ramkaunt* (the father) insisted upon his right to divide the *real* and *personal* estate, as he pleased. He denied separate property in the plaintiff, and the employment of his exclusive funds or industry, in the acquisition of joint property, admitted that plaintiff had the management of the landed property, but affirmed that other sons had been employed in different departments, for the benefit of the family. He stated that he had excluded *Lukhinarain* on account of his mismanagement and bad conduct, and that he had given his share to his wives, that he might not be left wholly destitute; he averred that the claim against plaintiff of 41,000 rupees was just. He said all the *ancestorial* estate had been included in the partition, and that he would make such a disposition of the mercantile concerns, as he might judge proper. The other defendants pleaded the general issue.

The *Zillah* Court declared the *Hissanama to be invalid and illegal, because the plaintiff was not a party to it, and because it was incumbent upon Ramkaunt, before he made a partition of the joint ancestorial property, to obtain the consent of all his sons.* The *Hissanama was decreed to be void, and of no effect. Possession of the property acquired by the plaintiff, was ordered to be given to him—and the joint property ordered to be distributed after Ramkaunt's death. Ramkaunt was declared to be at liberty to sue the plaintiff for* 41,000 *rupees, and the defendants were ordered to pay costs.*

On appeal to the Provincial Court of *Calcutta, the above decree was considered in all respects erroneous. The exclusive right of the plaintiff to the property he claimed, was supposed not to have been proved, and his claim to a third of the ancestorial property, was held to be inadmissible*—BECAUSE DURING THE FATHER'S LIFE A SON CANNOT SUE FOR A DIVISION OF SUCH PROPERTY. *Plaintiff's claim to be exonerated from the charge of* 41,000 *rupees was held to be improper, as no demand had been made upon him for the payment of that sum.*

THE DECREE AS IT SET ASIDE THE HISSANAMA, AND AWARDED SEPARATE PROPERTY TO THE PLAINTIFF, WAS REVERSED. Costs to be paid by the Respondent.

Ramkaunt died pending this appeal. *The property* (before *Ramkaunt's* death) *was attached by the Provincial Court, at the instance of the Respondent, in order that after Ramkaunt's (his father's decease,) he (the Respondent) might be able to secure his share of it.*

Ramkaunt petitioned the superior Court to prevent the execution of this attachment, because he still retained exclusive possession—and, because while he lived, no body was competent to claim any part of the property, movable or immovable, ancestorial or acquired. The Provincial Court was ordered to withdraw its attachment.

Mr. Fombelle, before whom the cause was first heard, in the *Sudder Dewannee Adawlut*, referred it to the *Hindoo* law officers, to whom the following questions were put:—

1st. Was the *Hissanama* a valid instrument, whether the property disposed of by it was *ancestorial*, or *acquired* by *Ramkaunt?*

2d. Possession not having been given, and *Ramkaunt* having died, not making any other disposition of his property, was the *Hissanama* binding upon the parties mentioned in it?

3d. Had *Ramkaunt* a right to exclude *one son* from participation, and to grant shares *to the wives of that son?*

To the first question the Pundits answered, that a man *cannot make an unequal distribution of ancestorial property among his sons, and that in so*

far as the Hissanama of Ramkaunt went to do so, it was not valid, nor binding upon the parties mentioned in it. But that with respect to acquired property, an unequal distribution was permitted —and the Hissanama binding upon the parties named as to it, unless made through perturbation of mind, &c. in which case, it would be absolutely illegal and void.

To the second question they answered, *that possession not having been given, &c. the Hissanama was not binding on the parties, or their heirs after Ramkaunt's death.*

And to the third question they answered, *that Ramkaunt was not authorized to grant shares to the wives of a living son, excluding that son, unless for a valid reason.*

This answer to the *second* question was deemed *conclusive,* all parties having admitted that partition was not actually effected in *Ramkaunt's* life time.

Mr. Fombelle recorded his opinion that the part of the Provincial Court's decree which reversed that of the *Zillah* Courts, so far as it went to order the plaintiff possession of the property claimed by him in his own right, should be affirmed. (This was an affirmation of the reversal of the *Zillah* Court's decree.) The plaintiff's right to the separate property claimed by him, not having been investigated by the *Zillah* Court.

Mr. Fombelle was further of opinion that the part of the Provincial Court's decree which virtually established the *Hissanama,* should be *reversed,* and the decree of the *Zillah* Court, so far as it went to make void the *Hissanama,* should be *affirmed.*

In September, 1815, this cause was brought before the senior Judge of

the *Sudder Dewannee Adawlut*, when two other questions were put to the *Pundits*.

1st. *Supposing the Hissanama to be a valid instrument*, would it be nugatory because not carried into effect in *Ramkaunt's* life time, *although the plaintiff had prevented it from being carried into effect?*

2d. If *Ramkaunt* had put all the parties, the plaintiff excepted, into possession in his life time, and divested himself of all right, would such a disposition be valid?

Upon these points the *Pundits* differed in opinion. That of *Chuttoorbhooj Pundit* was to the following effect.

There is no law by which a *Hissanama* without possession, can be made available, even if possession be prevented by the adverse party. Possession must be in sight of the adverse party, and without molestation upon his part. Possession for three successive generations is not sufficient, if not in sight of the adverse party, and with his acquiescence. If plaintiff resisted possession in *Ramkaunt's* life time, and by his opposition prevented the defendants from obtaining it, the *Hissanama* cannot be deemed valid or binding on the parties, because a title deed, *unaccompanied by possession*, must be disallowed as evidence of right.

Then follow his authorities.

Occupancy in the fourth generation is the principal evidence, but title must be adduced in its support. Yet its *validity* need not be proved; as it must be by the original holder, who will rest claim chiefly on the *title* and prove the *fact of occupancy* in its support. This is the doctrine of *Chuttoorbhooj*.

In answer to the second question, he says, Supposing the *Hissanama*, during *Ramkaunt's* life, to have been acceded to by all the parties, one only excepted, the share of that one having been in his own possession, and *Ramkaunt* to have divested himself of all right; the *ancestorial immovable* property COULD NOT HAVE BEEN SO DISPOSED OF BY THE FATHER. An *unequal* distribution of such property, cannot be maintained as *valid*. Where the *Dayabhaga* upholds the *validity of a prohibited gift* or sale, it is always understood that the donor *is vested with power to make it*.

In an *unequal* distribution of his own acquisitions among his sons, the father's *motive* must be looked to. If he gives more to one on account of his good qualities, numerous family, incapacity, or piety, such unequal distribution must be upheld. But if made by the father through perturbation of mind occasioned by disease, &c. or through irritation against one son, or through partiality for the child of a favorite wife, it cannot be upheld. It does not fall within the rule laid down in the *Dayabhaga, making a gift valid, although prohibited*. There a power in the donor is presupposed, and under the above circumstances, a father has no power of distribution. In the absence of legal motive, the father is supposed to be influenced as above, under the impulse of which, his acts are invalid. He then gives his authorities for this answer.

Soobha Shastree, to the first question, answers thus, The *Hissanama*, executed by *Ramkaunt, is a legal and valid instrument;* but possession under it was not given. *This was from the plaintiff's opposition.* The DEED however, sufficiently demonstrates *Ramkaunt's* relinquishment of his right, and the extinction of his property, that therefore vested a title in those to whom the *Hissanama* was executed. *Their want of possession did not proceed from neglect, which might have implied a voluntary relin-*

quishment; their title therefore remains unimpeached, and no lapse of time, under such circumstances, can annul their right to take possession of the respective allotments; the Hissanama must therefore be upheld, as valid and binding upon the parties.

To the second question *Soobha Shastree* answers, The *Hissanama* is *invalid* as it goes to make an *unequal* distribution of *ancestorial,* and *valid* as it goes to make such distribution of *self-acquired,* property; *a man has full authority to aliene his own acquisitions at his pleasure.* If he shall make an unequal distribution for *allowable* causes, he does not, if he shall make it for *prohibited* causes, he does, *incur the guilt of violating the law, but the distribution must be upheld as valid, and binding, upon the parties concerned.* The law is the same as to *ancestorial movable* property. But unequal distribution of *ancestorial immovable* property, is *invalid,* and *not binding* upon the parties concerned. *Soobha Shastree's* authorities in support of his opinions are as good, as well applied, and nearly as numerous, as those which were adduced by *Chuttoorbhooj.* Their numbers he might have easily augmented.

Here we have *an agreement* between these *Pundits* upon the subject of *ancestorial immovable* property; but in other respects, *the most direct contradiction.*

A fortnight was then given to the contending parties, that they might prove the validity of the several opinions given by the *Pundits* in their favor respectively. The appellant filed many objections against the doctrines of *Soobha Shastree,* and many reasons and authorities in favor of the doctrines of *Chuttoorbhooj.* The respondents filed many objections against the doctrines of *Chuttoorbhooj,* and many reasons and authorities in favor of the doctrines of *Soobha Shastree.*

The *Hissanama* was considered by the senior Judge to be *invalid.* He

concurred in opinion with *Mr. Fombelle*, and a final decree was passed accordingly.

The parties were now informed, that unless they settled their dispute amicably, they must institute another suit, for the purpose of ascertaining their legal shares. In the meanwhile, all the parties were ordered to pay their own costs in the three several Courts, through which the cause had passed.

In the *Remark* upon this case, it is said, "*It is manifest that the validity of an unequal partition of* ANCESTREL IMMOVABLE *property, such as is expressly* forbidden by the received authorities of Hindoo law, cannot be maintained on any construction of that law by Jimuta Vahana and others.*"

This *Remark*, after noticing the two cases of which I have spoken, proceeds, "In the second case (that of *Ramkoomar Neace Bachesputtee* v. *Kishenkunkur Turk Bhoosun*) the *bewustah* given by the *Pundits Chuttoorbhooj* and *Soobha Shastree* was *verbatim*, as follows, 'Should any *brahmin*, during the life of *an elder son*, make over by gift THE WHOLE OF HIS PROPERTY, MOVABLE AND IMMOVABLE, ANCESTREL AND ACQUIRED, *to his younger son*, THE GIFT IS VALID, *but the act is sinful, as the gift of the whole ancestrel property, movable and immovable, is prohibited by the Shasters. This bewustah is given according to the authorities current in Bengal.*'"

Thus it appears, that on the subject of *ancestorial immovable* property, these *two Pundits*, in different causes, *united* in declaring, 1st. That the gift of *such property* by a father, IS VALID. 2dly. That the gift of *such property* by a father, IS INVALID.

* This is quite at variance with the *Remark* on *Eshanchund* v. *Eshorchund*—see *ante*.

Chuttoorbhooj died, and I hope he has left some testimonial more creditable to his memory, than we can look for in a comparison of his two opinions.

He was succeeded by *Ramtunnoo*, who, being called upon, delivered the following *bewustah* to the *Sudder Dewannee Adawlut*.

"The gift of the *whole ancestrel estate (not consisting of immovable property, a corody, or slaves,) such as pearls, gems, &c. and the whole of his own acquired property, by a father to one son exclusively, while there are other sons living* IS A VALID ACT. If the father make a gift *of a small part of the ancestrel immovable property, not incompatible with the support of the family*, THE ACT IS VALID, *but if he make a gift* OF THE WHOLE ANCESTREL IMMOVABLE PROPERTY, OR OF A CORODY, OR SLAVES, THE ACT IS NOT VALID. *This opinion is in conformity with the Dayabhaga, and other authorities current in Bengal.*"

Ramtunnoo adduced his authorities in support of this opinion. In one point, namely, that a gift OF ALL THE ANCESTORIAL IMMOVABLE property to *one son*, IS INVALID, the three Pundits are agreed. The *immorality* of such a gift may be admitted, but its *invalidity* remains to be proved.

Now it is to be remembered, that, upon the law, as it is merely prohibitory, no dispute has ever arisen, that, in all questions the prohibition has been most fully admitted. It has been acknowledged at all times; and upon all hands, that a gift of *ancestorial immovable* property, to one of the sons, excluding the others from participation, is forbidden by the *Hindoo* code. No expounder has ever denied the *immorality* and the *sin* of making such a gift—but some say that it shall be *valid*, and others say that it shall be *invalid*, if made.

It is obvious that the Remark of the *Sudder Dewannee Adawlut* in the

cause between *Bhowannychurn Bunhoojea*, and the heirs of *Ramkaunt Bunhoojea*, is at variance with two other decrees which had been pronounced by that Court, and considering that the partition made among his family, by *Ramkaunt*, was of property *movable* and *self-acquired*, as well as of *immovable* and *ancestorial*, and that the decision was applied *to it all*; it will, I think be admitted, that a greater restraint was laid upon the disposal of property in this case, than had ever been applied upon any former occasion.

But however this may be, it is certain, that the declaration of a man's right to dispose of his *ancestorial immovable* property at his own discretion, leaving him to answer in another world, for the sin of having distributed it unequally, would render the law certain, not only as to that description, but as to every other description, of property.

The question at present, is greatly perplexed, and I wish it were as easy, as it certainly is desirable, to extricate it from difficulties. I cannot conceive how this is to be effected, with any thing in the resemblance of consistency, but by recurring to the principle which governed the earlier decisions of the *Sudder Dewannee Adawlut*—and, admitting an unequal distribution of such property, to be *immoral* and *sinful*, as it relates to the distributor; holding nevertheless, that his act shall be valid and binding, as it may affect other parties.

If we consider the ground upon which the last decision of the *Sudder Dewannee Adawlut* rested, the perhaps unprecedented length to which it extended, the direct contradiction given by the Court *Pundits* to their former opinion, the tergiversation of others, whose doctrines seem to have influenced the Judges, and the great distrust with which the dictates of *Hindoo* lawyers ought to be received, we may possibly conclude that the obstacles raised by this last proceeding of the *Sudder Dewannee Adawlut*, are by no means insuperable, or sufficient to prevent our return to the

law as it had formerly been declared by that Court, and as it seems to have prevailed in the Supreme Court of Judicature.

As to the "*Remark*" upon this case, of which I now speak, I know not who was its author, or that it is to be considered as a declaration of the law. The *actual decision of the Court* is not irreconcilable with its other decrees. It was the *Pundit's* answer to his *second question, that was deemed conclusive by Mr. Fombelle.* This answer did not turn upon an *absence of right* in the father to dispose of his estate as he pleased, but upon the *Hissanama* being inoperative, inasmuch as *possession had not been given under it, by the father himself.*

With respect to the senior Judge, the report states as follows:—"Considering therefore, *the deed of partition (which was never carried into effect) to be invalid, and not binding on the parties mentioned in it; the senior Judge concurred in the opinion expressed by the second Judge; and a final decree was passed accordingly,* IN CONFORMITY TO THAT OPINION."

I must observe that the opinion of the *Pundits* given on the *second* question which had been propounded to them, was not only the opinion upon which *Mr. Fombelle* entirely relied, but that this *second question* was contained in the *first interrogatories* which were put to the *Pundits.*

This is material, because the report of the case contains the following passage; "It being however, *satisfactorily ascertained* from the replies of the *Pundits to the first interrogatories*, that the deed of partition executed by *Ramkaunt*, WAS IN SEVERAL RESPECTS ILLEGAL; *the necessity of ascertaining the relative accuracy of the* CONFLICTING OPINIONS *of the Pundits delivered in reply to the queries subsequently put to them, was, in this case, superseded. In those queries it was hypothetically* assumed, for the reason already stated, *that the deed of partition was legal and had been carried*

into effect during the life time of Ramkaunt, which, from the admission of all parties, AND OF RAMKAUNT HIMSELF, *in the petition presented by him to the Sudder Dewannee Adawlut, against the attachment ordered by the Provincial Court,* WAS CERTAINLY NOT THE CASE." The report then proceeds, "*Considering* THEREFORE, &c." as before given.

I now suppose that this decree is not repugnant to former decisions, and it certainly is not repugnant to them, *if it stands upon non-delivery of possession alone.* Upon this ground it was decided by *Mr. Fombelle;* and also, as I infer, by the senior Judge. *Mr. Fombelle* observed, "That the answer delivered by the *Pundits* to the *second* question, *was conclusive as to the merits of the case, all parties having admitted that the deed of partition executed by Ramkaunt, had not been carried into effect during his life time,*" &c. Then we have, "*The senior Judge concurred in the opinion expressed by the second Judge.*" This must be particularly attended to, because it bears directly upon a question of the utmost importance.

I shall, in the first place, observe that this decree was pronounced upon the authority of *Chuttoorbhooj* and *Soobha Shastree,* the two *Pundits* attached to the *Sudder Dewannee Adawlut.*

From what has already appeared respecting their consistency, it will probably be admitted that their opinions are not entitled to the greatest degree of deference, and it appears to me, that in this very case, there is a discrepancy in the answers of one of them, sufficient to justify us in expecting more than his rescript for the confirmation of a law, which *must absolutely abolish the right of a Hindoo to dispose of his property by will.*

I shall have some further observations to offer on the subject of a man's right to dispose of his *ancestrial immovable* property. Upon the other point, it is evident, if possession must be delivered by the donor himself, that a

Hindoo never can dispose of his property by will—for the will is not to take effect until after his death, until his power of giving possession shall have terminated.

What will be the consequence? We shall create two separate and opposing laws, and that which is administered in the Supreme Court, will be directly in conflict with that which is administered in the *Sudder Dewannee Adawlut.* In the one Court, a Testator's directions will be executed, and in the other, his directions must be totally disregarded.

We might, I think, reasonably expect better authority than we have here, for a decree, which, if acquiesced in as law, must be productive of the most injurious consequences.

To what degree of credit are *Chuttoorbhooj* and *Soobha Shastree* entitled? That is the main question—for the decision was pronounced upon a joint opinion of these two *Pundits.*

They say that a *deed of gift, without an actual delivery of possession is invalid, and not binding upon the parties named in it.* In this opinion, the right of a *Hindoo* to dispose of his property by will, is denied.

The same question had been before two other Courts. A *Zillah* Judge had declared the deed of gift to be *invalid.* A Provincial Court of Appeal had declared it to be *valid,* and had further declared the *Zillah* Judges decision to be *erroneous in every respect.*

If then, between the *Zillah* Judge, and the Court of Appeal, a judgement of the latter is to preponderate, the excess of weight must be placed against that, which may still justly belong to the authority of *Chuttoorbhooj* and *Soobha Shastree.*

Should we cast these *Pundits* entirely aside, and I do not know how they can be better disposed of, we shall then have a *Zillah* Judge against the validity of this *Hissanama*, and a Court of Appeal in its favor.

I now return to the question of a *Hindoo's* right to dispose of his *ancestorial immovable* property, by will, or by gift. In all views of it, we shall discover difficulties, and I do not, as I before observed, see any mode by which we can be extricated from them, but by adhering to the rule which has already been acted on, and declaring that a gift of even the *entire ancestorial immovable* property to one son, in exclusion of the rest, is *sinful*; but nevertheless *valid*, if made.

Many decrees have been made in the Supreme Court which supposed the right of a possessor, to make such a disposition of the estate. The titles of many families to their property now stand upon such decrees. By the last decision of the *Sudder Dewannee Adawlut*, neither the parties, nor those claiming under them can suffer, because their partition was made ultimately by themselves. But if it goes to overturn the decisions of 1792 and 1812, the parties who failed upon those occasions, ought to have succeeded; and it is probable besides, that other such dispositions have been acquiesced in, under the authority of those decrees.

I have hitherto confined myself to what has been done upon this subject, in the *Sudder Dewannee Adawlut*, and *Mofussil Courts*, but in my chapter upon Wills, I shall state a case in which the Supreme Court expressly and distinctly declared that a *Hindoo Testator*, "*might and could dispose by will, of all his property as well movable as immovable, and as well ancestorial as otherwise.*"

Whatever we may think of the legality of this declaration, it is a fact, that one party affected by the decree, appealed from it to the King in

Council, and that it was there affirmed. Here then is a decision in the *dernier resort;* and if that is not, nothing can be, conclusive. I must however add, that the decree thus affirmed, turned on *the construction* of a will; and although it contained the above declaration, and directed all the bequests, and provisions made by the testator to be carried into effect, *that it ordered an equality of partition of all the residue of the estates,* consisting of *movable and immovable, ancestorial* and *self-acquired,* property, *to be made among his sons.*

There are two questions relating to *ancestorial immovable* property. 1st. Can the possessor give it all to one son? 2nd. Can he make an unequal distribution of it among his sons? An answer in the affirmative, to the first, must be an answer conclusive to the second.

Those who insist upon the right of unequal distribution, are very far from explaining themselves satisfactorily on the subject. The *proportion* in which one may be preferred to another, is quite unascertained. It may, they tell us, be carried to any extent in favor of one, provided enough be reserved as a suitable maintenance for the rest. This is quite indefinite, and we have seen, that according to *Menu,* there shall be an *equal* distribution, unless there be a superiority in virtue, among the sons. This criterion no longer exists, except for the purpose of giving latitude to the interpretation of *Pundits.* From all my reading, and other information on the subject, I cannot but conclude, that a man is not justified in making *an unequal distribution of ancestorial immovable property among his sons, if his right of giving all to one son, be denied.*

Over every other description of property, I conceive a possessor has the absolute power of disposal, whatever degree of guilt he may incur by its exercise. Fraud or imposture practiced upon him, would, of course operate here, as in every other transaction, and might invalidate the act.

It is said that an *undue*, shall be an *invalid*, disposition—but the weight of authority and of reason, without adverting to the vague, indistinct, and indefinite notions which are entertained as to the restraint, sufficiently establish, according to my humble judgement, the unqualified right of disposal over *all descriptions of self-acquired*, and over *ancestorial movable*, property, at the mere will of its possessor.

I shall now offer a few further observations, relating to *ancestorial immovable* property. The contest between *Bhowannychurn Bunhoojea* and the heir of *Ramkaunt Bunhoojea* was adjusted by the parties themselves, but it seems to have given rise to much investigation in the *Sudder Dewannee Adawlut*.

The following question was put by that Court to *Tarapershad* and *Mrityoonjoyee*, the *Pundits* of the Supreme Court; to *Nurrahurry*, *Pundit* of the *Calcutta* Provincial Court, and to *Ramjoyee*, *Pundit* of the College of *Fort William*.

The question was, "A person whose eldest son is alive, makes a gift to his younger, of *all* his property, *movable* and *immovable*, *ancestrel* and *acquired*. Is such a gift *valid*, according to the law authorities current in *Bengal*, or not, and if it be *invalid*, is it to be set aside?"

The following answer was returned, subscribed by the four above-named *Pundits*.

"If a father, whose elder son is alive, make a gift to his younger, of all his *acquired* property *movable* and *immovable*, *and of all the ancestrel movable* property, THE GIFT IS VALID, BUT THE DONOR ACTS SINFULLY. If during the life time of an *elder* son, he make a gift to his *younger*, of *all* the *ancestrel immovable* property, such gift is *not valid*. Hence, *if it*

have been made, IT MUST BE SET ASIDE. The learned have agreed that it must be set aside, *because* such a gift is *a fortiori* invalid, in as much as he (a father) *cannot even make an* UNEQUAL DISTRIBUTION among his sons, of *ancestrel immovable* property, *as he is not master of all*, as he is required by law, *even against his own will* to make a distribution among his sons of *ancestrel* property, *not acquired by himself* (i. e. not recovered) as he is *incompetent* to distribute such property among his sons, *until the mother's courses have ceased*, lest a son, *subsequently born*, should be deprived of *his* share; and as *while he has children living*, HE HAS NO AUTHORITY OVER THE ANCESTREL PROPERTY." This *bewustah* is accompanied by many authorities.

In the *Remark* upon this case of *Bhowannychurn Bunhoojea* v. *the heirs of Ramkaunt Bunhoojea* it is stated, with reference to the two cases of *Eshunchund Rai* v. *Eshorchund Rai* and *Ramkoomar Neace Bachesputtee*, v. *Kishenkunkur Turk Bhoosun* "*that the result of an enquiry on the subject, affords great reason for doubting the correctness of the two decisions above noticed, as far as they respect the ancestrel immovable estate.*"

We must keep in mind that the *decision of the Court did not rest upon this ground*, that an *unequal* division of *ancestorial immovable* property, *is certainly forbidden by the Hindoo law*; and that the only question is, *whether or not such a division will be valid, if made.*

In the books we seldom find a distinction between acts which are *sinful* merely, and acts which are *void* in themselves, clearly expressed. There is a general prohibition as to all, and the expounders are to discriminate between those which ought to be binding in morals, and those which are binding in law. We know what has been declared by the expounders, and what has been decreed by the Courts, upon the present question.

The *Dayabhaga* is of authority in *Bengal*, and we there find the law upon this subject, unequivocally laid down. It is there said, "The texts of *Vyasa exhibiting* A PROHIBITION, *are intended to show* A MORAL OFFENCE." "*They are not meant* TO INVALIDATE THE SALE, OR OTHER TRANSFER." "*So likewise other texts must be interpreted* IN THE SAME MANNER." "*Therefore, since it is denied*, THAT A GIFT OR SALE SHOULD BE MADE, THE PRECEPT IS INFRINGED BY MAKING ONE; BUT THE GIFT, OR TRANSFER IS NOT NULL, *for a fact cannot be altered by an hundred texts.*" *Raghunandana* (who has been highly extolled by *Sir William Jones)* in commenting upon this, says, "If a *Brahman be slain*, the precept 'Slay not a *Brahman*' *does not annul the murder*, nor does it render the killing of a *Brahmana impossible*. What then? IT DECLARES THE SIN."

I have before quoted the above passages for another purpose, and I did not then, nor do I now, bring them forward on account of their intrinsic worth; but they exhibit a principle, which we know to be very generally prevalent throughout the *Hindoo* institutes. This principle, whatever we may think of it, we must desire to see in the most active operation, where it can be the most beneficially applied.

When I noticed it first, I was upon a subject very different from the present. There the question was, whether or not a woman (who was certainly entitled to no more than a life interest in the property she possessed) could lawfully deteriorate that property to the prejudice of him, who had an unquestionable title to succeed to it, after her death. Here the question is, whether or not the man in possession of *ancestorial immovable* property, has a right to dispose of it according to his own will. If I could venture to draw a conclusion, it would be that he is invested with the temporal right, subject to all the spiritual consequences, of its exercise.

How does the account of authorities stand? We have in favor of the right, a Judge's decision, and that decision confirmed on appeal to the Governor General in Council. We have the decision of a Registrar, that decision confirmed by a Judge, and the two established on an appeal to the *Sudder Dewannee Adawlut*. Against the right, we have the decision of a Provincial Court of Appeal, but that decision *reversed* by the *Sudder Dewannee Adawlut*. In addition to this *one reversed decree*, we have the joint opinion of four *Pundits*, upon which the *Remark* on the last case which came before the *Sudder Dewannee Adawlut*, appears to have been founded.

As to the two (they are not two of the four who gave the opinion) *Pundits* of the *Sudder Dewannee Adawlut*, *(Chuttoorbhooj* and *Soobha Shastree)* it is needless to say more than that upon this question at least, they have most effectually disqualified themselves.

Of *Nurrahurry* and *Ramjoyea* (two out of the four *Pundits* who joined in the opinion given to the *Sudder Dewannee Adawlut*) I know nothing. I know not what may have been pronounced by them to be law, upon subsequent, or upon former, occasions. *Mrittenjoyee*, one of the Supreme Court *Pundits*, had died before the year 1821, and had been succeeded in office by his son. *Tarapershad*, the other Supreme Court *Pundit* was living in the year 1821.

The four had united in certifying to the *Sudder Dewannee Adawlut that* A FATHER CANNOT MAKE AN UNEQUAL DISTRIBUTION OF ANCESTREL IMMOVABLE PROPERTY AMONG HIS SONS.

In April, 1821, *Ramjoyee* (the son of *Mrittenjoyee)* and *Tarapershad*, (who had joined with the other three Pundits in giving the above opinion to the *Sudder Dewannee Adawlut*,) were examined by the Master of the Supreme Court, in a cause between *Raujkisno Bonerjee & al.* v. *Tarany-*

churn Bonerjee & al. and they both declared, that a father *might make a gift to any one of his sons, and that the extent to which he might go, in giving to one was unlimited, if he left enough for the other sons.* In the very case then in question, the fact was, that the father had eleven sons, and a property to the value of about *ten lakhs* of Rupees. He had given to *one son, in exclusion of the rest, an ancestorial Talook, worth one lakh of rupees*— and these two *Pundits* (*Tarapershad* being one, and the son of *Mrittenjoyee* the other,) declared, that the gift was legal, valid, and binding, and that the *son who received it would be entitled to share equally in the remainder, with his other brothers.*

If *Tarapershad* is to be mustered with the force to which he deserted, we shall have him and *Ramjoyee* against *Mrittenjoyee*, *Nurrahurry*, and *Ramjoyea*, and I should hope that a majority of one *Pundit* will not be thought sufficient to overturn *two* solemn decisions, which seem to have been founded upon the most mature deliberation.

Such occurrences as these I have spoken of, cannot but make us think, it the more necessary to establish the leading principles of *Hindoo* law, and make us the more anxious to render the property, and the rights of a people, secure.

It is melancholy and disheartening to know, that we are to be deprived of the only benefit which the evils of litigation can produce, and that nothing is to be fixed by the most authoritative decisions.

If the decrees of our Courts are not to have a prospective operation, where are we to find a rule for our guidance, in the transactions of life?

A liability to receive contrary opinions, from several *Pundits* in the same cause, would make it desirable to fix the law, but when we receive

contrary opinions from the same *Pundits* in several causes it becomes absolutely indispensable to justice.

This discussion, must, I am well aware, be thought tedious; and if I had but had time for the purpose, I should willingly have endeavoured to methodize or abridge it—but the two subjects, one relating to the legal power possessed by a *Hindoo* in the disposal of his property, while he lives; and the other to his right of disposing of it by will, are of very great magnitude and moment. I was therefore desirous of offering such considerations as occurred to me respecting them; yet in choosing between a desultory mode of communicating my sentiments, and their entire suppression, I may not have made a judicious election.

The law cannot be fixed but by an adherence to well weighed decisions, for I persuade myself that those who think most deeply, discover difficulties in legislating, which escape the notice of men who are willing enough to undertake the task.

Familiar as I am with law-making in India, I cannot but confess, that I fear it still. When laws are made at pleasure, they are generally made without requisite consideration. I could point out instances sufficient to prove, that it is much more easy to enact, than it is to preserve consistency, in enactments.

It was well said, that conferring a power upon men in this country to make laws for the *Hindoos*, was a matter of sufficient importance to be the subject of an act by itself.

Admitting that something ought to be done, is not the conclusion, but the commencement, of our considerations upon this topic. For my part I should prefer a statute enacting any thing in itself, to one which created

legislators, and authorized them to enact every thing. When proposed laws are openly discussed, and meet with every objection in their progress, we have but little to apprehend from them, in comparison with what is to be apprehended from such as may be framed in the closet. The opinions of selfishness, are not always to be disregarded; and admitting the purity of him who legislates in secret, he will proceed with more caution if his projected law is to make a subject of public discussion. In preparing for debate, he must consider the question in every point of view, and, whatever be the measure of his understanding, the deliberations of wisdom, or even the suggestions of folly, may enlarge it.

The two following cases were decided in the *Sudder Dewannee Adawlut*, and relate to *gifts made by women*, of property to which they succeeded as heirs.

The first was in the year 1803, between *Mahoda*, widow of *Gungagovind Sein* and *Bindrabun*, her *Serberakar*,* appellants, and *Kuleani*, and two others, daughters of *Joogulkishor* and *Tarni Dibeh*, respondents.—*1st Sudder Dewannee Adawlut Reports, p.* 67.

This suit was brought in *Srawun* B. Y. 1203, in the *Zillah* Court of *Rajshahi* by *Joogulkishor*, the father of *Kuleani* and the others, against *Mahoda* and her *Serberakar*, to recover the *Kismut Chunderdighee*, &c. These lands had formed the *Talook* of *Ramdeo Surma*. Upon his death without issue, his widow *Rajesree*, succeeded to the *Talook*. She survived her husband, a year or two, and died in the B. Y. 1199. The plaintiff, *Joogulkishor*, *claimed under a deed of gift from her, and also as her heir*. He stated, that (after the death of *Rajesree*) *Gungagovind* (the defendant

* *Serberakar* here means manager or conductor of the suit.

Mahoda's husband) got possession of the property by undue means, and that upon his death he was succeeded in the possession by *Mahoda.*

Mahoda pleaded that the deed of gift set up by the plaintiff *(Joogulkishor)* was of no authority, and that her husband, whom she succeeded, held the estate under an order of the Board of Revenue.

The plaintiff's deed of gift was dated the 11th of *Bysakh*, 1193, and was from "*Rajesree*, widow of *Ramdeo*, son of *Atmaram*, grandson of *Bishonath*, to *Joogulkishor*, son of *Jeynteram*, grandson of *Santeram*," and states, "I have no heirs; you are my husband's grandfather's own brother's grandson, and are the person to perform my obsequies; of my own free will I fully relinquish, and give you, my *Talook*. You henceforward have a right to give and sell; as long as I live the income of the *Talook* is reserved for my maintenance.

It appeared from a document produced, that *Gungagovind*, (the defendant, *Mahoda's* husband,) had obtained possession as *bhogdar*, or occupant, by the Board of Revenue's order, but this order provided, that any person claiming by inheritance, might sue for the establishment of his right.

The *Zillah* Judge considered, that the defendant's husband had possession only, and not right; that the deed of gift by *Rajesree* to the plaintiff, was proved, and from a written pedigree which was filed by the plaintiff, he (the Judge) inferred the relationship alleged, between the donee and the donor's husband.

He gave judgement for the plaintiff *under the deed of gift*. Upon appeal, this judgement was affirmed in the Provincial Court of *Moorshedabad.*

The original defendant now became appellant to the *Sudder Dewannee*

Adawlut; and she there insisted that her title rested principally on a *Bye bil wufa,* or conditional sale, made by *Rajesree* to her husband, for 501 rupees, which afterwards became absolute. She insisted also on a will of *Rammohun,* who had managed the *Talook* in *Rajesree's* life time, and kept possession of it after her death, under a deed of gift *made thereof by her to him.* That *Joogulkishor* never had had possession under the deed of gift in virtue of which he claimed, and that the pedigree from which he claimed relationship to *Rajesree's* husband, was incorrect.

The first point insisted on by the appellant, not having been adduced by her during the former proceedings, and no reason having been assigned by her for not bringing it forward, was rejected.

A question was put to the *Pundits* as follows: "If *Rajesree* executed the deed of gift to *Joogulkishor,* for the *Talook* left by her husband, and if neither during the life time of *Rajesree,* nor after her death, possession was gained by *Joogulkishor;*—if, notwithstanding the intention expressed in the deed, that *Joogulkishor* should take the *Talook* into his hands, another person *(Rammohun)* was the manager of it, and after *Rajesree's* death, remained possessed of the *Talook* as long as he lived, no claim having been preferred by *Joogulkishor,*—is the deed of gift under such circumstances valid in law, and can it establish the title which it purports to convey of *Joogulkishor* and his heirs to the *Talook?*"

The answer of the *Pundits* was as follows: "If *Rajesree, calling Joogulkishor her heir,* made a gift, in his favor, of the *Talook* left by her husband, such gift, *in the event of there being an heir* (of the husband) *cannot avail.* The *Shaster* declares, that a gift, by a widow, of *the whole* of her husband's estate, *is invalid: but that a gift of a moderate portion of his property, made by the widow* WITH A VIEW TO HIS SPIRITUAL BENEFIT, *may*

be valid. If Joogulkishor were the heir of Rajesree's husband, and there were no other heir, Joogulkishor, at Rajesree's death, would take the Talook left by her husband: and at Joogulkishor's death, it would pass to his daughters. If Joogulkishor were not the heir, and there were no heir, the *Talook* would escheat to the ruling power. There was no sort of affinity or connection between *Rajesree* and *Mahoda*, the appellant; whose *possession*, devoid of *right*, cannot form a title."

Joogulkishor must have died after the commencement of this suit in the *Zillah* Court of *Rajshahi*. Of *Tarni Dibeh* there is not any mention made, except in the title of the cause. If she had been the wife of *Joogulkishor*, and had been living at the time of the final decree, she must necessarily have succeeded to this *Talook* for her life, in preference to the daughters of *Joogulkishor*.

The report proceeds, "As it appeared therefore, that by law, *a gift by Rajesree, of the Talook left by her husband, would not avail, and that the determination on the case depended on the question, whether Joogulkishor, was, or was not, next heir to the husband (of Rajesree)* the respondents were called on to bring evidence to the correctness of the genealogical table filed by them, and to the relationship between *Joogulkishor* and *Ramdeo Surma;* which they undertook to do; the appellants at the same time being allowed to produce counter evidence. The evidence taken in the *Zillah* Court of *Rajshahi*, and transmitted to the *Sudder Dewannee Adawlut*, verified the genealogical table, and proved that *Joogulkishor* bore relationship to *Ramdeo*, as therein stated, viz. that he was grandson of the full brother of *Ramdeo's* grandfather, and consequently a collateral kinsman. *On the ground that Joogulkishor* WAS HEIR AT LAW *to the husband of Rajesree, and therefore entitled to the Talook after her death, and that after his death, it passed to his daughters the respondents;* the *Sudder Dewannee Adawlut* affirmed the decrees passed

by the *Zillah* and Provincial Courts, in favor of the claim preferred originally by *Joogulkishor*, and directed that possession of the *Talook* should be made over to the respondents, with an account of mesne profits, since the date of the *Zillah* decree."

The following *Remark* is made upon this case, "A reference to the following passages of *Jimuta Vahana* will confirm the correctness of the grounds on which the decision of this cause rested. Ch. ii. Sect. i. § 56, 59, and Sect. vi. § 9, and summary or recapitulation,* p. 225. It has been declared by the law officers of the Courts in other suits, *that a widow's gift of the estate* TO THE NEXT HEIR, *is good in law, though she be restrained from making any other alienation of it.* This opinion, though not founded on any express passages to that effect in books of authority, seems reasonable; *as such a gift is a mere relinquishment of her temporary interest, in favor of the next heir.* It may however, happen, that the person who would have been entitled to take the inheritance at her decease, may be different from the one who obtained it under gift or relinquishment to him as presumptive heir: and *if the title be either preferable or equal, it may invalidate such gift in whole or in part.*"

In short, this decision confirms the law as I have before laid it down, namely, *that the widow has no more than a life interest in her husband's immovable estate. That she may dispose of it for her own life, but that after her death, the heirs of her husband will be entitled to succeed.* To say that the next heir of her husband, is competent, as well as any other person, to take from her a grant of this life interest, is perfectly superfluous. If he shall turn out to be the sole heir, he will, of course hold the estate, *in his own right*, after the widow's death. If there be *joint* heirs, they must all, after the widow's death, necessarily participate in the inheritance.

* The recapitulation here spoken of, will be found in this book, page 233, &c.

The other case which I proposed to notice is that of *Bijya Dibeh*, appellant, and *Unpoornah Dibeh*, respondent. It was decided by the *Sudder Dewannee Adawlut* in 1806, and is reported in 2d part Sudder Dewannee Adawlut Report, page 84, vol. i.

This was an action brought by *Bijya Dibeh*, on the part of herself, and her minor son to recover from *Unpoorna Dibeh* the moiety of an estate consisting of *Kismut two annas pergunnah Chundason.* The suit was brought in the *Zillah* Court of *Rajshahi.*

Bijya Dibeh was the eldest daughter of *Kishenkaunt*, late *Zemindar* of the estate, who shortly before his death, having no male issue, gave a written order to *Tarni Dibeh*, his wife, to adopt a son. *Tarni Dibeh*, the wife of *Kishenkaunt*, had two daughters by him, viz. *Bijya Dibeh*, the plaintiff, and *Gunga Dibeh.* This latter *(Gunga Dibeh)* had a son.

Tarni Dibeh, in pursuance of her husband's directions, adopted *Kalikaunt*, who died without issue, in a few months after he had been adopted. After the death of *Kalikaunt*, *Tarni Dibeh*, the widow of *Kishenkaunt*, made a gift of the estate in question to *Kali Bhyroo*, the son of *Gunga Dibeh* her youngest daughter; *Kali Bhyroo* died, and left *Unpoorna Dibeh*, the defendant, his widow.

It must be presumed, although it is not stated in the Report, that *Unpoorna*, upon the death of her husband *Kali Bhyroo*, took possession of the whole estate.

The plaintiff contended that the gift made by *Tarni Dibeh* to *Kali Bhyroo*, was illegal, because she inherited as the heir of *Kalikaunt*, her adopted son, and that she could not make a gift of the estate, but that on her death it would vest in the plaintiff and her sister equally; both of whom had male issue.

Upon this ground, the plaintiff claimed half of the estate.

The defendant was in possession of the whole, as widow and heiress of *Kali Bhyroo*, to whom the gift had been made by *Tarni Dibeh, Kishenkaunt's* widow.

The defendant relied upon the validity of the gift to her husband, stating that the plaintiff had no son at the time it was made, and that she was married to a man in affluent circumstances, whereas the younger sister *Gunga Dibeh*, mother of the defendant's husband, was a widow, and had not the means of supporting her son, who independently of being *the only male heir of the family then living*, was deemed a proper object of charity, and that the *Zemindar's* widow made the gift in his favor, *as a charitable donation, enjoined by maxims of religion, and calculated to benefit the soul of her departed husband.*

The *Pundit* of the *Zillah* Court having been applied to, declared that the gift by *Tarni Dibeh*, to her grandson *Kali Bhyroo*, WAS NOT VALID.

The *Pundits* of the three adjacent *Zillahs* were consulted, and they were of opinion that *the gift was good in law*, ON THE GROUND OF ITS BEING A CHARITABLE DONATION BY THE WIDOW, BENEFICIAL TO THE SOUL OF HER HUSBAND. The Judge agreed with these three *Pundits—declared the gift to be legal*, and dismissed the plaintiff's claim with costs.

The plaintiff appealed to the Provincial Court of *Moorshedabad*. That Court affirmed the *Zillah* Court's decree, and dismissed the appeal with costs.

On a further appeal to the *Sudder Dewannee Adawlut*, the question was referred to the *Pundits* of that Court, "but as on a review of the circum-

stances of the case, it appeared, that, although the widow of the *Zemindar had certainly declared her adoption of Kalikaunt, there was no satisfactory proof of* THE ACTUAL PERFORMANCE OF THE LEGAL CEREMONIES, NECESSARY TO MAKE THE ADOPTION VALID, and it was therefore uncertain whether the widow at the time of the gift to *Kali Bhyroo, held the estate in right of her husband, or of her adopted son*—and as this point might eventually be of importance in the decision of the cause, the question as to the validity of the gift, under the *Hindoo* law of *Bengal,* was proposed to the *Pundits* of the Court in the following form."

1st. "The widow of the *Zemindar Kishenkaunt,* having after the death of her husband, proceeded, in pursuance of authority previously received from him to adopt a son, and the boy designed for adoption, having died before the performance of the legal ceremonies, and the widow having made a gift of her husband's estate to the son of her youngest daughter, which gift, the eldest daughter, who afterwards had a son, denies to be legal, claiming a half share of the estate by hereditary succession; under these circumstances, is, or is not, the gift valid in law?"

2d. "If the ceremonies of adoption were performed, and the boy selected by the widow was actually adopted, was the widow, after his decease without issue, authorized to make a gift of the estate?"

The *Pundits* answered, "A woman succeeding to the possession of property, *in right of her husband, or of her adopted son, is not at liberty to alienate it* WITHOUT THE CONSENT OF THE LEGAL HEIRS; *or to settle it on one heir, while there is a possibility that a co-heir may be subsequently born.*"

The report proceeds, "Under this opinion, whether the adoption of *Kalikaunt* was valid, and the estate reverted to the widow, as his heir, on his dying without issue, or whether the adoption was not valid, as she held

the estate in right of her husband, the Court considered the gift of the estate made in favor of the respondent's husband, *to be void*, and determined, that on the decease of the widow (which took place during the present suit,) her two daughters, viz. the appellant and *Gunga Dibeh*, mother of the respondent's husband, both having male issue at the time, were entitled to equal shares of the estate, as the legal heirs; and consequently that the appellant was entitled to the moiety which she claimed. *The decrees passed against the claim by the Zillah and Provincial Courts, were, in consequence reversed by the Sudder Dewannee Adawlut, and final judgement given in favor of the appellant, with costs against the respondent.*"

This case decides, and I believe, in strict conformity with the law, that a widow succeeding upon the death of her husband, or as heir to her son, to an estate, has a life interest only; that she has not any power of disposal over it, beyond her own life, and that it must upon her death, go to the heirs of her husband. This is no more than I had laid down, without reference to the present case, and is indeed, no more than had been decided by the *Sudder Dewannee Adawlut*, between *Mahoda & al.* v. *Kuleani & al.* for, that a widow succeeding to her husband, and a mother succeeding to her son, stood upon the same footing, could not have admitted of a doubt.

The *Remark* upon the case of *Bijya Dibeh* v. *Unpoorna Dibeh*, may nevertheless be thought worth transcribing. It is as follows: "An *intricate question* of *Hindoo* law was determined in this case, relative to the power of a widow, on whom property has devolved by the death of her *husband*, or of her *son*, to aliene it by gift *without the consent of the heir-at-law.* The disagreement of the opinions of the *Pundits* arose from the following considerations. The succession to property which has devolved on a widow, passes to daughters, *for the sake of the male issue* which they have,

or may have. The son of the youngest daughter (the eldest being then childless) was therefore the person contemplated in the inheritance. A gift to him might be deemed beneficial to the deceased, and consequently legal, or the donation in favor of him, who finally was to be heir in regular succession, *could not be considered as made against the consent of heirs, since his consent to a gift in his own favor might be assumed.* In the present instance the presumption was, that a son had been adopted by the widow, and that the estate consequently reverted to her, on his decease, without issue. It was therefore a case of property, devolving on a *mother* by the decease of her *son*, and it was questioned whether a woman was restricted from aliening land so inherited by her. The law officers of the *Sudder Dewannee Adawlut* dissented from the doctrine which maintains the woman's right of alienation, and held that THE RULES CONCERNING PROPERTY DEVOLVING ON A WIDOW, EQUALLY AFFECT PROPERTY DEVOLVING ON A MOTHER. IN BOTH CASES, THE WOMAN IS RESTRICTED FROM ALIENING, unless for her *necessary subsistence*, or for *pious purposes, beneficial to the deceased; and that only to a moderate extent.* A gift of the whole property does not fall within the exception. Nor could this donation be considered as one made in favor of the heir-at-law, the immediate heirs being daughters, and the exclusion of the further issue, which might be born between the period of the gift, and that of the woman's demise, being illegal. They were therefore of opinion, that the gift was void, and that the succession devolved on the two daughters, both of whom had male issue at the time of their mother's decease."

I cannot perceive the intricacy of this question, an alienation by the widow, or the mother, *with consent of the heir*, is no more (if the alienation be not in his own favor) than a relinquishment by the heir, of his right to the succession. It is true that the estate " passes to the daughters for the sake of male issue ;" but is the male issue of the eldest daughter to be therefore excluded ? The disagreement of opinion among the *Pundits* could

hardly have arisen from this consideration. That the eldest daughter in the present case, was capable of having male issue, is proved by the fact of her actually having had a son. The *Sudder Dewannee Adawlut Pundits* say truly, that the estate cannot be settled upon one heir "*while there is a possibility that a co-heir may be subsequently born;*" but the moment we admit, that the *widow* taking upon *the death of her husband*, and the *mother* taking upon *the death of her son*, stand upon the same footing, (and this seems to be unquestionable,) all difficulty is at an end. That the daughter of a daughter, cannot succeed to her grandfather's estate, through her mother, is certain; but it is equally certain that the daughter may succeed to her father immediately, or to her father, through his wife. If then we suppose *Bijya Dibeh*, the eldest daughter to have been proved, by the most certain test, *incapable of bearing a child*, how could this case be varied by the supposition? She would still have had a life interest in the moiety of her father's estate, and a gift, depriving her of this right, must have been void as to her. The *only question* of which the case could have been supposed to admit, is this. Had *Tarni Dibeh*, her adopted son having died, and she having succeeded to him, as heir, the power of doing more, than she could have done, if she never had adopted, but had continued to hold the estate as representative of her husband?

It is now, I hope, finally settled, that in either situation, her interest must be the same; that whether she is in possession as heir to her husband, or to her son, she has an estate for life only, and that she has not a right to make any disposition of the property, by which the next heirs of her husband may be prejudiced.—See rule 5, page 4, and rule 34, page 10, Chap. Inheritance *ante*—also rules 15, 16, 17, page 6, &c.

OF WILLS.

I DO not know that any question founded upon a Will, has ever come before the *Sudder Dewannee Adawlut*. In the *Mofussil*, Wills may not have been often made by the natives of *India*, but in *Calcutta*, if there be a large property to dispose of; intestacy, has of late years, been uncommon.

In the Reports of the *Sudder Dewannee Adawlut*, and in a "Remark" upon the case of *Eshanchund Rai* v. *Eshorchund Rai*, it is said that the decision "has been received as *a precedent*, which *settles the question* of a father's power to make *an actual disposition* of his property, even contrary to the injunctions of the law, whether by *gift* or BY WILL, or by distribution of shares."

The above case, was one of a *gift* made by a father in his life time; and it *seems to have been* afterwards over-ruled.

If a father has not the right of making such a *gift* at all, it must follow that he cannot make such a one by *Will*. But I do not find any thing in the *Sudder Dewannee Adawlut* Reports, from which we can infer a denial of the right to dispose by will, where there is a right of disposal *by any means*, in the possessor; and may we not suppose that the *dictum*, so far as it relates to a power of making *Wills*, still remains undisturbed? The men-

tion of a will was gratuitous, and may be received as an independent proposition, importing that a *Hindoo's* will shall be operative after his death, as his gift would have been if made by him in his life time, that he may dispose by will, of such property, as he can make any disposition of by his own law.

It might be extremely injurious to the natives of this country, if one law with respect to them should prevail in the Supreme Court, and another in the *Sudder Dewannee Adawlut.* In all cases of doubt in the Supreme Court, the practice of the *Sudder Dewannee Adawlut* is ascertained; their reports are consulted, and their decisions are received with the greatest respect.

Upon the right of a *Hindoo* to dispose of his property by will, I have seen the opinion of *Mr. Colebrooke*, and I need not add that there is not any man whose opinions may justly command a greater degree of deference.

He says, "According to the authorities of *Hindoo* law, which prevail in *Bengal,* a member of an undivided family, may *give away*, or *otherwise aliene,* property to the extent of his *own share* of the joint wealth, and I conceive his disposal of property by WILL would be here maintained (i. e. within the limits of that province,) in conformity with *Jimuta Vahana's* doctrine, that the *gift,* or *other alienation,* by an *unseparated co-heir,* may be an *immoral* act, but it is not an *invalid* one.—*Dayabhaga, Chap.* 2, *Sect.* 28—*Jagannatha's Digest, vol.* 2, *Pages* 57 and 219. It would be otherwise in the rest of the provinces."

Again *Mr. Colebrooke* says, "When writing a few days ago, I stated that I thought a *Hindoo's will,* must be governed, and controlled by the general rules concerning *gift* It will hold good I think for the same things'

for which a *gift* made in his life time, would do so; and not otherwise. I should have added however, that his *legacies to his family, must be controlled by the rules regarding partition, made by the father of* the family. The principle I would lay down is, that a man cannot confer either on a stranger, or on one of his family, *by will* (which I consider to be a donation in contemplation of death) what he could not bestow, either by deed of gift, or partition of patrimony during his life time. The utmost that can be said is, that he may do that by *will* which he could have done by *partition* or *donation* between living persons."

He proceeds, "Upon the principle which I have stated, a *Hindoo* in *Bengal*, may leave by will, *all his own acquisitions;* but is restricted, if he have sons, from distributing *ancestrel* property according to his own pleasure.* In countries in which the doctrines of the *Mitacshara* prevail, he is restrained from giving away *immovables*, and from making any other partition of his possessions among his male descendants, but such as the law has sanctioned; consequently, on the principle before explained, he would be restricted from distributing *immovables* in a mode not sanctioned by law, but may dispose of *movables*, of which the law permits him to make gifts on account of affection; not however to the amount of the whole property. If there be no *sons*, or *male* DESCENDANTS, and the property be not shared by a co-heir, *the whole of his possessions being his separate and distinct property, may be disposed of by* WILL *as he pleases.*"

The right of a *Hindoo* to make a *will*, (I mean of course to confine myself to the province of *Bengal)* has not, I believe, been questioned, even incidentally, by the *Sudder Dewannee Adawlut.* If it be declared that he cannot make by *Hissanama* (or deed of partition) in his life time, *an unequal distribution of ancestorial immovable property* among his sons, it will

* *Quere.*—If "*immovable*" be not unintentionally omitted.

be absurd to say that he may do so, provided the act of dividing is to be postponed until after he shall have died.

He cannot dispose by *will*, of that which he is prohibited from disposing of by *deed*. He cannot direct that to be done *in futuro*, which he has not the power of doing *in præsenti*. He cannot bequeath, what he could not have bestowed. If, of a certain description of property, he is tenant for life, his power over it cannot extend beyond the period which must arrive before his will can have effect; but, according to the opinion of *Mr. Colebrooke*, I do not discover that there is any other restriction in the province of *Bengal*.

I take it to be established, that a *Hindoo* may, by law, make such *reasonable* disposition as he pleases, of personal chattels *(or movable property)* whether *ancestorial* or *self-acquired;* and that he is not under any *legal* restraint with respect to a distribution of his *self-acquired immovable property*.

With respect to *Wills*, it is now perfectly well understood, from the decisions which have taken place in the Supreme Court, that the devise or bequest of a *Hindoo*, will be supported there, if it be made of such property as the testator could lawfully (whether *sinlessly* or not) have disposed of by *gift* in his life time. But the Court never professed to go further, than to permit that to be effected by *will*, which might have been done *inter vivos*. It never indeed has declared, nor do I know that it ever has been called upon to declare, any *restraint* with respect to the disposal of *ancestorial immovable property*. It has declared, on the contrary, that there is not any such restraint.

There have been several decisions in the Supreme Court, which involved in them, an *unequal* distribution of *ancestorial immovable* property, but

no objection (if I am rightly informed) has ever been made by the parties interested, and upon one occasion, the right of a *Hindoo*, to dispose by will, of *every description of property*, in any manner he might think fit, is pronounced in the declaratory part of a decree.

The Stat. 21st, Geo. 3d, Ch. 70, provides, "That their *Inheritance* and *succession to lands, rents and goods*, and all matters of contract and dealing, between party and party, shall be determined in the case of *Mahomedans* by the laws and usages of *Mahomedans*, and in the case of *Gentoos* by the laws and usages of *Gentoos*."

In many instances the wills of *Hindoos* have been recognised and established in the Supreme Court.

It is *Mr. Colebrooke's* opinion that their right to dispose of their property by will, is maintainable in the province of *Bengal*, in conformity with *Jimuta Vahana's* doctrine, that the gift or OTHER alienation of property by a *Hindoo* is *not an invalid*, although it may be an *immoral* act. In the words "*other alienation*," *Mr. Colebrooke* supposes alienation by *Will* to be included.

However this may be, it is certain that the Supreme Court grants probate of the wills of *Hindoos*, and administration to the next of kin, when it is applied for in the case of an intestate.

The will of *Goculchunder Corformah* is long, and will be found in the Appendix. In the cause between *Issurchunder Corformah & al.* v. *Govindchund Corformah & al.* which arose out of that will, (*see page* 74,) the Court declared it to be *well proved*, but to be *wholly inoperative* except as to a disposition it contained in favor of *Gourmonee Dossee, step-mother* of the testator.

Upon a reference to this will, enough may appear to justify the Court's declaration; if the declaration had been made without any exception.—But that the will should have been declared "*well proved,*" may, upon a perusal of it, be thought unaccountable; for it seems to be the production of a madman, and I should have thought, had for that reason, been pronounced to be "*wholly inoperative.*" There is however, an exception with respect to one rational bequest.

The testator's whole property, which was, I believe considerable, is left for the support of an *idol.* The sons, and the widows are to be merely maintained.

In this case a partition of the property was ordered, and it does not appear that any provision was made for the family *Shib* or household god.

It is probable that because the entire estate had been devoted to such a purpose, the will was declared to be wholly inoperative, but to make this consistent with other decisions of the Court, an allowance ought (considering that the will was *well proved)* to have been set apart for the *Shib.* It might have been proper, and it certainly would have been reasonable, to declare that the sons should inherit according to the due course of the *Hindoo* law, and considering the internal evidence which is borne in the will itself, of the testator's insanity, it might have been still more correct if it had been declared to be utterly void; particularly as the step-mother was entitled by law to her maintenance.

The words of the decree with respect to her are these, "This Court doth think fit to order, adjudge, declare, and decree, and doth accordingly order, adjudge, declare, and decree, the will of the testator *Goculchunder*

Corformah in the pleadings of these causes mentioned to be *well proved*, but that the same is *wholly inoperative, except as to the disposition therein contained in favor of Gourmonee Dossee, the step-mother of the said testator and that the same ought to be so far established and carried into execution.*" Again, "That the said Master do also enquire and report to this Court *what will be a proper sum to be allowed to the said Gourmonee Dossee for subsistence and clothing, under the disposition in the said will of the said Goculchunder Corformah, and how the same together with the sum to be expended in her funeral ought to be secured.*"

I do not understand how it became necessary to establish that part of *Goculchunder's* will which related to *Gourmonee Dossee*, for a partition having been directed, she took nothing by the will, or under the decree, which she was not entitled to have secured to her, upon a partition by law.

In many instances, the Court has upheld a bequest for the support of an *idol*, but no attempt had ever before been made to establish such a will as that of *Goculchunder Corformah.* Indeed I do not believe that such a one had ever been executed, either before or since.

Many of the wills to which I shall have occasion to advert, made a provision for the *idol's* establishment, and directed an expenditure for, (what we must call) superstitious purposes, and they have all been carried into effect by the Court.

From disputes which arose among the family of *Goculchunder Mitter* and the suit which was instituted upon his will in the Supreme Court, the provisions which he had made for an *idol*, were particularly considered.

A detail of the proceedings in this cause, may throw considerable light

upon several points of *Hindoo* law, will prove that the feelings and the religion of a people, who certainly deserve well of their rulers, are duly appreciated by the Supreme Court, and I shall therefore give an account of the contest with all practicable brevity, and yet sufficiently at large to make it intelligible.

In the year 1813, a bill was filed by *Nubkissen Mitter & al.* v. *Hurrishchunder Mitter & al.* There were nine parties, seven complainants, and two defendants to the bill.

Goculchunder Mitter died on the 8th of April, 1808, seized and possessed of a large property, real and personal. He had had three sons, viz. *Rammohun Mitter*, *Juggomohun Mitter*, and *Gourmohun Mitter*. *Rammohun Mitter* died (before his father) on the 28th of January, 1808, leaving the complainants *Nubkissen Mitter*, *Gopeemohun Mitter* and *Kissenkaunt Mitter*, his sons surviving him. *Gourmohun Mitter*, the third son of *Goculchunder Mitter*, died also in his father's life time, on the 1st of December, 1804, and left surviving him his sons, the defendants *Hurrishchunder Mitter*, and *Rajchunder Mitter*. *Juggomohun Mitter* survived his father *Goculchunder*, and died the 3d of August, 1811, leaving the four other complainants *Hurloll Mitter*, *Russickloll Mitter*, *Shamloll Mitter*, and *Ramloll Mitter*, his sons surviving him. All the sons of *Goculchunder* had died before the bill was filed.

The bill stated that on the 23d of *Falgoon*, in the B. Y. 1214, or 4th of March, 1808, *Goculchunder* made his will, which is set forth *verbatim*.

The first clause is as follows: "Of my *fixed*, &c. property, I give the new *chuck* house, bounded by the four boundaries, the whole of the grounds and appurtenances and buildings to the east of the high road within my

dwelling-house, in *Mouza Sootalooty* in the town of *Calcutta*, and *Talook Joypore* in *Pergunnah Chotipore*, and the *Pykeparrah* garden in village *Punchanno Gaon*, as *debutter for the worship of the deity Modunmohun-jee and other idols;* the right of disposing of which by gift or sale does not rest with me nor my heirs, and the worship of the deity, &c. festivals are to be performed with the profit which arises after paying the government revenue, &c. thereof. My son *Juggomohun Mitter* will manage the collection, &c. business, and pay the expense of the worship of the deity, the daily worship, festivals, &c. in a suitable manner according to the sheet signed by me, and with whatever remains after deducting that, he will pay the requisite repairs of the deity's temple, after deducting which he will get the requisite articles made for the idols as may appear necessary with whatever remains. The ornaments, &c. of the idols, and the gold and silver chairs, &c. requisite articles which I have given, I have no concern whatever with nor have my heirs. Should the said *Sreejoot Juggomohun Mitter* occasion any interruption in the worship of the deities or embezzle or make away with any thing from the profits thereof, which may the deity forbid! my other heirs will be able to take an account thereof on account of the deities."

The will then proceeds; "Exclusive of the fixed, &c. property which I give to the deities as written above; my PATERNAL and *self-acquired* FIXED, &c. property, subject to rent and rent free *Zemindaries* and *Talooks*, and gardens, *bazars*, and houses, and lands, and so forth *immovable*, &c. property whatever, *the same shall all remain undivided. My heirs shall not have or hold the right of disposing thereof by gift or sale, nor shall my* HEIRS EVER HAVE *power to divide and share the same, nor shall any one have power to mortgage the same, and the same shall in the succession of sons, grandsons, &c.* REMAIN UNDIVIDED *in common concern.*" He then makes his son *Juggomohun*, the *manager* of his property, and declares that what he *has given* to any one, shall be his, and that there shall not be any claim

among them *on account of disproportion therein.* He then recites that two sons and one daughter, of his son ***Radhamohun***, that three daughters and one son, of his son ***Juggomohun***, and that one son, of his son ***Gourmohun***, remain unmarried, and he leaves 2000 rupees for the marriage of each grandson, and 1000 rupees for the marriage of each grand-daughter, to be paid out of the common fund.

In this will the testator declared in the most express terms that his estate should remain *undivided.* The bill of complaint however, prayed a *partition*, and a partition was decreed by the Court. By the decree *the will was established*, and although the partition may not have been opposed, it was as we shall see an *unequal* one, and had it not been for the will it must of course have been *equal.* Hence, I think we may conclude, although a father may be allowed by the Supreme Court, to make an unequal distribution of his estate, that it will not allow him to restrain his descendants from partitioning, according to the distribution he has made. It is true that the unequal distribution was not objected to, and that the partition was not opposed, but it is also true that an acquiescence in the unequal partition by those parties whom it affected, would be sufficient to justify the Court in carrying it into effect, and that the Court could not be justified, under any circumstances, in directing a partition, the testator having peremptorily prohibited it, if he had had a right to prohibit it according to law, that the parties were competent to a surrender of their own rights, but that the Court was not competent to annul a provision which the testator might lawfully make.

He proceeds to direct that 25,000 rupees shall be expended on his own *Adya Sraddha* and 50,000 rupees expended on the *Adya Sraddha* of his son's (*Juggomohun Mitter's*) mother.

It will be recollected that he had spoken of his "PATERNAL and *self*

acquired FIXED, *&c. property.*" He now goes on to dispose of the whole after the before-mentioned deductions shall have been made. This he does by dividing it as usual into sixteen parts or shares, (the number of *annas* in a *rupee.*)—*Six annas* he gives to his surviving son *Juggomohun*—*Five annas* he gives to the sons of *Rammohun*, and *five annas* he gives to the sons of *Gourmohun*. He adds, "After my death the property and title of *Sreejoot Juggomohun Mitter*, (to be) in his sons, grandsons, &c. and the sons heirs of the late *Rammohun Mitter*, in their sons, grandsons, &c. and the heirs sons of the late *Gourmohun Mitter* in their sons, grandsons, &c." "*But my heirs have no concern with the principal*, NO ONE SHALL HAVE POWER TO DIVIDE AND TAKE HIS SHARE." He appoints *Juggomohun* guardian to his infant grand children until they shall attain the age of *twenty-one* years, and he directs that all *profits* shall be carried to the credit of the *sircary* accounts, the parties to benefit thereby according to their several proportions as allotted by his will. He further directs that none of the parties shall take any thing upon their separate accounts, unless there be profits, but permits them if there be profits after payment of the common expences, to take therefrom, and in this case that the parties so taking shall be debited with what is so taken.

There is then another clause in the will, which I do not interpret as authorizing *partition*, but as authorizing the parties to assume a share in the management severally, after they shall have attained respectively the age of twenty-one years. This I conceive must be the construction, because *Juggomohun*, who was of age when the will was made, is prohibited as well as the others from partitioning; and his proportion is to go to his sons, grandsons, &c. Indeed the provision made for debiting the parties with such sums as they might take, proves that the testator intended them to remain undivided after they came of age, because until then they could not have taken any sum, inasmuch as the estate was to be under the management, and they under the guardianship, of *Juggomohun*. Indepen-

dently of these considerations the eldest of the *five* minors was *eighteen* years of age only, and the youngest of them was *six* years of age only, when the commission to divide the estate actually issued. *Two* of the grandsons appear to have been of age when the bill was filed, at least they do not sue by their next friend, but one of them is the next friend of the infant complainants.

The clause I alluded to is this, "*Whenever any* ONE *of these comes of age, twenty-one years old, and is capable of taking* HIS *concerns into his own hands, he will take his own share in full* ACCORDING TO WHAT IS WRITTEN ABOVE *from the said Sreejoot Juggomohun Mitter, and the said Mitter will deliver it over in full, but the one shall not have power to take the share of another, &c.*

It is certainly of importance to ascertain, whether or not, a *Hindoo* can, by his will, prevent his sons, or descendants from coming to a partition among themselves, after his death, and it appears to me, (whatever construction may be put upon the last clause which I have quoted from the will) that he cannot do so

The rest of the will cannot possibly be so modified by this last clause, as to enable us to say that any one could receive his share *in severalty, until after he had attained the age of twenty-one years*, and yet a partition was ordered by the Court among the parties, when many of them were greatly under that age. Thus the restraint which was attempted by a testator, to be put upon partition among his descendants, has been taken off by the Court; and no doubt can exist as to the rectitude of this decree, for a power of partitioning is given in a most unqualified manner, to the parties interested, by the *Hindoo* law; nor is there any thing to be found from which it can be inferred that the possessor has any manner of right to interfere with the mere pleasure of his descendants, on the subject of partition.

A partition was, upon the prayer of the complainants, ordered, according to the proportions directed by the testator in his will. The will was *established*, as the bill prayed that it might be, one set of the grandsons having been decreed *six* sixteenth, and the other two sets of grandsons having been decreed *five* sixteenth, parts of the estate each, to be enjoyed by them in severalty.

The Commissioners, on the 2d of April, 1818, made their return to the commission of partition, and concluded it in these words; "*And in as much as we further find that the said Goculchunder Mitter, the testator in the pleadings of these causes mentioned, has in and by his said will, directed that the said dwelling-house and the said Talook called Joypore, and the said garden at Pykeparrah shall be appropriated to certain religious purposes in the said will particularly specified, we have therefore* ABSTAINED FROM PROCEEDING TO A DIVISION THEREOF, *and humbly submit the same to this Honorable Court for its directions thereupon.*"

On the 10th of April, 1818, the cause came on for further directions on the return of the commission of partition. The Court then decreed "*that the partition of the messuages, tenements, lands, heriditaments and premises so made by the return and schedule to the said commission of partition be firm and effectual for ever.*"

The decree concludes, "*And it is also further declared and decreed, that the parties to these suits, Complainants and Defendants,* ARE ENTITLED TO THE MANAGEMENT OF THE PREMISES BEQUEATHED TO THE FAMILY IDOL BY THE SAID GOCULCHUNDER MITTER, DECEASED, IN RESPECT OF THE TIME AND DURATION OF SUCH MANAGEMENT ACCORDING TO THE RESPECTIVE SHARES AND PROPORTIONS IN WHICH THEY ARE ENTITLED TO THE OTHER PREMISES OF WHICH THE SAID GOCULCHUNDER MITTER DIED SEIZED AND POSSESSED." And further it was referred to the Master

to enquire and report, "*What will be the best mode of the said Complainants and Defendants holding the management of the said idol and the said premises appropriated as aforesaid* FOR THE EXPENSES OF THE WORSHIP OF THE SAID IDOL, *reference being had to the period during which the said parties have already held adverse possession and management thereof.*"

The Master made his report, which on the 1st of July, 1819, was confirmed, and on the 11th of August, 1819, the causes (for there was cause and cross cause) coming on for further directions upon this report, the Court decreed, "That *Nubkissen Mitter, Gopeemohun Mitter,* and *Kissenkaunt Mitter, do and shall hold possession of the said idol called Muddunmohun-jee, and the possession and management of the premises appropriated thereto, from the* 1*st day of Bysaack in the Bengal year* 1226, *until the* 1*st day of Bysaack, which will be in the Bengal year* 1231; *and it is further ordered and decreed, that Hurloll Mitter, Russickloll Mitter, Shamloll Mitter, and Ramloll Mitter, do and shall hold possession of the said idol called Muddunmohun-jee, and the management and possession of the premises appropriated thereto, from the* 1*st day of Bysaack which will be in the Bengal year* 1231, *until the* 1*st day of Bysaack which will be in the Bengal year* 1237; *and it is further ordered and decreed that Hurrishchunder Mitter and Rajchunder Mitter do and shall hold possession of the said idol called Muddunmohun-jee and the management and possession of the premises appropriated thereto from the said* 1*st day of Bysaack* 1237, *until the* 1*st day of Bysaack* 1239, *and that from and after this last mentioned period the said Nubkissen Mitter, Gopeemohun Mitter, and Kissenkaunt Mitter shall hold possession of the said idol and the management and possession of the said premises appropriated thereto for a period of five years, and that Hurloll Mitter, Russickloll Mitter, Shamloll Mitter, and Ramloll Mitter, shall hold such possession and management for a period of six years and Hurrishchunder Mitter and Rajchunder Mitter shall hold such possession and management for a period of*

five years; and it is further ordered that the said parties, Complainants and Defendants, and their heirs, shall continue in the possession and management of the said idol and Talook in the order and succession herein before specified and decreed until the further order of this honorable Court."

Goculchunder, as we have seen, had three sons, viz. *Rammohun*, *Juggomohun*, and *Gourmohun*. The sons of *Gourmohun* (the youngest of *Goculchunder's* sons,) had possessed themselves of this *idol* and the premises appropriated thereto for three years. The principle then, upon which the Court proceeded was this, that the sons of *Rammohun*, the eldest brother, should have the first turn of possession of this idol, &c. for five years corresponding with their *five anna's* share of *Goculchunder's* estate, that the sons of *Juggomohun*, the second brother, should have the second turn of this idol, &c. for six years corresponding with their *six anna's* share of *Goculchunder's* estate, and that the sons of *Gourmohun*, the third brother should have the third turn of the idol, &c. for five years corresponding with their *five anna's* share of *Goculchunder's* estate; but that these last, having had three years possession should not have the other two, to complete their five, years until after the others should have had their turns. From the expiration of these two years, the sons of *Rammohun* were to begin again and the parties to proceed in their order according to the seniority of their fathers, and, in point of time, according to the shares they were left by *Goculchunder's* will.

The period of possession, to which the sons of *Rammohun* were entitled having expired, they, as they alleged, gave up all the property which had been appropriated to the idol, together with the idol itself, to the sons of *Juggomohun*. This gave rise to a motion in Court, in August, 1824. The question was, what part of the house mentioned by the testator, was devoted to the idol, or whether his (the testator's) descendants had a right to use it as a habitation. I need not be more particular as to this collateral

dispute. It is enough to say that all parties were agreed as to the main point, and that the testator's right to appropriate that part of his property, which he had appropriated to the idol's use, never was questioned. The only doubt was concerning the testator's intention, and the construction which had been put upon his will by the Court. It may be said to have been admitted that all the adjuncts intended by the testator, should continue to be attached to the idol.

The following cause, which grew out of the will of *Radhakaunt Chuttopadhya* was decided in the Supreme Court on the 22d of November, 1816. The parties were *Ramdoolal Sircar* and *Choitonchurn Set*, complainants, against *Sree Mootee Sonah Dabee*, *Sree Mootee Joymonee Dabee*, *Issenchunder Bundopadhya*, and *Sree Mootee Gouree Dabee* (his wife) and *Gungaharain Bundopadhya*, defendants.

The bill was filed by the complainants for the purpose of relieving themselves from the burden of the execution of *Radhakaunt's* will; and they having fully accounted before the Master, were ordered to be so relieved according to the prayer of their bill.

Radhakaunt's will was as follows:—

"*Sree Sree Huree.*

"*Sreedhur and Seeb Doorga.*

"*Sreejoot Ramdoolal Sircar and Sreejoot Choitonchurn Set.*

"*Sree Radhakaunt Chuttopadhya* makes this Will.

Sree Radhakaunt Chatterjya.

"My property remains the three *Barnagore Sree Sree Ishwurs.* My Takoors, constant fixed, expense will be defrayed out of the interest, and you

will perform the *Ishwur Ootsub* and other rites and *Dol Jattra*, in a suitable manner with the remainder. You will defray the expence of the family out of the interest. My daughter, *Sree Mootee Gouree*, will live in the family. My daughter's son *Sreejoot Gunganarain Bundopadhya* will receive sicca (10,000) ten thousand rupees on becoming of age, and my elder *Brahminee** the interest on (3000) three thousand rupees, and apply it to her use. The younger *Brahminee* will receive the interest on (3000) three thousand rupees and apply it to her use. They shall receive interest at the rate of (8) eight rupees; they shall not receive cash. And should the two *Brahminees* cause the *Poorans*, &c. to be read, about (1000) one thousand rupees, as is proper.

" *Ishwur Sreedhur's* constant worship, more or less monthly, (2) two rupees of the three *Ishwur Seebs*; more or less (10) ten rupees, including repairs monthly.

" *Sreejoot*, the grandson of my spiritual guide, shall receive (6) six rupees per month, and on becoming of age shall receive (600) six hundred rupees; on Mother *Thakoorannee* dying, you will give (200) two hundred rupees at her *Sraddha*. To *Sree Radhabullubh Chutto*, you will give (4) four rupees per month. *Sreejoot Bissonath Nyayapunchanun* shall receive (7) seven rupees per month, and my sister's daughter *Sree Unnopoorna*, shall receive (4) four rupees per month; besides which, if she goes to *Ishwur Cassi* or performs any pious acts, you will give (700) seven hundred rupees; you will give *Sreejoot Prancrishna Turcalunkar* sicca (6) six rupees per month. You will give to the younger *Unnopoorna*, the daughter of my sister (1) one rupee per month. You will give to *Sree Obhoya* sicca (4) four rupees per month, and (50) fifty rupees nett. You will give 100) one hundred rupees at the *Sraddha* of *Sree Ramniddhee Sircar's* mother. And my four

* His two wives.

houses at Calcutta, the *Ishwur* temple at *Barnagore*, the *Belessur tank*, [illegible] these remain my *Sree Sree Ishwur Sreedhur's*. My son-in-law *Sree Ishanchunder Bundopadhya* will take care (of the same.) My daughter's son *Sreejoot Gunganarain Bundopadhya* shall receive all on becoming of age, and you will pay to my sister's sons, *Sreejoot Juggomohun* and *Sreejoot Goluckchunder Bundo* sicca (16) sixeen rupees per month, and to *Sreejoot Ramchunder Roy* sicca (3) three rupees per month, and sicca (200) two hundred rupees annually for my late *Thakoor* and *Thakooranee's Sraddha* which will take place, and you will give *Sreejoot Rammohun Gungopadhya* sicca one hundred rupees.

To *Kabulram Moonshee*, ...	*Sa. Rs.* 100
Gooroodoss, ...	10
At Sraddha, ...	2000
Sree Gooroo Deb, ...	200

"A true Translation of the annexed paper, T. T. October, 1815.

W. C. BLAQUIERE."

This will was established, and ordered to be carried into effect. I shall give the words of the decree as it relates to the parts which made provision for religious purposes.

"It is further ordered and declared that *Sree Mootee Sonah Dabee** and *Sree Mootee Joymonee Dabee*, are entitled under the said will, of the said testator *Radhakaunt Chatterjee* to the sum of *sicca rupees one thousand to defray therewith the costs and charges of reading the Poorans*, &c. as mentioned in the said will, and it is further declared that the bequests or legacies *of two rupees monthly for Ishwur Sreedhur's constant worship* IS A VALID BEQUEST; *and also that the bequest of ten rupees more or less monthly for the constant*

* These are the two *Brahminees*, his wives, in the will mentioned.

worship of Sree Ishwur Shiv including repairs IS A VALID BEQUEST *under the said will of the said testator.*"

"And it is further declared, that the said legacy in the said will, whereby the said testator bequeaths *two hundred rupees for the Sraddha of the said testator's mother Takoorannee,* IS ALSO A VALID BEQUEST AND OUGHT TO BE CARRIED INTO EFFECT *out of the said testator's personal estate, pursuant to the said will.*"

"And it is further declared, that the said testator's sister's daughter *Sree Unnopoorna* is entitled under the said will of the said testator *Radhakaunt Chatterjee* to receive four rupees per month out of the testator's personal estate, *and that if she goes to Ishwur Cassi,* OR PERFORMS ANY PIOUS ACTS, SHE IS ALSO ENTITLED TO RECEIVE THE FURTHER SUM OF SEVEN HUNDRED RUPEES *for the expenses thereof, as mentioned in the said testator's said will.*"

"And it is further declared, that the legacy whereby the said testator bequeaths *the sum of one hundred rupees* FOR THE SRADDHA *of Sree Ramniddhee Sircar's mother to be paid out of the said testator's personal estate,* IS A VALID BEQUEST AND OUGHT TO BE CARRIED INTO EFFECT."

"And it is further declared, that the legacy in the said will whereby the said testator bequeaths *two hundred sicca rupees annually to be paid out of the said testator's personal estate* FOR THE SAID TESTATOR'S LATE TAKOOR AND TAKOORANNEE'S SRADDHA, IS A VALID BEQUEST AND OUGHT TO BE CARRIED INTO EFFECT *pursuant to the said testator's said will.*"

"And it is further declared, that the said legacy contained in the said will *whereby the said testator bequeaths* TWO THOUSAND RUPEES FOR HIS OWN SRADDHA *to be paid out of the said testator's personal estate,* IS A VALID BEQUEST AND OUGHT TO BE CARRIED INTO EFFECT."

The will was completely established as to all its provisions, but I have given the above extracts from the decree for the purpose of showing that the Court most fully recognizes the right of a *Hindoo* to make provision by his will for the performance of religious ceremonies, and the maintenance of his family idols.

On the 6th of December, 1814, a cause between *Radhabullubh Tagore*, complainant, against *Gopeemohun Tagore*, and thirteen other defendants was decided by the Supreme Court. The complainant prayed for an account and partition of an estate, to which he alleged he was jointly entitled with the defendants. His claim was derived from *Joyram Tagore* the common ancestor of all the parties to this suit. It was stated in the bill that *Joyram* had left property which had been greatly increased by his descendants in succession, that no partition of it had ever been made, and that the defendants or those whose representatives they were, had always been in the management and possession of the property. The defendants admitted that, as they had heard, *Joyram Tagore* might have been possessed of personal property, and that he died as they believed in the year 1762, but that before his death he had, at the capture of Calcutta, lost all his property except the sum "of thirteen thousand current rupees, which he left in the hands of his sons, with directions that the proceeds thereof should be applied TO THE SUPPORT AND WORSHIP OF HIS FAMILY IDOL *Sree Sree Radhakaunt-jee*." The defendants believed such proceeds had been so applied from that time to the present. The complainant's bill was dismissed. In this case there was not a will, but the Court by dismissing the bill seems to have admitted the right of a *Hindoo*, to apply the whole of his property to religious purposes. It will be observed that this was personal property, and acquired by *Joyram* himself; besides, the acquiescence of his sons in this disposal, may fairly be inferred. The parties were all descendants (grandsons, or great grandsons) of *Joyram*.

If every thing be considered, I think the most important decision of the

Supreme Court on the subject of Wills, arose out of the four following testamentary papers which were left by *Nemychurn Mullick*.

"*Sree Sree Ramjee Soronong*.

"To *Sreejoot Ramgopaul Mullick*, my eldest son, and *Sreejoot Ramrutton Mullick*, my middle son, greeting with benedictions.

Sree Nemychurn Mullick.

"I *Sree Nemychurn Mullick* make this will.

"I make this Will in the names of you two in my life time and senses, and of my own free will.

"After my decease, from my estate, you two, and my third son *Sreejoot Ramtonoo Mullick*, and my fourth son *Sreejoot Ramconaye Mullick*, and my fifth son *Sreejoot Rammohun Mullick*, and my sixth son *Sree Heeraloll Mullick*, and my seventh son *Sreejoot Soroopchunder Mullick*, and my youngest son *Sreejoot Moteeloll Mullick*, these eight persons shall receive each sicca (3,00,000) three lacks of rupees.

"The money which you two have taken for to trade with, and what you will take, you will return to the estate with interest, and the money which those six have taken for to trade with, and what they will take, they will return to the estate, with interest.

"The gold and silver ornaments and plates, and ornaments set with precious stones, and clothes and apparel which I have given to the eight sons respectively, and what I have given to their wives, sons, and daughters, and what I shall give, have no concern with the estate, and will belong to these eight persons respectively, no one will have any concern with another.

"Besides this, whatever estate shall remain consisting of houses, ground, talooks, cash, Company's paper, bonds of individuals, sums due by individuals, apparel, gold and silver plates, effects, and jewels, &c. will remain under the charge of you two; you two are the managers thereof, you two will discharge my debts out of that remaining estate, and will realize what is due to the estate, and from that estate perform my obsequies, and those of my wife, and constantly perform religious acts in a suitable manner. Whenever you perform any religious or other act, you two brothers will inform the other six brothers, and if they acquiesce in your opinions, you eight brothers will perform the act collectively, otherwise whatever you two brothers think proper, you will do, and should any one raise objections, it is inadmissible.

"To this purport I execute this Will, the 24th Maugh, the year 1213."

Two witnesses' names subscribed

"*Sree Sree Ramjee.*

"To *Sreejoot Ramgopaul Mullick*, my eldest son, and *Sreejoot Ramruttun Mullick*, my middle son, with benedictions. I *Sree Nemychurn Mullick*, make this written order.

"I have made a will on this day's date in your two names, I therefore direct you. *I write the particulars of what is to be done out of the remainder of my estate, which will remain under your charge.*

"1st. It is my desire to perform some work at *Sree Sree Brindabun* and *Sree Sree Juggernaut*, and to make a *ghaut* on the bank of the *Ganges*, and to cause the *Srimot Bhagbut*, the *Sree Mahabharut*, the *Valmikee Pooran*, and *Choytunya Mungul* to be chanted, should good or harm happen to me before the completion of all these, you will after my decease perform all these acts, *and defray the expense thereof from the residue of my estate which remains in your charge.*

"The cash which stands in my accounts for the worship of *Sree Sree Juggunnath Deb-jee* at *Mahesh*, and for the worship of *Sree Sree Radhabullubh-jee* at *Bullubpore*, and for the worship of *Sree Sree Crishna Roy-jee* at *Canchrapara*, in the names of these deities respectively, will remain under the charge of you two, and you will after my decease defray the expenses of the monthly worship of the deities from the interest thereof in the manner I am paying it.

"The money given by mother for the purpose of making a bower at *Sree Sree Brindabun*, stands in my accounts, and it is my wish to cause the said bower to be made by myself. Should I die before the completion of it, the said money will remain under your charge, and you will cause the bower to be made.

"It is my wish to make a temple for the *Sree Sree Maha Probhoo-jee* at *Ombica;* should I die before the completion of this, you will make the temple and consecrate it from the residue of my estate which remains under your charge."

"*Sree Sree Ramjee.*

"To *Sreejoot Ramgopaul Mullick*, my eldest son, and *Sreejoot Ramrutton Mullick*, my middle son, with benedictions.

Sree Nemychurn Mullick.

"I *Sree Nemychurn Mullick*, write this *Hookoomnama* (written order.)

"I have made a Will on this day's date in your two names, I therefore direct you. A dwelling-house measuring 13 *cottahs* altogether, has been formed at *Calcutta* from the private dwelling-house of the late *Sookmoy Mullick*, measuring 10 *cottahs*, and the dwelling-house of *Nirmul Raur*,

measuring 3 *cottahs*, which dwelling house, I give (have given) for my youngest daughter to reside in, but neither she or her children have the right to dispose of the same by sale or gift.

"My youngest daughter will receive (10,000) ten thousand sicca rupees from the residue of my estate, which remains under your charge after my decease, but this money will remain under your charge. The annual interest on this sum at eight per cent, amounts to (800) eight hundred sicca rupees, from which you will pay the monthly expenses of my youngest daughter as I now pay them.

"*What remains after paying this, will be applied to other expenses.*

"As long as my daughter is living you will pay her the interest only in this manner, and she will reside in the dwelling-house, and if she has no male offspring living at the time of her decease, the principal, interest, and dwelling-house, will belong to my estate; should there remain male offsprings they will live in the house and receive the interest, in the same manner. The year 1213, date 24th Maugh."

"*Sree Sree Ramjee.*

"To *Sreejoot Ramgopaul Mullick*, my eldest son, and *Sreejoot Ramrutton Mullick*, my middle son, with benedictions.

"I *Sree Nemychurn Mullick* give these written directions.

"I have made a Will on this day's date in your two names. I therefore give you directions.

"My eldest daughter will receive (10,000) ten thousand sicca rupees

Sree Nemychunder Mullick.

from the residue of my estate which remains under your charge after my decease, but this money will remain under your charge. The annual interest on this sum at eight per cent amounts to (800) eight hundred sicca rupees, from which you will pay the monthly expenses of my eldest daughter, as I now pay them, what remains after paying this, will be applied to other expenses.

"As long as my daughter is living, you will pay her the interest only in this manner, and if she leaves no male offspring at the time of her decease, the principal and interest will belong to my estate.

"If she leave male offspring, they will receive the interest in the same manner.

"The 24th Maugh, 1213."

Nemychurn Mullick left eight sons, who had all attained their full age at the time of his death. His property was to a very large amount in value. He died on the night of the 24th of October, 1807, and on the 26th of the same month the six younger, filed their bill against the two elder, brothers. This bill was amended on the 14th of December following.

The parties were *Ramtonoo Mullick*, *Ramconaye Mullick*, *Rammohun Mullick*, *Heeraloll Mullick*, *Soroopchunder Mullick*, and *Moteeloll Mullick*, complainants, and *Ramgopaul Mullick*, and *Ramrutton Mullick*, defendants.

On the 11th of July, 1808, the Court decreed as follows; "This Court doth think fit to order and decree and it is accordingly decreed and declared THAT BY THE HINDOO LAW NEMYCHURN MULLICK, DECEASED,

IN THE PLEADINGS OF THIS CAUSE MENTIONED, MIGHT AND COULD, DISPOSE BY WILL, OF ALL HIS PROPERTY, AS WELL MOVABLE AS IMMOVABLE, AND AS WELL ANCESTORIAL AS OTHERWISE. *And that the said Nemychurn Mullick, deceased, did, in his life time, duly make and publish the four testamentary papers exhibited in this cause, as and for his last will.* And it is further decreed and declared that the residue of the estate of the said *Nemychurn Mullick*, deceased, after the payment of the debts of the said *Nemychurn Mullick*, and subject to the payment of the several legacies directed to be paid, *and to the performance of the several acts and ceremonies directed to be performed in the said will and testamentary papers of the said Nemychurn Mullick, deceased, and exhibited in this cause,* IS JOINT AND UNDIVIDED FAMILY PROPERTY ACCORDING TO THE HINDOO LAW; *and that the Complainants and Defendants, the eight sons and co-heirs of the said Nemychurn Mullick, deceased, are entitled to the same.* And it is further decreed and declared, that the Defendants *Ramgopaul Mullick*, and *Ramrutton Mullick are entitled, under the said will of the said Nemychurn Mullick, to the management of the said joint and undivided family property.*"

The testator died possessed of great wealth; and a considerable part of it, as well *movable* as *immovable*, was *ancestorial*. Yet from the nature of this decree I cannot discover the necessity of making a declaration respecting the testator's right to dispose by will of all sorts of property, for the result was certainly what it would have been, if such a right had been denied.

It will be observed that *Ramgopaul Mullick*, and *Ramrutton Mullick*, the defendants, were declared entitled to the *management* of the joint and undivided family property under *Nemychurn Mullick's* will, which is scarcely consistent with a declaration that the residue of the estate was joint and undivided family property according to the *Hindoo* law, and

that the eight sons and *co-heirs* were entitled to the same. I must observe however, that at this time, the Complainants had not prayed for a partition, that the temporary management of the Defendants might have been intended ; or, if permanent, that it was to be confined to that part of the estate which was applicable to religious purposes.

Upon a reference to the testamentary papers, it will appear what those purposes were, and it may here be observed, that a very large sum of money was required for their completion. Yet the Court did not think itself at liberty to restrain the expense, or to interfere, respecting them, with the disposition which the testator had thought proper to make. It was referred to the Master to take an account of the whole of the property which *Nemychurn Mullick*, had died possessed of, or entitled to.

" And it was further ordered and decreed, that the said Master do also enquire and report to this Court *what sum will be requisite for the performance and execution in a suitable manner of the several* ACTS, WORKS, AND CEREMONIES *directed by the said will and testamentary papers of the said Nemychurn Mullick, deceased, to be performed and executed, distinguishing between those ceremonies* WHICH BY THE HINDOO LAW *are to be performed once, and those which are to be performed periodically.*"

From this decree *Ramgopaul* and *Ramrutton*, the defendants, appealed to the King in Council.

The first bill, as it was amended, stated that the complainants had all attained their full age according to the *Hindoo* law, and that the parties to the suit were the only children of the testator, except two daughters who had been married in his life time and had therefore no claim upon his estate. That the eight brothers had been, and continued to be, a joint and undivided *Hindoo* family. That *the whole or the greatest part of the*

movable and immovable property of which the testator died seized or possessed, was either inherited by him from his ancestors or grew out of such ancestorial property; and that all the parties, Complainants and Defendants, were entitled to the joint and undivided ownership of the said property. The bill goes on to state that *Nemychurn Mullick*, executed a writing purporting to be a will by which he gave to the complainants a small part of his property, *far less than their proportion of the ancestorial property; and gave the residue without distinguishing between the ancestorial and self-acquired, to the Defendants, and that such a disposal* SO FAR AS IT RELATES TO ANCESTORIAL PROPERTY IS INVALID; *and that the Complainants are equally entitled with the Defendants to the immediate possession and enjoyment of the said ancestorial property.* An account and an injunction against waste are prayed by the bill.

By a further amended bill filed the 14th of December, 1807, the Complainants state that having had an opportunity of getting further insight into the testamentary papers left by their father, they find they were mistaken in *the construction* which they had put upon the said papers, and that the testator in truth gave, and proposed to give *to each of his eight sons the sum of three lakhs of rupees*, and that upon a just and true construction of the will, there is no intention to dispose of *ancestorial* property, but that the will relates to property *acquired by the testator himself*, and that out of such property there is nothing given to the defendants beyond the sum of *three lakhs of rupees each*, and that the residue after satisfying legacies and supplying the sums directed by the testator to be expended, is a fund to be equally divided among all the brothers, Complainants and Defendants.

The Defendants, by their answer, denied that the whole or greatest part of the *movable* and *immovable* property, of which *Nemychurn Mullick* died, seized or possessed, was *ancestorial*. They say that *Nemychurn* and his brother *Gourchurn* continued undivided as to *ancestorial* property, to the year 1798, when a partition between them took place, and that during the

period of their union, regular books of account had been kept, separate and distinct from the accounts of their own several acquisitions, and that all the money received by *Nemychurn* out of the *ancestorial* property amounted to 13,94,601 rupees 12 annas and 3 pice, and no more. They then set forth the particulars of the *ancestorial immovable* property making *Nemychurn's* share thereof to amount in value to about 40,000 rupees. They say they are advised and believe that their father might and could dispose by will of his *ancestorial movable* property, and if he could not have disposed of his *ancestorial immovable* property, that the complainants ought to elect between their claim to it, and the legacies bequeathed to them by *Nemychurn's* will. They set forth the testamentary papers, and they say that the money received by *Nemychurn* from the *ancestorial* property is subject to several deductions, viz. paid to the widow of *Radhachurn Mullick* in satisfaction of his claim upon the ancestorial estate 55,000 rupees. For the marriage of the complainant *Rammohun*, 9623 rupees. For the marriage of *Heeraloll*, 9860 rupees. For the marriage of *Soroopchunder*, 1022 rupees 6 annas and 9 pice. For the second marriage of *Ramgopaul*, 12,180 rupees. For the marriage of *Mooteelaul*, the two several sums of 11,600 rupees. For the marriage of grand-daughters, 4176 rupees. For the marriage of a grandson by his youngest daughter, 26,000 rupees or thereabouts. For *Nemychurn's* own performance of three religious ceremonies called *Porain*, 45,000 rupees or thereabouts. For the performance of a religious ceremony called *Gaun*, 60,000 rupees. For the performance of another ceremony called *Toolah* or weighing himself with *Goldmohurs* and other expense relating thereto, 56,000 rupees. For family expenses disbursed by him since his separation from *Gourchurn*, 250,000 rupees. They then say they are advised that they have a right to deduct these several disbursements from the sum of 13,94,601 rupees 12 annas and 3 pice, received by *Nemychurn* as his share of the *ancestorial movable* property. They go on to say, that the sum of *three lakhs* of rupees left to each of the complainants will greatly exceed what they would be entitled to as

their shares of the *ancestorial* estate, and that they are ready and willing to pay to each of them his *three lakhs* of rupees under the will of their father.

In answer to the last amended bill of complaint the defendants say that a disposition by will is available to alter the established rule of descent and succession among *Hindoos*. They deny the construction put by the complainants upon the testator's will, and insist that after having given each of them 300,000 rupees, it was his intention to give the entire residue without distinguishing between *ancestorial* and *self-acquired* property to them, (the defendants) for the purposes stated in the will. They insist that such a disposition is valid, and of full force by the *Hindoo* law; and that the complainants are not entitled jointly with the defendants, or at all, to the possession, enjoyment, use, or benefit of any part of *Nemychurn Mullick's* estate except the sum of 300,000 rupees left to each of them by the will.

The decree has been already set forth, and it has been stated that there was an appeal from it by the defendants to his Majesty in Council. The result of this appeal may be best known from a supplemental bill, afterwards filed by the complainants and the answer of the defendants thereto.

The bill charges that, "By the decree pronounced by this honorable Court *and since affirmed on appeal by an order of the King in Council, the said eight sons of the said Nemychurn Mullick, were and are declared entitled, to the residue of the said estate, and the benefit of which said decree your orators and oratrixes humbly submit they are now entitled to receive, and to have such residue after setting aside a sufficient sum for the performance of the acts, works and ceremonies as aforesaid, ascertained and allotted and divided between them and the said defendants in eight equal shares and proportions to be held by them in severalty*," &c.

In the defendants' answer they "deny that they give out or pretend that under and by virtue of the last will and testament of the said *Nemychurn Mullick*, they, these defendants, have a right to detain the residue in their hands as managers of the said estate (if any such residue should so remain) save as herein before is mentioned; *the question regarding the right to such residue having, as these defendants admit, been decided by the said order of the said King in Council in the said bill mentioned.*"

The first bill filed, even after it had been twice amended, was certainly not adapted to the case of the complainants; one of them died, and the suit having been revived, a supplemental bill was filed on the 19th of December, 1821. To this bill the parties were *Ramtonoo Mullick*, *Ramkonoye Mullick*, *Rammohun Mullick*, *Soroopchunder Mullick*, *Mootecloll Mullick*, *Sree Mootee Conomoyee Dossee*, widow and legal representative of *Heeraloll Mullick*, deceased, and *Sree Mootee Joyomonye Dossee*, *Sree Mootee Operna Dossee*, and *Sree Mootee Nobocomaree Dossee*, infants and unmarried daughters of *Heeraloll Mullick*, by *Sree Mootee Conomoyee Dossee*, their mother and next friend, complainants, against *Ramgopaul Mullick* and *Ramrutton Mullick*, defendants.

It does not appear to me that the daughters of *Heeraloll* were necessary parties, but with a view to securing for them their father's property after the death of their mother, it may have been thought proper to bring them before the Court.

This bill set forth the former proceedings. It prayed that the Defendants might account with the complainants as to the personal estate of *Nemychurn Mullick*, and that a just and fair partition might be made among the parties of his real estate, after the deduction of a sufficient sum, for the purpose of carrying all the testator's directions into effect.

The Master had been directed to make a separate report, as to the

sums necessary for effecting these purposes, and on the 9th of June, 1820, he reported, *that the sum of* 8,59,296 *rupees,* 11 *annas, and* 6 *pice, was requisite for the performance and execution of the several acts, works and ceremonies in a suitable manner as directed by the said will and testamentary papers to be performed and executed.*

To this report all parties filed exceptions; the complainants because the allowance was too large, and the defendants because it was too little. The exceptions of each were over-ruled, and the report was confirmed.

Upon this the complainants and defendants, for these opposite reasons, filed their petitions of appeal; but the petition has not been prosecuted by either.

It may perhaps appear extraordinary that a sum, which at the ordinary exchange of a few years back, was equal to £107,000 sterling, should not have been thought by the Court, immoderate for such a purpose, and that it should by the defendants, have been deemed to fall far short of the necessary expenditure. They say that, "*a sufficient sum for the performance and execution in a suitable manner of the several acts, works and ceremonies directed by the said will and testamentary papers of the said Nemychurn Mullick, to be performed and executed and which these defendants contend and submit ought not to be less than the sum of* 2,523,350 *rupees,* 9 *annas;*" or at the exchange I have mentioned *about* £ 315,418 *sterling.*

Independently of these expenditures, the defendants say, "*that, a sum of* 3088 *gold-mohurs or sicca rupees* 49,408 *called Toola gold-mohurs; against which the said Nemychurn Mullick was weighed in his life time, although in the possession of these defendants, forms no part of the estate of the said Nemychurn Mullick, in as much as the same must, according to the laws and*

usages of Hindoos be distributed among Brahmins by these defendants as managers of the said estate."

What questions may yet arise cannot be foreseen, but I consider it to have been finally decided, that all the directions contained in *Nemychurn Mullick's* will, shall be carried into effect. That the sum of 8,59,292 rupees, 11 annas, and 6 pice, shall be expended for religious purposes, and that the residue of the testator's property, including all descriptions, shall be equally divided; the seven surviving sons taking each a share, and the representatives of the eighth son, deceased, taking his share.

The personal property cannot be divided until an account of it shall have been taken, and reported by the Master. Some time since, a partition of the real or immovable estate was consented to by all the parties; and before the supplemental bill was filed, the legacies of *three lakhs* of rupees each, had been paid by the defendants, to the original complainants.

It is now to be observed, that the Court's decision was founded upon a construction of the testator's will, and an intention to construe it according to his meaning; that a sum sufficient for effectuating all the acts of piety he directed, was ordered to be provided out of his estate for the purpose; that the legacies were all confirmed; that the estate was in other respects disposed of as it would have been had *Nemychurn Mullick* died intestate; and *that the Court expressly declared the right of a Hindoo* TO DISPOSE OF HIS ANCESTORIAL IMMOVABLE PROPERTY BY HIS WILL; which, as I conceive, meant according to his pleasure.

The *mere abstract right* of a *Hindoo* to direct the *disposition of his property* BY WILL, cannot be better exemplified, than it was in the following case. There cannot indeed, be a doubt, upon any principle ever contend-

ed for, but that the person who was testator in this case, had a right by *partition in his life time,* to make the allotment of his property which he made of it by will.

The testator *Durpnarain Surmono* was possessed of a very large property both *movable* and *immovable.* It was all, as he recited, self-acquired. His will contained the following provisions; "As my *eldest* son *Sree Radhamohun Baboo* and *third* son *Sree Kishnamohun Baboo, have discarded their gooroo* (spiritual teacher,) *and drink spirituous liquors and have threatened to murder me, I have discarded them, and debar them from performing the ceremonies of burning my body, and Sraddha.*"

He then gives to each of them 10,000 rupees, "for their support and maintenance." He goes on, "and to my youngest son, by my first wife, *Pyareemohun Baboo, he being deaf and dumb,* I bequeath 20,000 rupees for his maintenance."

He gives 30,000 rupees for the worship of *Sree Sree Ishwur Radhakauntjee,* and says, "you will cause the worship to be performed from the interest arising on this sum, exclusive of whatever apparel, utensils, and ornaments are in the *Sree Sree Ishwur,* are his."

He makes some other provisions, and then declares, "I bequeath the whole that remains to *Sree Gopeemohun Baboo, Sree Hurrymohun Baboo,* and my sons by my second wife *Sree Ladelymohun Baboo,* and *Sree Mohoneymohun Baboo,* in four equal shares."

In the year 1813, an action of ejectment was brought upon the demise of *Kishnamohun,* one of the *discarded* sons, for his share of *Durpnarain's* (his father's) estate. To this action *Gopeemohun, Hurrymohun, Ladleymohun,* and *Mohoneymohun,* took defence, *and upon proof of Durpnarain's will being duly made, there was a verdict for the Defendants.*

Gourchurn Mullick died possessed of a very large property, *ancestorial* and *self-acquired, immovable* and *movable*. We have seen that *Nemychurn's* half of this *ancestorial movable* property amounted to upwards of *thirteen lakhs of rupees.*

Bissumber, one of the sons of *Gourchurn*, had been employed by a house of agency in *Calcutta*, and having conducted himself there so as to dissatisfy his father, he (the father) made a will by which he left this son a very inconsiderable sum of money, and disposed otherwise of the residue of his property. The case was not brought into Court, but it is to be presumed that the disinherited son took advice, and was satisfied that he must fail in an attempt to set aside his father's will.

The cause between *Woomischunder Paul Chowdry* and *Ruttonchunder Paul Chowdry*, infants, by *Sree Mootee Dossee*, their mother, and next friend, complainants, and *Premchunder Paul Chowdry*, *Isserchunder Paul Chowdry*, *Joogulkishore Bundopadhya* and *Ramsoonder Gooptoo*, defendants, is now to be mentioned. Three of the defendants answered, and the bill was taken *pro confesso*, against *Ramsoonder Gooptoo*.

This suit, as it afterwards appeared, related to ancestorial property; descended, or originating in that which did descend, from *Sohocheram Pauntee*. Upon the present occasion however, the proceedings were had, supposing *Sohocheram* to have died in indigent circumstances, and his sons to have been founders of the property in question.

The bill stated that *Sohocheram Pauntee* had three sons, viz. *Kishnochunder Paul Chowdry* (who was father of the complainants and two of the defendants,) *Sumbhoochunder Paul Chowdry*, and *Ramneedy Paul Chowdry*. That *Sohocheram Pauntee* had a very inconsiderable property, and died in very indigent circumstances; not having been at the time of his death

worth more than one hundred rupees. That *Kishnochunder* and *Sumbhoochunder*, in the life time of their father *Sohocheram*, procured money, and began to trade in grain, and in salt, that their trade became extensive and lucrative, and that during the life time of *Sohocheram*, he and these two sons continued to live as a joint and undivided *Hindoo* family in food and habitation, but that the father had not any concern whatever, in the trade which was carried on by his two sons, and that he did not assist them in any manner. The bill further stated, and it was admitted by the answer that these two sons had acquired a very considerable property before their father *(Sohocheram)* died.

As to *Ramneedy Paul Chowdry*, the third son of *Sohocheram*, he was excluded from all claim (both by the bill, and by the answer) to a participation in the property, now in question. It was stated that he had died in the life time of his father, and that neither he, nor the father had any thing to do with the trade which was carried on in his father's life time, by *Kishnochunder* and *Sumbhoochunder*.

Ramneedy left an only son, *Buddinoth Paul Chowdry*, and a widow named *Ulica Dossee*, *Buddinoth's* mother.

If it had appeared that the property now possessed by the family, had grown out of that which was left by *Sohocheram* at the time of his death, or that *Sohocheram* had carried on the trade jointly with his two sons, or that *Ramneedy* had been a partner in the trade, his (*Ramneedy's*) son *Buddinoth*, would have been entitled to a share of the estate. It was therefore the interest of all these contending parties to have it understood that the two persons, *Kishnochunder* and *Sumbhoochunder*, were alone concerned in the acquisition of this wealth.

To exclude *Buddinoth* the more effectually, the bill stated, the answer

admitted, and the fact was, that *Buddinoth* in his infancy, and his mother *Ulica Dossee*, on his behalf, executed a general release to *Kishnochunder* and *Sumbhoochunder*. By this release all claim on the part of *Buddinoth* to the estate of *Sohocheram*, his grandfather, and upon every other account, was renounced.

Buddinoth afterwards filed his bill claiming, as heir of *Ramneedy*, one-third of the property in question. In this proceeding the release executed by *Buddinoth* and *Ulica Dossee* was declared null and void, but, as there was no question upon a will, *Buddinoth* having claimed as a representative (through his father *Ramneedy*) of *Sohocheram*, who died intestate, it is needless to be more particular in this place. It is sufficient to say that he succeeded in disproving every thing alleged, or admitted to his prejudice, by the complainants and defendants in the present suit.

Upon the present occasion however, the proceedings went on, as if *Kishnochunder* and *Sumbhoochunder* were the only parties entitled to share in this property. These two had come to a partition among themselves, and had divided the estate between them.

Kishnochunder had four sons *Woomischunder*, and *Ruttonchunder*, the complainants, and *Premchunder* and *Ishwurchunder*, two of the defendants. He made the following will by which he left *ten annas*' share of the property, which he possessed as I have stated, to the defendants, and *six annas*' share of it to the complainants.

The complainants, as we have seen, avoided going on the ground of the property being *ancestorial*, but they endeavoured to set aside the will, because their father was not of disposing mind at the time it was executed.

Here is *Kishnochunder's* will :—

"*Sree Crishnoo Soronong.*

"To the benevolent *Sreejoot Joogulkishore Bundopadhya* and *Sreejoot Ramsoonder Goopto;* this power of attorney is made in the year 1216.

Schoy. Sree Crishnoochunder Paul Chowdry. *Sree Crishnoochunder Paul Chowdry.*

"I have four sons by two wives. By my eldest wife *Sreejoot Premchund Paul Chowdry* and *Sreejoot Ishwurchunder Paul Chowdry*, two sons of age, and by my second wife *Sreejoot Oomeschunder Paul Chowdry* and *Sreejoot Ramrutton Paul Chowdry*, who are minors, for the purpose therefore of guarding and preserving the whole of my estate, consisting of cash and property, and *Zemindaree* and purchased *Lakkeraj*, and houses, affairs, and so forth, in my real and in fictitious names, wherever and whatever there is at different places, according to papers and documents exclusive of debts, I appoint you two attornies. As long as I am alive, the property, &c. will be under my control; on my death you will undertake the translation and management of the whole of my property, *Zemindaree*, purchased *Lakkeraj*, houses and affairs, whatever there be and at whatever place, according to the papers and documents, in real and fictitious names. Out of the whole of my estate (100,000) one lakh of rupees remains for the purpose of establishing a *Shib* and for my obsequies; *Premchund Paul Chowdry* and *Ishwurchund Paul Chowdry* will establish the deity and perform my obsequies, you will pay this one lakh of rupees to those two brothers. My younger wife is living, and I give (30,000) thirty thousand rupees for her pious, &c. acts. I have three daughters by my two wives, and give (6000) six thousand rupees to them at 2000) two thousand rupees each for their food and raiment. I give to these four persons the sum of (36,000) thirty-six thousand rupees, which sum you will give credit for in those four

names in the Calcutta account, and pay them the interest thereon at (6) six rupees per cent per annum individually every year, exclusive of these, the allotment of shares of the whole of the remaining estate is thus: *Premchund Paul Chowdry* and *Ishwurchunder Paul Chowdry*, my two sons, are of age, *they are very attentive to me, being satisfied with which I allot them two brothers a portion of* (10) *ten annas, and to the two brothers Oomeschunder Paul Chowdry and Ramrutton Paul Chowdry I allot a portion of* (6) *six annas.* My two sons who are of age *Premchund Paul Chowdry* and *Ishwurchunder Paul Chowdry* are Masters* of the whole; you will continue them Masters, and transact businees and affairs with their consent, and they the two brothers will likewise do business according to your advice. You will transact the business, concerns, &c. in the same manner they are going on now, and the profit or loss thereon will be admitted according to papers and documents; you will furnish money for my daily acts, family expense, the worship of the deity, the *Ruth Jattra*, &c. ceremonies according to the estimate as the same are managing. As to the estate which remains exclusive of expense and disbursement, should the two minor sons when they become of age, not agree together, you will divide it according to the above allotment, and give to the four brothers. In the mean time, should the four brothers ask for money for their own uses, you will debit him who takes money, and give what is proper.

"As to the money which stands in the *Calcutta* account to the credit of my wife and three daughters, you will give it to them respectively at the time of the above division.

"Should any one not abide by the allotment which I have made, and claim an excess, it is inadmissible. Should excess take place in the expenditures over and above the *lakh* of rupees which I lay by for the establishment of deity and my obsequies, you will furnish it from the undivided estate, but should any sum remain on hand after these two expenditures

* Mookhtars.

have taken place, it will remain for the stated expenses of the above deity's worship. You are employed in my Circars and are confidential, I have therefore appointed you attornies. You will receive the fixed allowance you get for your trouble from my Circar, besides which, for the trouble attending this power of attorney, you *Goopto* will take (600) six hundred rupees, and you *Bundopadhya* (400) four hundred rupees every year during my life time, you will not receive allowance for your trouble on account of this power of attorney. To this purport I execute this power of attorney for after my death. Year above written; date (27th) twenty-seventh Cartick.

"Witnessed by five witnesses."

From what has taken place in the Supreme Court, we must conclude that the decree in this cause would not have been varied, even if it had been clearly shown that all the property in question had descended from *Sohocheram*, the grandfather of the contending parties, and that the unequal distribution of it by the father of these complainants and defendants, would have prevailed, whether it had been *ancestorial*, or acquired by himself.

It will be observed that, in this case, the testator left 100,000 rupees, *out of his whole estate*, for the purpose of establishing a *Shib*, and for his obsequies, and directed that his two elder sons should receive this sum to establish the *deity*, and perform his obsequies.

An issue was ordered by the Court to try whether the instrument in the pleadings mentioned was the last will and testament of *Kishnochunder Paul Chowdry*, deceased. The will was duly proved, and the Court upon a subsequent hearing of the cause decreed and declared that, "the paper

writing in the pleadings in this cause mentioned is the last will and testament of *Kishnochunder Paul Chowdry*, and is well proved, *and ought to be carried into effect.*"

Rajah Nobkissen, in the will by which he intended to deprive his adopted son of the share to which he proved himself entitled, (see pages 194 and 228,) gave to *Gopeemohun Deb* (the adopted son) and his four brothers (sons of the *Rajah's* brother *Ramsoonder Bewerta)* all his (*the Rajah's*) third share of a house, and all his right, title, share, and interest *in his* LATE FATHER'S *Talook*, called *Boonsoondriah*. The Rajah had a son begotten, as well as a son adopted, living at the time. He also gave to the four brothers of *Gopeemohun* (his nephews) and their heirs 270 rupees a month for fifty years. He recites that he had given to *Radhamohun Ghose* and *Oboychurn Ghose*, (the sons of one of his sisters,) 10,000 rupees between them, and also a *bigah* and an half of ground in *Calcutta*, which he confirms by his will. He gives to *Neemnarain Bose*, the husband of one of his sisters, and his heirs, 50 rupees a month for fifty years, or 5000 rupees, if he should please to take that sum, in lieu of the monthly allowance. He makes a similar provision for *Dattaram Bose*, the husband of another of his sisters.

Thus the Rajah gave by this will, away from his sons (one begotten and one adopted) the *Talook* of *Boonsoondriah*, which was *ancestorial immovable* property. He also, by his will, as well as by gift in his life time, disposed of other *immovable* property. His right to do so, was not questioned by any one; and by a decree passed in June, 1800, (after *Gopeemohun Deb*, and *Rajah Rajkrishna* had settled their dispute) it was declared that they should take the estate and property of *Rajah Nobkissen* as tenants in common; *subject nevertheless, to* ALL THE PROVISIONS, *made by the last will and testament of Rajah Nobkissen, except only as to those provisions which respect Gopeemohun Deb and Rajah Rajkrishna.*

This decree keeps clear of any declaration respecting the rights of an adopted son, but it recognizes the power of a *Hindoo* in possession, to dispose by will, of all manner of property. It must indeed be admitted that, upon this occasion, the power was not disputed or questioned by either party to the suit.

The case of *Dialchund Adie* v. *Kishoree Dossee* has been heretofore mentioned. See pages 20 and 35.

Joogulkishore Adie was the husband of *Kishoree Dossee*, by whom he had a son called *Nundoolol Adie*. *Kishoree Dossee* and this son, survived *Joogulkishore*. The son (*Nundoololl*) then died, leaving an infant son *Dialchund Adie* and his mother *Kishoree Dossee*, surviving.

From this state of the family, if *Joogulkishore* had died intestate, it is quite clear that his son *Nundoololl* would have succeeded him, and that *Nundoololl* would have been succeeded by his son *Dialchund* in all the property *movable* and *immovable* of which *Joogulkishore* died seized or possessed, and that *Kishoree* the mother of *Nundoololl* and grandmother of *Dialchund*, would have been entitled to a maintenance only.

The Court however, gave effect, although perhaps not so largely as it would now give, to such a will. *Kishoree Dossee* was declared entitled *for her life*, to a moiety of the real, as well as to a moiety of the personal, estate of her husband *Joogulkishore Adie*.

The following is a copy of *Joogulkishore's* will:

"*Sree Sree Radhakishno, the protector!!!*

"I *Sree Joogulkishore Oddhio* write this will paper. The contents are

as follow:—I have of my own free will appointed my wife *Sree Mootee Kishoree Dossee*, and my son *Sree Sree Nundoolall Oddhio*, joint executors of my estate, and made them *master* of all my riches, and landed, &c. property. If any will should appear in the name of any other person, except this will, the same I do hereby make void. *Finis.* Dated the fifth of *Bhadur*, in the *Bengal* year one thousand one hundred and eighty-eight. English style eighteenth August, one thousand seven hundred and eighty-one."

"Witness, *Gunganarain Doss, Brijumokun Ghose, Punchanund Bose.*"

A bill was filed by *Dialchund Adie* against his grandmother *Kishoree Dossee*, and the Court came to a decision certainly favourable to the complainant. See pages 20 and 35.

It has never been said that words of inheritance are necessary in a *Hindoo's* will for the purpose of giving a devisee the entire estate. It has indeed, on the contrary, been considered that a *Hindoo* coming into possession of an estate, was vested with an absolute interest, and held it at his own sole and uncontrolled disposal.

It is however, I think evident, that the Court in this instance, proceeded upon the principle of a female not being entitled, under any circumstances, to more than a life interest in her husband's estate.

The right of *Joogulkishore* to direct the disposal of his property by will, was fully recognized; for if it had not been so, the whole estate must have gone to *Nundoolall*, and have passed through him to *Dialchund.*

I cannot reconcile this decision with the principles which seem to have prevailed in the Supreme Court.

If it was supposed that a *Hindoo* woman is incapable of possessing property in her own right, and holding it at her own disposal, the Court was unquestionably in error. That she may have property in *streedhun* is most certain; and it is so admitted in all the books upon *Hindoo* law. See rules 7, 8 and 9, page 4, chapter "Inheritance."

A gift made by a husband to his wife of *movable* property, becomes immediately hers. If it be made of *immovable* property, it becomes hers after the husband's death.

Now as a right to make wills is acknowledged, the power would become unavailing, if we did not admit that the will after death, was to operate, as a gift made in the life time, of a testator.

In this very case, the right of making a valid will, was recognized by the effect which was given to that of *Joogulkishore Adie*, but I am ignorant of the ground upon which the Court confined *Kishoree Dossee's* interest, to an estate for life.

It is possible that the testator's intentions might have been inferred from circumstances, by the Court. Here the widow, if it had not been for the will of her husband, would have had a right to maintenance only; and *it might have been presumed*, that the husband having altered her condition so much for the better, by giving her one half of his estate for her life, intended no more; besides the testator *had a son*, which fact would have very much strengthened this presumption, supposing it to have existed.

But we ought to be able to account for the decisions of a Court of Justice, by something more certain than conjecture, and if I happen to be right in this one of mine, I shall only have opened the way to embar-

rassment ; for if a *Hindoo, not having a son*, should dispose of his property by will, *to his childless wife*, the presumption would be entirely removed, because she, in case of his intestacy, would have a right to all for her life, and her condition could not be improved by such a will, unless she took under it, an absolute interest.

If I am right in my apprehension of the law, if the property possessed by *Kishoree Dossee* under her husband's will, had been given to her by him in his life time, that she would have held it upon his death, at her own absolute disposal; and as the right of making testamentary dispositions, is undoubted in the Supreme Court, it is inconsistent to determine that there is a less interest in property taken under a will, than there would have been, had it been received as a gift.

I cannot add any thing to what I have already said on the proceedings which grew out of *Muddunmohun Bysaack's* will. See page 77, chapter "Partition."

Although I have ranged, and I think not improperly, these proceedings under the head of *Partition*, the effect which the Supreme Court gives to the will of a *Hindoo*, is, in some respects, illustrated, throughout the long protracted litigation which took place among the parties interested in that question.

I have before spoken of *Soorjeecomar Takoor's* will, by which he left a sum of money to his wife, and all the rest of his very large property, *movable* and *immovable*, *ancestorial* and *self-acquired*, to his brothers. He left a *widow* but no child surviving him. She filed a bill claiming as her husband's heir, and denied the existence of a will.

The will of *Soorjeecomar* was produced by the brothers, in whose favor

it was made, and an issue was directed. The will was well proved, and no further question was raised.

In the next case it will be seen, that *Sonatun Mullick* who left a widow and two daughters surviving him, made a will by which he left his property, which consisted of every description, to his brother. The widow filed her bill, alleging her husband's intestacy, and claiming his estate, but the will was established.

It does not appear from this case, that the husband's *right* to make such a disposition of his estate, was contested. The question was, did he, or did he not, make the will?

On the 1st of April, 1822, a bill was filed by *Bustom Doss Mullick* complainant, against *Rajindro Mullick*, the adopted son; *Sree Mootee Heeramoonee Dossee*, the widow; *Govindchunder Roy*, the executor of *Neelmony Mullick*; and *Sree Mootee Bidamonee Dossee*, the widow of *Sonatun Mullick*, defendants.

The bill prayed that the respective wills of *Ramkissen Mullick*, *Sonatun Mullick*, and *Neelmony Mullick*, be established. The complainant by his bill claimed *two-thirds* of the estate and property which had belonged to, or been derived from, *Ramkissen Mullick* and *Gungabissen Mullick*, and prayed an account, and partition, accordingly.

On the 27th of November, 1822, a cross bill was filed by *Rajindro Mullick*, and *Heeramonee Dossee*, against *Bustom Doss Mullick*; *Govindchunder Roy* and *Bidamonee Dossee*. This cross bill prayed, that *Rajindro Mullick*, (who was an infant) be declared entitled to *one-half* of the estate, and property of which *Bustom Doss* had claimed *two-thirds*, and also an account and partition.

A feigned issue was directed "to try whether or not, the said *Bustom Doss Mullick* is entitled to *two-thirds* of the joint *immovable* and *movable*, or real and personal estate, in the pleadings mentioned;" and that *Bustom Doss Mullick* be the plaintiff, and *Rajindro Mullick* defendant, in the said issue.

This feigned issue came on to be tried on the 2d of February, 1824, and *a verdict was found for the plaintiff.*

The circumstances of the case were these, *Saumsoonder Mullick*, who died about seventy years ago, without having acquired any property, left two sons, viz. *Ramkissen Mullick* and *Gungabissen Mullick; Ramkissen*, and *Gungabissen* (until the time of *Gungabissen's* death) continued living together, as a joint family. They were undivided as to diet, property, and the performance of religious ceremonies; they had been successful in their pursuits, having accumulated great wealth, and possessed themselves of real as well as personal estate, to a large amount in value.

Ramkissen had two sons, viz. *Bustom Doss* (the plaintiff in the issue) and *Sonatun*, (who died on the 19th of *Bhadur* in the Bengal Year 1212, answering to the 2d of September, 1805.) *Sonatun* left no male issue, but his wife *Sree Mootee Bidamonee Dossee* survived him. *Gungabissen* died on the 27th of *Maugh* in the Bengal year 1194, answering to the 7th of February, 1788. He died intestate, and left one son only, viz. *Neelmony*, the adopting father of *Rajindro Mullick*, (the defendant in the issue).

At the time of *Gungabissen's* death, *Neelmony* (his son,) was eleven or twelve years of age; and as the representative of his father (*Gungabissen,*) he was clearly entitled to one-half of the property of which *Ramkissen* (his uncle) and *Gungabissen* (his father) had been jointly possessed.

Neelmony continued to live with his uncle *Ramkissen*, and all the fami-

affairs were managed by *Ramkissen*, whose sons (*Bustom Doss* and *Sonatun*) were younger than *Neelmony*.

The property was supposed to have been considerably encreased by *Ramkissen*, after *Gungabissen's* death.

In the month of *Bysaack*, Bengal Year 1200 or April 1793, (*Neelmony* then being sixteen or seventeen years of age,) *Ramkissen* executed a paper in the nature of a will, by which he declared his nephew (*Neelmony*) and his sons entitled *in equal shares* (each one-third) to the whole of the property and that it was to be so enjoyed by the three upon the death of him (*Ramkissen*.) To this paper the two sons of *Ramkissen*, and his nephew *Neelmony*, signified their assent in writing.

This document is directed to "*Sree Neelmony Mullick, Sree Boishnob Doss Mullick*, and *Sree Sonatun Mullick*; may the highest felicity attend them!!"

(Signed) "*Sree Ramcrishnoo Mullick.*"

"I *Sree Ramcrishnoo Mullick* make this will."

"Of my free pleasure, and in my sound senses, I write this paper in my life time. On my death you are proprietors of the two items of wealth, consisting of my own wealth whatever exists, and my late brother *Gungabishno Mullick's* wealth, whatever is in my possession. You will receive the dues, and pay the debts, and if you do not agree, you three persons will divide equally among you all this wealth, and the worship of *Sree Sree Ishwar*."

"The ornaments and wearing apparel belonging to individuals several-

ly are theirs severally. On these conditions I make this will, year 1200. Dated 5th *Bysaack*. English year 1793, 15th April."

Signed in the margin by the several parties ;

"Sree Neelmony Mullick, agreed."

"Sree Boishnob Doss Mullick, agreed."

"Sree Sonatun Mullick, agreed."

On the back.

"Witness, Sree Nemychurn Mullick."

"Sree Radhamohun Mullick."

"Sree Sreeram Surmono."

This arrangement was perfectly fair, and perhaps favorable, to *Neelmony*. *Ramkissen* might have separated himself from his nephew, when *Gungabissen* died, or *Neelmony* might have separated himself from *Ramkissen* on the death of *Gungabissen*, or at any time afterwards, or when the will was executed, and in either case, *Neelmony* would have been entitled to one-half, instead of one-third, of the joint estate. It was said however to have been much improved by *Ramkissen's* management. And possibly *one-third* of it, on the death of *Ramkissen*, was of a larger amount in value, than *one-half* it when the will was made.

Ramkissen lived about ten years after the will was executed, and died in *Poos*, 1210, or December, 1803. After the death of *Ramkissen*, the family, consisting of his two sons *Bustom Doss* and *Sonatun*, and *Neelmony* (the son of *Gungabissen*) continued to live joint and undivided, each appearing to acquiesce in the right which he derived under *Ramkissen's* will.

In *Bhadur*, 1212, or September, 1805, *Sonatun* died, having previous made the following will:

"To the most mighty in dignity *Sreejoot Bustom Doss Mullick* my brother *Mohashihee*."

"I *Sree Sonatun Mullick* do write this deed of bequest to the following purport. That the one-third share belonging to me out of the family, I, being in my perfect senses, have bequeathed to you. You are to get my two daughters married, and on the wedding day of each of them, you will procure a Company's paper made out in her name for twenty-five thousand rupees. The Company's paper for this sum you will keep in your possession. The interest of such paper from that day she is to receive. You will keep my wife in your family and maintain her. The remainder of my estate consisting of wearing apparel, jewels, gold ornaments, and silver plate, houses and gardens, whatever they may be, I have bequeathed to you. The jewels belonging to *Sree Sree Ishwurjee* the deity I have also given to you. My two daughters and wife are to have no further claim upon my estate. You are the master for receiving my demands and paying my debts. I have made this bequest on account of my illness. Should I recover again, this deed of bequest is to be null, otherwise to remain in full force. To this purpose I have executed this deed of bequest dated *Bhadur* the 5th year 1212."

This will was signed at the head, "*Sree Sonatun Mullick*, I have of my own accord made this bequest;" and witnessed by "*Sree Juggomohun Mullick* and *Sree Prawnkisno Mozendar*."

In May, 1821, and nearly sixteen years after the death of *Sonatun*, his widow *Sree Mootee Bidamonee Dossee*, filed a bill against *Bustom Doss Mullick* and *Neelmony Mullick*, alleging that her husband (*Sonatun*) had died intestate, and claiming his separate property, as well as his third part of the joint estate. To this bill, the defendants pleaded and answered, severally. Each by his plea, set up the will of *Sonatun Mullick*; and *Neel-*

mony disclaimed all manner of right or title, to any part of his property. *Bustom Doss Mullick*, relied upon the will, by which he insisted that he was entitled to all that had been given him by it. In July, 1822, *Bidamonee*, finding her case hopeless, came to a settlement with *Bustom Doss*, and thus her claim terminated. If it had not been for the will of *Sonatun*, it is clear, that *Bidamonee* would have been entitled to the whole of his estate for her life; and that after her death, it would have gone to the two daughters of *Sonatun*, who are mentioned in his will.

I must observe, that in this case there was *ancestorial* property, as well *immovable*, as *movable*; notwithstanding which, the will of *Sonatun* was considered by the advisers of *Bidamonee*, to be conclusive against her rights.

Neelmony Mullick died in *Bhadur* 1228, or September 1821. About eighteen months before his death, he had adopted *Rajindro* as his son, but he continued to live with *Bustom Doss*, as he had lived ever since the death of *Sonatun*; acquiescing in the proportionment of the estate which had been made by *Ramkissen*, and also in the will of *Sonatun*; by which two dispositions, *Bustom Doss* became entitled to *two-thirds*, and *Neelmony* entitled to one-third, of the family estates.

Neelmony had been for several months before his death, in a gradually declining state of health, and a few days before he died, (continuing in a sound state of mind) he declared his intention of making a will. He dictated one which was written in the *Bengalee* language, and character. He then sent for Mr. Thomas, an attorney of the Supreme Court, and desired him to prepare a will in the English language, giving him the one which had been written in Bengalee, as his instructions. The English will was prepared, and brought for execution, to *Neelmony*. He was then very much debilitated, but still of sound mind. He declined executing the

English will; because, although he was acquainted with the language, he thought reading and understanding it would have given him too much trouble, in the state in which he then was. He therefore, directed the Bengalee paper which he had before dictated, to be copied; other executors to be substituted for those which he had before nominated, and the date to be altered, so as to make it correspond with the day of its actual execution. All this having been done, he signed it at about ten o'clock in the morning, and died at night. There was no doubt of his sanity, or of the deliberation with which this act was performed.

This will was signed "*Sree Neelmony Mullick*, and was as follows:

"To the highest felicitous."

"*Sreejoot Rajindro Mullick Baboo-jee.*"

"May the highest felicity attend him!!!"

"I *Sree Neelmony Mullick* make this will."

"Of three shares of Company's paper, and property in cash, and immovable and movable property, and jewels, and gold and silver ornaments, and metallic utensils, wearing apparel, and so forth, one share is mine according to my elder paternal uncle, the late *Ramcrishnoo Mullick's Mohoshoio's* will. At present I am ill. If *Sree Sree Ishwur* gives me health, it is well. If not, it is uncertain what good or evil may happen; and when I therefore, of my free will and in my sound senses and mind, of my free pleasure give unto you my one share by writing, but you are at present a minor. Your mother therefore remains mistress of all that property, also of what I received from my *brother Sreejoot Boishnob Doss Mullick*,* according to an account in my own name, and a list on the 28th of Shrabun,

* It is common for cousins circumstanced as these were to call each other "*Brother.*"

1228, and have made over to the charge of your mother; and the expense of the family and *Ishwur Dol*, *Doorga Pooja*, and fixed and occasional rites and ceremonies, and the annual allowances and the worship of *Ishwur Jeeo* and the worship of *Sree Sree Jaggernot'h-jeeo*, and so forth. Three *Takoors* at the *Chore Bhaugaun* house, and *Ruth Jatra* and so forth, shall all be defrayed with the profits of the premises and land according to particulars, and with the profits of the Company's paper. Besides this, with regard to the outstanding dues remaining, one-third share shall be carried to the credit of my estate as the same shall be realized, and remain in the hands of your mother. Out of which money your mother shall take sicca (30,000) thirty thousand rupees, with which and with your mother's separate property and ornaments, and property in cash given by my mother, you have no concern. Your mother is the proprietress thereof. The sum of twenty thousand rupees remains for rites and ceremonies to procure me future bliss. Deducting this amount and thirty thousand rupees, which I give unto your mother and also deducting the above written various family expenses and so forth, whatever residue shall be forthcoming is yours on becoming of age. You will make enquiry respecting all the above property and obtain the same from your mother, and whenever you do any act you will do it having taken the advice of your mother. You must not do any act departing from the opinion of your mother. You will conduct yourself in such a manner, that my reputation may be preserved, and the rites and ceremonies carried on the same as they have been all along. To this purpose I make this will of my free pleasure, in sound mind—year 1228, date 19th *Bhadur*. English year 1821, 2d September, Sunday."

Witnessed on the back;

"R. M. Thomas, Attorney at Law."

"Sree Modhoosoodun Sandyal."

"Sree Suroopchunder Addye."

"*Postscript.*—All that property remains under the charge of your mother, but I appoint my brother *Sreejoot Boishnobdoss Mullick*, and *Sreejoot Govindchunder Roy*, joint attornies."

Bidamonee Dossee, had according to her agreement with *Bustom Doss Mullick*, dismissed her own bill; and the cause and cross cause, between *Rajindro* and *Bustom Doss*, after the finding of the issue, came on for further directions upon the 18th of February, 1824; when it was declared that *Bustom Doss Mullick* was entitled to *two-thirds* of the property, *movable* and *immovable*, in the pleadings mentioned. That the Master do take an account, and that a commission of partition do issue, &c.

It may be inferred from the part of this proceeding, which relates to *Sonatun's* share of the estate, that a *Hindoo* may *by will*, dispose of his *ancestorial immovable*, as well as *movable* property, and that he may do so to the prejudice of his wife and daughters, although they were unquestionably entitled by the *Hindoo* law, to the whole of his estate in preference to the person to whom it was given by will.

And further, that a *Hindoo* may by *his will* bind his adopted son to an agreement, into which he himself had entered, to receive one-third, instead of one-half, of the joint family estate; although it consists of *ancestorial immovable* as well as *movable* property.

It was indeed supposed, that *Neelmony*, every thing considered, had entered into an advantageous agreement with his uncle *Ramkissen*, but it did not appear in evidence to have been so, and the case was decided upon the ground of *Neelmony's* right, to do as he had done, and upon the adopted son's having been concluded by his adopting father's act.

Reghoonoth Paul died possessed of a considerable property, both *mov-*

able and *immovable*, but it was all *self-acquired*. He made his will, by which he disposed of his whole estate, *unequally* among his *younger* sons, leaving his *eldest* son, a small monthly allowance. This will was never contested, and seemed to have been thought (by the interested party, and his advisers) incontestable. The elder son, however, who may be said to have been disinherited by it, endeavoured to recover his proportion of his father's property in the Supreme Court, but this was not done by a denial of the father's right to dispose of his property by will as he thought proper. There was an attempt to establish the testator's *verbal* revocation of the will, which he was proved to have made. This attempt failed, the will was established, and it is now in operation against the eldest son. The case is not necessary for the purpose of establishing a *Hindoo's* right to dispose of his property by will, but it shows that *unequal* distribution may be made of *immovable*, as well as of *movable*, property by a testator, and that by his will, the eldest son may be disinherited.

In a cause between *Kishnonundo Biswas*, complainant, and *Prawnkishno Biswas*, defendant, in equity, an issue was directed and tried between *Prawnkishno Biswas* and *Kishnonundo Biswas*. *Kishnonundo*, was the complainant in equity, but *Prawnkishno* was ordered to be the plaintiff at law.

The case was this; *Prawnkishno Biswas* and *Juggomohun Biswas* were the sons of *Ramhurry Biswas*, and *Kishnonundo*, the complainant, was *Juggomohun's* son; *Juggomohun* being dead, his son *Kishnonundo* claimed as his representative.

Prawnkishno alleged, that *Ramhurry* (who died at Benares) had given to *Juggomohun* who was with *Ramhurry* at the time of his death all his personal property to the amount of some *lakhs* of rupees. And that he (*Ramhurry*) had made a will, by which he left *Prawnkishno three-fourths*, and *Juggomohun one-fourth* of his landed or *immovable* property.

Prawnkishno failed in his attempt to prove that his father *(Ramhurry)* had made such a will. His story was disbelieved, and *Kishnonundo* succeeded in the issue.

This case was very strongly contested, but, although, it would have been of great importance to *Kishnonundo* (when it was doubtful whether or not the will might be established) to show that *Ramhurry* could not make an *unequal* distribution of *immovable* property by his will, no such objection was urged, because, as I suppose, it was well understood that no such objection could be urged with effect.

Indeed, if it had not been assumed that *Ramhurry* could lawfully make a will, disposing of his *immovable* property, in *unequal* shares, the issue could not have been thought, in any manner availing, whatever might have been its result.

The following cause was decided in March, 1820. It arose out of the will of *Rasbeharry Surmono*. The complainants were *Debnoth Sandial* and *Conuckmonee* his wife; *Brijunoth Sandial* and *Soobodra his wife; Bississory Roy* and *Parbuttee* his wife, and *Rookoonee* widow, also *Colucknoth Sandial, Sreenoth Sandial* and *Janokeenoth Sandial* infants, by their next friend the said *Debnoth Sandial.*

The defendants were, *Patrick Maitland* and *Henry William Droz,* executors of *Rasbeharry Surmono.*

The house of *Messieurs Palmer and Company,* had been appointed executors along with *Mr. Droz,* and *Mr. Maitland* proved the will as a member of that house.

The testator had lived and died at *Cossimbazar*. He died in the month of Assin, Bengal Year 1224, answering to October, 1817.

Here is his will:—

"*Sree Sree Huree*—Year 1224. English year 1817.

"I solemnly make over to *Sreejoot Palmer and Company* my estate as specified under the heads of *receipts* and *disbursements*.

"They will receive a fair commission for the measures they adopt, according to what is specified in these receipts and disbursements.

"Whatever remains after deducting the commission, will be disbursed. My son-in-law *Sreejoot Debnoth Sandial* has authority to interfere, and suggest the adoption of measures as occasion requires."

He then sets forth his property under the head "*Receipts*." It amounts to 335,501 rupees, and he adds, "*Sreejoot Messieurs Palmer and Co. Mr. Henry William Droz*, and *Sreejoot Debnoth Sandial*, are the attornies of this statement of my estate. I appoint these persons attornies and managers in my sound senses."

Then follow the disbursements:—

"*Sree Sree Ishwur Brindabun*:—Out of the whole my estate, *one lakh and twenty thousand rupees*." "Particulars thereof"—"*Ishwur Munder* and *Bhog Munder*, &c. 16,000 rupees"—"Making a deity, and establishing the same, and so forth, expense 4,000 rupees"—"and there will remain 100,000 rupees in Company's bonds, with the profits of which the service of the deity, entertainment of strangers, and *Jattra Mohotsobarree*, to be carried on as appears necessary."

"*Goberdhun Doss Baboo*, son of *Sebuckram Baboo*, has been charged with the superintendence of the *Ishwur Battee*. A commission shall be paid to him at the rate of 2 rupees per cent. As long as *Brijukishore Mitter* superintends the temple, &c. accounts, he is to receive at the rate of 5 *rupees per month* according to the custom of that place."

"Of my free pleasure, I make a present to *Mr. Droz* of 40,000 *rupees*"—"4 daughters 8,000 *rupees*,"—"wife 5,000 *rupees*,"—"in Company's bonds to remain for *annual Sraddha* 10,000 *rupees; Sraddha*, &c. to be performed every year with the profits." "The interest on Company's bonds amounting to 50,000 *rupees*, to be received and given in alms to the poor and destitute and so forth, according to circumstances." "Charges to build a house at *Sree Sree Ishwur Juggunnath* 2,500 *rupees*." "If 200, *or* 500 *rupees* be expended herein, over and above, the same shall be paid out of the interest of the Company's bonds." "In hand 100,001 rupees—335,501."

"This money is mine as long as I live; on my decease, my grandsons, by daughters who are living, are to receive one-half thereof. From the remainder of money *one hundred thousand Brahmins* are to be fed. My son-in-law and others, will superintend and effect this. If they fail therein, the sin arising therefrom, is theirs; and my grandsons by daughters, will receive the money which remains on my death, after feeding *an hundred thousand Brahmins;* and requisite disbursements are to be made from what remains, after the agents have received what they are entitled to, according to usage."

The bill stated that the testator never had any grandsons except the complainants *Golucknoth, Sreenoth* and *Janokeenoth*, and that they are meant by the description of "grandsons by daughters who are living." It is then stated that after payment of all legacies, and performing all ceremonies, &c. directed by the will, a considerable residue will remain, to which

the three above-named grandsons will be entitled as residuary legatees. That the legacy of 5,000 *rupees left to the wife lapsed, as she burned herself with the body of her husband, which act of burning related back to the time of her husband's death, and she is supposed by the laws, customs, and usages of Hindoos to have died simultaneously with her husband, and that the 5,000 rupees left to the wife is part of the residue of the testator's estate.* The bill prays that the will may be established, that the trusts thereof be decreed to be carried into execution, that an account be taken, that the legacy of 5,000 rupees left to the wife be declared lapsed, and that the residue be declared to belong to the three grandsons, &c.

The answer of the defendants admitted all the facts set forth in the bill, and the cause came on upon bill and answer; an account was ordered to be taken, but the Court did not concur in the statement of *Hindoo* law, as it was given by the complainants in their bill. The wife who had burned herself with her husband was not admitted to have *constructively* died at the *same time* with him, and her legacy did not go to the residue of his estate, but was decreed to her daughters as her representatives.

The Master was ordered to enquire and report, "Whether or not the said complainant *Debnoth Sandial*, or who else would be a proper person or persons to carry into execution the *religious* and *charitable acts* mentioned and directed by the will of the said testator to be performed; and it was further ordered and decreed, that the said Master should also enquire and report to this Court what would be *a sufficient and proper sum to be allowed for the feeding of one hundred thousand Brahmins as directed in and by the said will of the said testator.*"

"And it was further decreed and declared, that the legacy bequeathed to the widow of the said testator, *who was burned on the same funeral pile with the said testator, her husband belonged to her daughters;* that is to

say, to the said complainants *Soobodra*, *Conockmonee*, and *Parbutee* in equal shares and proportions; and that the residue of the estate *after payment of debts, legacies, and donations*, in the said will mentioned, belonged to the grandsons of the said testator, who were at the time of making the will and are now living; that is to say, to the said complainants *Golucknoth Sandial*, *Sreenoth Sandial*, and *Janokeenoth Sandial* in equal shares and proportions," &c.

The Master reported that *Debnoth Sandial* was a fit and proper person to carry into execution the *religious* and *charitable* acts, mentioned and directed in and by the will of the testator to be performed.

The Report proceeds; "I have taken evidence on oath as to the sum that will be sufficient and proper to be allowed for the purpose of *feeding one hundred thousand Brahmins* also directed in and by the said will, and I find that the sum of *sicca rupees* 43,750 *will be sufficient and proper to be allowed for that purpose.*"

It was stated by the will, and admitted by the defendant *Maitland*, that he was in possession of the funds belonging to the estate of *Rasbeharry Surmono.*

The cause coming on to be heard upon the Master's report, the Court decreed, "that *Debnoth Sandial* be appointed the guardian of the persons, and the Accountant General of this Court for the time being be appointed the guardian of the fortunes of the infant complainants *Golucknoth Sandial*, *Sreenoth Sandial*, and *Janokeenoth Sandial* during their respective minorities. And this Court doth hereby declare that the said complainant *Debnoth Sandial* is a proper person to be appointed to carry into execution the *religious* and *charitable* acts mentioned and directed in and by the said will of the said testator *Rasbeharry Surmono*, deceased, to be performed; and the said

complainant *Debnoth Sandial* is accordingly hereby *appointed and directed to carry the same into execution according* TO THE TRUE INTENT AND MEANING OF THE SAID WILL of the said testator *Rasbeharry Surmono*. And it is further ordered and decreed, that the sum of *sicca rupees forty-three thousand seven hundred and fifty be within one week paid to him the said Debnoth Sandial by the said defendant Patrick Maitland* as such executor as aforesaid of the said *Rasbeharry Surmono*, out of the funds in his hands appertaining to the estate of the said *Rasbeharry Surmono for the purpose of paying therewith the expenses that will be incurred in feeding* 100,000 *Brahmins pursuant to the said will of the said Rasbeharry Surmono.*" *Maitland* is then ordered within one week to pay the residue of the estate of *Rasbeharry Surmono* into the hands of the Accountant General, and thereupon he and *Henry William Droz* as executors are to be discharged from their executorship.

It will thus be seen, that out of an estate amounting to 335,501 rupees, the Court ordered the sum of 226,250 rupees, or upwards of *two-thirds* of the whole, to be applied to *religious* purposes, as the testator had directed by his will.

OF CONTRACTS.

IN this chapter, I shall confine myself to such texts as I find set forth in the Digest of *Jagannatha*.

Nareda says, "That contract of delivery and receipt, which is made with a view to gain by the lender on the principal sum while remaining with the debtor, is called a loan on interest *(cusida)* and money lenders acquire their subsistence by it."

Catyayana:—"Let no man lend any thing to women, to slaves, or to children: whatever thing of value has been lent to them, the lender cannot, *in general*, recover without the assent of their guardian or master;" and again, "*Bhrigu* ordained, that a man shall pay a debt contracted in his *remote absence, even without his assent*, by *his servant, his wife, his mother, his pupil, or his son: provided it were contracted for the subsistence of the family.*"

Nareda to *Indra*, in the *Herivansa*:—"No man, O thou subduer of foes, should have pecuniary dealings with him, from whom he desires *much affection, nor visit his wife in his absence.*"

Vrihaspati, quoted by *Bhavadeva*, *Vachespati* and *Chandeswara*:—"A prudent lender should always deliver the thing lent, on receiving a pledge of adequate value, either to be used by him, or merely kept in his hands,

or with a sufficient surety, and either with a written agreement, or before credible witnesses."

Nareda:—"Written evidence is declared to be of two sorts; the first *in the hand-writing of the party himself*, which need not have subscribing witnesses, and the second, in that of another person, *which ought to be attested*: the validity of both depends on the usage established in the country."

Yajnyawalcya:—"There should in general be three witnesses, persons who take delight in acts ordained in the *Veda*, and in sacred law books; and properly they should be of the same sex and class with the party, for whom they give evidence; but if that cannot be, those of all classes may be examined;" again, "But every document, *which is in the hand-writing of the party himself*, is considered as sufficient evidence, even without witnesses, *unless obtained by force or fraud*." "Whatever contract shall have been concluded by mutual consent, a written memorial of it should be attested, after the lender's name has been first inserted. It should bear the year, month, half month, and day, with the designation of the debtor, by his name, class, and the like."

Menu:—"Even in the space of six months, men forget occurrences: therefore were letters and writings anciently invented, by the beneficent creator."

Yajnyawalcya:—"When the transaction is completed, the borrower should sign his name with his own hand, adding, 'what is above written, has the assent of me, son of such a one.'" And the witnesses should sign their names all together, in their own hand-writing, after writing the names of their fathers, and so forth; adding, 'I the son of such a one, am witness to this writing.'" "Let the writer next subscribe at the end of the writ-

ing, 'this has been written *at the request of both parties*, by me, such a one, son of such a one.'"

Vyasa:—"A borrower, who is unlettered, should direct another person to subscribe his declaration of assent; or a witness, in the same predicament, should cause his name to be signed by another witness, in the presence of all the witnesses."

Nareda:—"In this contract there are two things which *give confidence* to the lender, a pledge, and a surety; and two which afford *clear evidence*, a writing, and an attestation."

Menu:—"A lender of money may take, in addition to his capital, the interest allowed by *Vashishtha*, an eightieth part of an hundred by the month." N. B. This is 15 *per cent per annum*, and with the security of a pledge; but it will be seen that much higher interest, under other circumstances, is allowed.

Vrihaspati, quoted in the *Retnacara*:—"The eightieth part accrues monthly on the principal; and if the interest be received, *the loan is doubtless doubled in a third of a year less than seven years*, that is, in six years and eight months."

Vyasa:—"*Monthly* interest is declared to be an eightieth part of the principal, *if a pledge be given*. An *eighth* part is added, *if there be only surety*, and if there be *neither pledge, nor surety, two* in the hundred may be taken from a debtor *of the sacerdotal class*." N. B. In this case the permitted interest is 24 *per cent per annum*.

Yajnyawalcya:—"An eightieth part of the principal is the monthly inter-

est, when a pledge has been delivered; otherwise, it may be in the direct order of the classes, *two, three, four, or five,* in the hundred."

Menu:—"*If he have no pledge,* a lender of money may take two in the hundred by the month, *remembering the duty of good men:* for by thus taking two in the hundred, he becomes not a sinner for gain. He may thus take *in proportion to the risk,* and in the direct order of the classes; *two* in the hundred *from a priest, three from a soldier, four from a merchant, and five from a mechanic or servile man, but never more as interest, by the month.*"

The following text from *Harita,* relates to the sacerdotal class:—"For twenty-five *puranas* (or four hundred *panas*) of copper, *lent without either pledge or surety,* the interest may be *eight panas* a month; and the principal, being doubled in four years, and two months, *bears interest no longer.* Such interest is legal, and the lender violates no duty by taking it."

Yajnyawalcya:—"All borrowers who travel through *vast forests,* may pay ten, and such as *traverse the ocean,* twenty in the hundred, to lenders of all classes, *according to circumstances,* or whatever interest has been stipulated by them, *as the price of the risk of the lender.*"

Menu:—"Whatever interest, *or price of the risk,* shall be settled between the parties, by men well acquainted with sea voyages or journies by land, with times and with places, such interest shall have legal force."

Harita:—"Some allow a *pana* each month for one *purana, or a sixteenth of the principal.*"

Vrihaspati says; "Learn from their properties, the various sorts of interest declared to be *four,* or, according to some, *five,* and, according to others, *six.*"

"*Cayica*, corporal; *Calica*, periodical; *Chacravriddhi*, compound interest; *Carita*, stipulated; *Sichavriddhi*, daily interest; and *Bhogalabha*, interest by enjoyment"

"*Cayica* is connected with *(caya)* the body of a pledged animal. *Calica*, is due monthly. Interest upon interest is *Chacravriddhi;* and interest stipulated by the borrower, is *carita*."

"When interest is received at the *close of each day*, it is called *sichavriddhi*, or *hair interest;* because it grows daily, like hair, which can only cease growing, *on the loss of the head*."

"Thus the daily interest, can only cease *by the payment of the principal*, and hence it is called *sichavriddhi*. The rent, or use and occupation of a pledged house, or the produce of a pledged field, is called *bhogalab'ha*, interest by enjoyment."

"Interest payable *at the close of each day*, and *cayica*, or interest *accruing from a pledged body*, as well as interest by enjoyment, the creditor shall receive entire, *so long as the principal remain unpaid*."

"*But the use of a pledge, after twice the principal has been realized, from the usufruct*, compound interest, and the exaction of the principal and *whole interest, after a part of it has been liquidated*, is usury and reprehensible."

Nareda:—"In law, interest on loans is of *four* kinds. *Cayica*, *Calica*, *Carita*, and *Chacravriddhi*, or interest paid on an undiminished principal, periodical interest, stipulated interest, and interest on interest."

"Interest at the rate of one *pana*, or of half, or other fraction of a *pa-*

na, repeatedly paid without diminishing the (*caya*) principal, is named *cayica*; but that which runs by the month, is considered as *calica*, or payable at a (*cala*) time certain."

"That interest is named *carita*, or stipulated, when the debtor of his *own accord* has agreed for it; *and interest upon interest is declared to run like a wheel.*"

Catyayana:—"Stipulated interest is that, which has been specially, and freely promised by the debtor, in a time of extreme distress, *above the allowed rate.*"

"And in that case, *but in no other whatever*, stipulated interest must always be paid."

"Where a loan is made on an agreement, *that the whole use and profit of a pledge shall be the only interest*, it is called a loan on the use of a pledge, (*Adhib'hoga.*)

Yajnyawalcya:—"Interest on interest, is *chacravriddhi*; monthly interest is named *calica*; that which is stipulated by the party himself, is *carita*, but *cayica* accrues from *the body of a pledged quadruped.*"

"A debt secured merely by a written contract, shall be discharged, *from a moral and religious obligation, only by three persons, the debtor, his son, and his son's* son; but a pledge shall be enjoyed until actual payment of the debt *by any heir in any degree.*"

Vyasa:—"That interest is called *cayica*, which arises from (*caya*) the body of a pledged female quadruped to be milked, or a male animal to work and carry burdens."

Goutama:—"Some hold that no lender should receive interest *beyond the year.*"

Menu:—"Let no lender for a month, or for two or three months, at a certain interest, receive *such* interest beyond the year; nor any interest which is unapproved, nor interest upon interest, *by previous agreement*; nor periodical interest, exceeding in time, the amount of the principal; nor interest exacted from a debtor *as the price of risk, when there is no public danger or distress, nor immoderate profits from a pledge to be used by way of interest.*"

Menu:—"Stipulated interest *beyond the legal rate, and different from the following rule, is invalid*, and the wise call it an usurious way of lending. The *lender is entitled at most to five in the hundred.*" N. B. This means *five in the hundred by the month;* and here is the rule referred to—"Interest on money, *received* AT ONCE, *not year by year, month by month, or day by day*, as it ought, must never be more than enough to double the debt, that is, *more than the amount of the principal paid* AT THE SAME TIME."

Harita:—"Some allow a *pana* each month, for one *purana, or a sixteenth of the principal.*"

"Grain borrowed before the harvest, may be doubled, or at most trebled, *according to its price at the time of the harvest, being then payable by agreement*, and so may wool, or cotton; but grass, and the fibres of grass, clarified butter, salt, and new sugar, may be increased eight-fold in one year."

Nareda:—"Of interest on loans, *this is the universal, and highest rule, but the rate customary in the country where the debt was contradicted, may be different.*"

"It may be double or treble, or in another country, quadruple; so in another, even octuple. What is usual in the country, must be paid."

Jagannatha says, "To reconcile the *seeming* contradictions of these texts, *all commentators* have established *various applications* of them *consistent with their own apprehension* of the purport of the several texts. The subject is *very intricate;* and the opinions of some authors, shall therefore be separately stated, *to explain the sense of the texts,* and *elucidate* the rules established."

This observation might certainly have been much better applied. It is seldom that we find so many texts, and so few contradictions, together; and if there be much intricacy, it must be looked for in the commentaries with which the texts have been encumbered by *Jagannatha* himself.

If a pledge (which is the best security) be given, the interest is to be an eightieth part by the month.

If personal security only be given, an eighth part is to be added.

If no pledge (nor surety) be given, then the interest is to be more or less according to the order of the classes, two, three, four, or five *per cent;* that is, the priest shall pay *two*, the soldier, *three*, the merchant, *four*, and the mechanic or servile man, *five* per cent by the month.

If neither pledge nor surety, he of the sacerdotal class shall pay so as to double the principal, in four years and two months, i. e. *twenty-four per cent per annum;* and when the principal is thus doubled, the interest shall cease.

Borrowers, who undertake perilous voyages or journies; the repayment

depending upon their lives, are to give interest in proportion to the risk which is run by the lender.

It is said by *Harita* that some allow in this case *one-sixteenth* of the money lent *per mensem.* This will amount to *seventy-five per cent per annum.* Here, as in all other countries, this premium must be regulated by the discretion of the parties, and it stands upon the principle of *Respondentia* or *Bottomry.*

Sons, and son's sons, are *morally* bound to pay a debt contracted by the father or grand-father, but in case of a pledge having been given, it shall be retained by the lender, until the debt is discharged.

Interest, upon grain, &c. lent and payable in kind, is prescribed; but the rate may be varied by the usages of different countries.

The statute against usury in *India*, applies to *British* subjects only; but although a security reserving a higher rate of interest than *twelve per cent per annum* will not be thereby vacated, if taken by any other than a *British* subject, the Supreme Court has never allowed a higher rate to be recovered.

It would seem, that a bargain made for less than a year, shall not be extended beyond that period, without a special stipulation.

Generally speaking, it does not appear that interest shall cease when it amounts to the principal lent. *Yajnyawalcya* says, "When a *pledge* has been given, which the creditor *promised to return on the debt being doubled,* then surely, the interest having equalled the principal, *the pledge must be released on the double sum being paid,* or having been received from the use of the pledge;" and *Vishnu,* "Even if the *highest interest,* or that

equal to the principal sum, have accrued, *the creditor shall not be forced to restore a pledge* fixed in his hands, *unless there have been a special agreement.*"

Menu says, "He, who cannot pay the debt at the fixed time, and wishes to renew the contract, may renew it in writing, with the creditor's assent, *if he pay all the interest* then *due.*"

Interest may be payable, even if the loan be made without a reservation of it; or in cases of fraud, interest shall be paid, although the creditor agreed to lend his money free from any such charge.

Catyayana:—"Though a loan be made *expressly without interest*, yet, if the debtor pay not the sum lent after demand, *but fraudulently go to another country, that sum shall carry interest after a lapse of three months;*" and *Vishnu* says, "*After the lapse of one year, debtors who have* NOT *acted fraudulently*, must pay interest, as allowed, *even though not agreed on at the time of the loan.*"

Catyayana again says, "What has been *amicably lent for use*, shall bear no interest, *until it be demanded back; but, if on demand, it be not restored*, it shall bear interest on its true value at the rate of five in the hundred;"—and, "A debtor, who even residing in his own country, pays not the debt, *after more demands than one*, shall be forced, however unwilling, to pay interest on it, *though not stipulated*, after the lapse of a year."

The price of commodities sold, seems to be put upon the same footing with money lent. The same rule holds with respect to a chattel lent for use, if the borrower absconds without restoring it. But according to *Nareda*, "There shall be no interest without a special agreement, on va-

luable things *lent through friendship for use, not for consumption;* but, even without agreement, property so lent bears interest after half a year."

Gotama says, "The principal can only be *doubled* by length of time, *after which interest ceases.*" This I conceive, means that more than the amount of the principal is not to become payable *at the same time, in interest;* and so it is declared by *Menu.* This may be in the nature of a penalty on the lender for allowing the interest to accumulate beyond the amount of the sum lent. It would be absurd to say that a *Soodra* (for instance) who is to pay, if he borrows without pledge, or surety, five *per cent* by the month, or *sixty by the year*, should hold the principal as long as he pleased, without making any further return in the way of interest, if he had paid it for twenty months. If the creditor pleases to let interest remain due, until it is brought up to the amount of the principal, it may not be unreasonable to restrain him from enforcing more than double the amount of his loan *at the same time.*

The difference in the nature of pledges, must be attended to. Some are *for use*, and by the enjoyment of them, interest is supposed to be paid. Others are *for keeping*, or merely as security for the debt and interest. These last, when the interest becomes equal to the sum lent, the creditor may appropriate to his own use, or, as some say, sell, and account with his debtor for the proceeds, but the pledge cannot be sold, or become a creditor's property, until after the interest shall have amounted to as much as the principal.

There is indeed a great diversity of opinion, respecting the *amount* to which interest may arise upon various *articles* lent *for use.*

Nareda says, "A commodity, the price of a commodity, wages, a de-

posit and the like, a fine to the King, a thing clandestinely taken *without a design to steal it*, a thing *idly promised*, and *a stake played for*, carry no interest *before demand, without a special agreement.*"

Samverta:—"There shall be no interest on the property of women, lent amicably by them to their kinsmen, nor on interest itself, nor on a deposit, nor on any thing so committed in trust, nor on a sum which is dubious, or unliquidated, nor on a sum due by a surety, unless it be mutually stipulated."

And *Catyayana* also says generally—"No interest is *ever due* on leather, on straw or produce, on pale wine, on a stake played for, on the price of commodities, *on a woman's fee*, nor on what is due on account of suretyship." This is the doctrine of *Vyasa* also.

Yajnyawalcya:—"Property lent, which the creditor *will not receive back when tendered*, must be deposited with a third person, *and bears no interest afterwards.*" And *Vishnu*, "Property lent, *bears no further interest, after it has been tendered, but refused by the creditor;*" and "by the *use* of a pledge, *to be kept only, the interest is forfeited.*" *Gotama* adds to this, "*nor money tendered*, nor a sum *of which part is undelivered by the lender, or of which he disturbs the possession.*"

Vrihaspati says, "A pledge *(Ad'hi)* is called *band'ha*, and is declared to be divisible into four *pairs;* movable or personal, and fixed or real; for custody only, and for use; unlimited, and limited, as to time; with a written contract, and with a verbal attested agreement."

Vishnu;—"By the *use* of a pledge, to be *kept** only, *the interest is for-*

* Kept *as security*, not to be used by the Pledgee.

feited, and the creditor shall make good the loss of a pledge, *unless it was caused by the act of God, or the King, and without his fault.*"

Nareda:—"If a pledge be *lost*, and the creditor *do not replace it*, the principal itself shall be forfeited, unless the loss was caused without his fault, by the act of God, or of the King."

Yajnyawalcya:—"If a pledge for *custody* only, be *used, there shall be no interest*, nor, if a pledge for *use* be *damaged;* a pledge *spoiled, lost*, or *destroyed*, unless by the act of God, or of the King, *shall be made good by the creditor.*"

Vyasa:—"If *gold*, or other *precious* thing, shall be pledged, and *lost* by the *negligence* of the receiver, that creditor, on the principal and interest of his loan being paid, *shall be forced to pay the price of the pledge.*"

Vrihaspati:—"Any pledge being *used*, and *wholly* spoiled, by the *fault* of the *pledgee, the principal debt shall be lost.* If the pledge be of *great value in respect of the debt, he must fully satisfy the pledgor.*"

Menu:—"A pledge must not be *used by force;* that is, *against consent.* The *pawnee* so using it, must *give up his whole interest, or must satisfy the pawner*, if it be spoiled or worn out, by paying him *the original price of it;* otherwise, *he commits a theft of the pawn;*" and "the fool who secretly uses a pledge *without*, though *not against*, the assent of the owner, shall give up half of his interest, as a compensation for such use."

Catyayana:—"He who employs on work, an *unwilling* slave, or other *living* pledge, without the assent of the owner, shall be compelled to pay *the value of the work*, or shall receive *no interest on his loan.*" "But he, who with *words* or with *blows* struck on a sensible part, insults or pains

a pledged slave, or the like, refusing to work, shall *forfeit the interest* of his loan, and pay the first amercement."

Menu:—"If he take a *beneficial* pledge, or pledge to be *used for his profit*, he must have *no other interest on his loan*."

Vrihaspati:—"If the creditor, through avarice, use a pledge *before interest cease on the loan*, or before the stipulated period expire, *the debt shall bear no further interest*."

Vyasa:—"If a pledge be destroyed by the act of God, or of the King, *no fault is by any means imputable to the creditor; and immediately after the loss of that pledge, the debtor shall be compelled to pay the debt with interest, or deliver another pledge*."

Nareda:—"When a pledge, though *carefully preserved*, is *spoiled in course of time*, another pledge must be delivered, or the amount of principal and interest, must be paid to the creditor."

Catyayana:—"When a pledge becomes unfit for use, or perishes, *without any fault* on the part of the creditor, the debtor shall be compelled to deliver another pledge, for he is not exonerated from the debt."

Yajnyawalcya:—"Mortgaged land being carried away by a rapid stream, or being seized by the King, *another pledge of land must be delivered*, or the sum lent must be restored to the lender."

Vrihaspati:—"The *whole amount*, due to the pledgee not being paid, he shall on no account be compelled to restore the pledge against his will, nor shall it be obtained from him by deceit or confinement."—"When the debtor, tendering the principal sum, demands the pledge, even then it must be released, otherwise the creditor is criminal."

Yajnyawalcya :—" To the debtor who comes to redeem his pledge, the creditor shall restore it, *or be punished as a thief;* and if the creditor be dead or absent, the debtor may pay the debt to his kinsmen, and shall take back his pledge."

Vrihaspati :—" When a house or field, mortgaged *for use, has not been held to the close of its term,* neither can the debtor obtain his property, nor the creditor obtain the debt."

" When land or other immovable property has been enjoyed, and *more than the principal* debt has accrued therefrom, then the *principal* and *interest having been realized,* the debtor shall obtain his pledge."

Yajnyawalcya :—" When a debtor mortgages land to his creditor, declaring and specifying ' this shall be enjoyed by thee, *even though the interest cease* on becoming equal to the principal,' that pledge shall be restored to the debtor, *whenever the principal and interest shall have been received.*" " But a pledge shall be *enjoyed* until *actual payment* of the debt."

" The pledge is *forfeited* if it be not redeemed *when the debt is doubled;* since it is pledged for a *stipulated* period, *it is forfeited at that period.* But a pledge *to be used* for an *unlimited* time, *is not forfeited.*"

" He who sees his *land* possessed by a *stranger for twenty years,* or his *personal* estate for *ten years, without asserting his own right,* loses his property in them."—" Except *pledges, boundaries, sealed deposits, the wealth of idiots and infants, things amicably lent for use, and the property of a King, a woman, or a priest versed in the holy writ.*"

Vrihaspati :—" After the time for payment has past, and *when interest ceases,* on becoming equal to the principal, the *creditor* shall be *owner* of

the pledge, but *the debtor has a right to redeem it,* before ten days have elapsed."

Vyasa :—" *Gold* being doubled, and the stipulated period having expired, the creditor becomes owner of the pledge, *after the lapse of fourteen days.* But a pledge *to be used,* of which the term has elapsed, the debtor shall only recover, on then paying, from other funds, the exact amount of the principal."

Menu:—" If a man take a *beneficial pledge,* he must have *no other interest* on the loan ; nor, after a great length of time, or when the profits have amounted to the debt, can he assign or sell such pledge."

Smritti:—" After giving notice to the debtor's family, a pledge *for custody* may *be used* when the principal is doubled, and so may a pledge for a *limited period, when that period is expired.*"—" If the debtor be missing or dead, let the creditor produce the writing in a Court of Justice, and obtain a certificate from the Court, *specifying the period which it bore.*"

Vrihaspati, cited by *Misra* and *Bhavadeva,* under the title of Recovery of Debts :—" When the debt is doubled by the interest, and the debtor is either dead, or has absconded, the creditor *may attach his pledge,* or the debtor's chattel, and sell it before witnesses ; or *having appraised* it, in an assembly of good men, he may keep it *ten days ;* after which, having received the amount of his debt, he must relinquish the balance, if there be any. Having ascertained his own demand by the help of men skilled in arithmetic, and taken the attestation of witnesses, he commits no offence by thus recovering it."

Catyayana:—" When the pawner is missing, let the creditor produce his pledge before the King ; it may be then sold with his permission

This is a settled rule. Receiving the principal with interest, he must deposit the surplus with the King."

Yajnyawalyca:—"Or, even in the absence of the debtor, the creditor may sell the pledge before witnesses."

Vyasa:—"Pledges are declared to be of two sorts, *immovable*, and *movable; both are valid when there is* ACTUAL ENJOYMENT, *and not otherwise.*"

Vrihaspati:—"Of him *who does not enjoy a pledge, nor possess it*, nor claim it *on evidence*, the *written contract for that pledge is nugatory;* like a bond, when the debtor and witnesses have deceased."

Catyayana:—"Should a man hypothecate the *same thing* to *two* creditors, what must be decided? *The first hypothecation must be established, and the debtor shall be punished as for theft.*"

Vishnu:—"He who has mortgaged even a *bull's hide* of land to *one* creditor, and *without* having redeemed it, mortgages it to *another*, shall be corporally punished by whipping or imprisonment. If the quantity be less he shall pay a fine of sixteen *suvernas*. That land, whether little or much, on the produce of which, one man can subsist for a year, is called the quantity of a *bull's hide.*"

Smritti, cited in the *Retnacara:*—"If *two* men, to whom the *same* property has been pledged, enter into a contest; to him who *has possessed* the land, it shall belong, *if no force were used.*"—"By two creditors, claiming the pledge on the grounds of *possession* for an equal time, it shall be shared equally; and the same rule is declared in the cases of a gift and a sale."—"If a pledge, a sale, or a gift, of the *same thing*, be alleged to be

made *before witnesses* to one man, and by *a written instrument* to another, the *writing* shall prevail over the *oral testimony*, because *one contract only*, is maintained."—"Should the creditor, against, or even without, the assent of his debtor, possess himself of MORE LAND, *or other property*, than was expressly mortgaged, he shall pay the first amercement, and the debtor shall *receive back his whole pledge*."

Yajnyawalcya :—"It is declared that *brethren, husband and wife, father and son, cannot become sureties for each other*, BEFORE PARTITION; *nor reciprocally lend their joint property*, NOR GIVE EVIDENCE FOR EACH OTHER, *in matters relating to the common stock*."

Nareda :—"*After partition*, BUT NOT BEFORE IT, *brothers may become witnesses, or sureties for each other*, and may reciprocally give and receive presents, or make contracts with each other; but in regard to property *separately acquired, they may do so even before partition*."

Vrihaspati :—"*Four* sorts of sureties are mentioned by sages, in the system of jurisprudence, *for appearance, for honesty, for paying a sum lent, and for delivering the debtor's effects.* The first says, '*I will produce that man*;' the second says, '*that man is trust worthy*;' the third says, '*I will pay the debt*;' the fourth says, '*I will deliver his effects*.' On failure of their engagement, *the two first, but not their sons, must pay the sum lent* at the time stipulated. *The two last* (on default of the borrowers) *and even their sons*, if they die, *and leave assets*."

Nareda says, "*Three sorts of sureties, for three purposes*, are mentioned by the wise, *for appearance, for payment*, and *for honesty*. If the *debtors* fail in their engagements, or if his confidence *misled the creditor, the surety must pay the debt*, and so must the surety *for appearance, if he do not produce the debtor*."

Yajnyawalcya:—"Suretiship is ordained *for appearance, for honesty,* and *for payment.* The *two first sureties, and not their sons, must pay the debt on failure of their engagements;* but EVEN THE SONS *of the last, may be compelled to pay it.*"

Catyayana:—"Let the King cause sureties to be given *for payment, for appearance, for confidence,* or *for honesty, for the matter in contest,* and *for ordeal.* On failure of their engagements, they shall be answerable *according to circumstances.*" "If a surety for the *appearance* of a debtor, *produce him not at the time, and in the place agreed on, he shall discharge the debt, unless he was prevented by the act of God or the King.*" "*After the time of difficulty has past,* the surety, who still does not produce him, *shall pay the debt, and the same law is declared, even if the debtor should die.*" The "time of difficulty" means that time when the act of God, or of the King was in operation."

Menu:—"The man who becomes surety *for the appearance* of a debtor in this world, and *produces him not,* shall pay the debt out of his own property."

Vrihaspati:—"Let the creditor allow time for the surety to search for the debtor *who has absconded, a fortnight, a month,* or *six weeks,* according to the distance of the place where he may be supposed to lurk. Let no sureties be *excessively harrassed.* Let them gradually be compelled to pay the debt. Let them not be attacked, *if the debtor be at hand, and amenable.* Such is the law in favor of sureties."

Smriti:—"From a *malicious debtor,* who is on any account disposed through enmity, to take the protection of a stranger professedly hostile to his creditor, or to do *any thing inauspicious* to him, or to adopt the con-

duct of wicked men. Let a surety *for honesty* be taken as a caution *against such behavior.* If his conduct *belie the promise, his surety must pay the debt.*"

Catyayana:—"At the time and place, when the ceremony should be performed, *if he fail in ever so small a degree,* the surety shall be compelled to pay the sum, as a just debt; *such is the law respecting proved debts.*"

Menu:—"But money due by a surety, *or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or what remains unpaid of a fine or toll; the son of the surety,* OR DEBTOR, shall not *in general* be obliged to pay. Such is the rule in case of a surety *for good behavior or for appearance;* but if a surety *for payment* should die, the Judge may compel *even his heirs* to discharge the debt."

Yajnyawalcya:—"Should a surety for *the appearance,* or *the honesty* of another die, *his sons need not pay the debt,* but the sons of a surety *for payment,* or *delivery, must pay the sum lent, or deliver the thing undertaken.*"

Catyayana:—"Should a man become surety *for the appearance of a debtor, from whom he had received a pledge, as his own security* the creditor, if that surety die, may compel *his son* to pay the debt, *upon proving the whole case.*" This is rather obscurely expressed, but it means that the son of a surety who had received a pledge, by way of counter security, shall be answerable if the fact be proved; and so it is in *Menu,* "*If the surety had received money from the debtor,* AND HAD ENOUGH TO PAY THE DEBT, *the son of him who so received it, shall discharge the debt out of his* INHERITED PROPERTY. *This is a sacred ordinance.*"

"*Yajnyawalcya:*—"When there are *two or more sureties* JOINTLY BOUND, *they shall pay their proportionate shares of the debt; but when*

they are bound SEVERALLY, *the payment shall be made* BY ANY ONE OF THEM, *as the creditor pleases.*"

Vyasa :—" The *son of a son*, shall, in general, pay the debt of his grandfather; *but the son only, shall pay the debt of the father*, INCURRED BY HIS BECOMING A SURETY, and both of them *without interest; but it is clearly settled*, that their sons, the *great grandsons*, and *grandsons*, respectively, *are not morally bound to pay.*"

Catyayana :—" Money due *by a surety*, need not on any account, be paid *by his grandsons;* but, in every instance, such a debt incurred *by his father*, must be made good by a son, *without interest.*"

Smritti, cited in the *Mitacshara*:—" Should the *debtor* be insolvent, *and the surety have assets*, the *principal* only must be paid by his son. He is not liable for the payment of interest."

Vrihaspati :—" Should a surety, *being harrassed*, pay the debt for which he was bound, he shall receive *twice the sum* from the debtor, after the lapse of a month and an half."

Vishnu and *Nareda*:—" If the surety, *being harrassed by the creditor*, discharge the debt, *the debtor shall pay twice as much to the surety.*"

Yajnyavalcya :—" When the surety *is compelled* to pay *a notorious debt* to the creditor, the debtor shall *be forced to repay double the sum to the surety.*"

Catyayana :—" The *surety* shall *immediately* receive from the *debtor, but without interest*, the sum which he has paid, when legally urged by the creditor, on proving the case by witnesses." This must apply to a

payment made by a surety, who has *not been harrassed,* or compelled to it, by the creditor.

Vrihaspati :—" By whom, to whom, and in what mode, should, or should not, be paid a loan, which has been received from another, in the form of a loan, on interest, shall now be declared. If the *time* of payment be *not expressed,* the debt shall be paid *on demand, with interest then due. If expressed, at the full time limited,* and, *if not previously demanded,* WHEN INTEREST CEASES ON BECOMING EQUAL TO THE PRINCIPAL. If the father should die in debt, it shall be paid by his sons, with interest, as far as the law allows." "The father's debt must be *first* paid, and *next* a debt contracted by the man himself, but the debt of the *paternal grandfather,* must even be paid before either of those." "The sons must pay the debt of their father, when proved, *as if it were their own, or with interest.* The son's son, must pay the debt of his grandfather, but *without* interest; and his son, or the *great grandson,* shall not be compelled to discharge it, *unless he be heir, and have assets.*"

Vishnu :—" If he, who contracted the debt, should die, or become a religious anchoret, or remain abroad for twenty years, that debt shall be discharged by his *sons,* or *grandsons, but not by remoter descendants,* against their will."

Nareda :—" A father being dead, his sons, *whether after partition, or before it,* shall discharge his debt, in proportion to their shares, or, that son alone, who has taken the burden upon himself."

Yajnyawalcya :—"The father, *being gone to a foreign country, or deceased, naturally or civilly, or wholly immersed in vices,* the sons, or their sons must pay the debt; but, if disputed, it must be proved by witnesses."

Catyayana :—" A creditor may enforce payment of such debts *from the sons of his debtors*, who, though alive, are *incurably diseased, mad, or extremely aged*, or *have been very long in a foreign country*, PROVIDED THEIR SONS HAVE ASSETS OF THE DEBTOR." Possession of assets by the son, must, as I conceive, be always understood, when a liability to pay his father's debts is spoken of. By the *Hindoo* law, as administered in the Supreme Court, a representative is only held answerable to the amount of assets which have come to his hands.

The payment of a father's debts by a son, who is of ability to pay them *out of his own means*, is enjoined as a moral duty. *Nareda* says, " Fathers desire male offspring, for their own sake, reflecting, '*this son will redeem me from every debt whatsoever, due to superior and inferior beings.*' Therefore a son begotten by him, should relinquish *his own property, and assiduously redeem his father from debt, lest he fall into a region of torment. If a devout man, or one who maintained a sacrificial fire die a debtor*, ALL THE MERIT OF HIS DEVOUT AUSTERITIES, *or of his perpetual fire*, SHALL BELONG TO HIS CREDITORS."

Nareda :—" A debt contracted *before partition* by an uncle, or a brother, or a mother, *for the support of the family*, all the parceners, or joint tenants, shall discharge."

Vishnu :—" A debt contracted *jointly* and *severally by parceners*, shall be paid by *any one of them who is present and amenable;* and so shall the debt of the father, *by any one of the brothers*, BEFORE PARTITION ; *but* AFTER *partition they shall severally pay according to their shares of the inheritance.*"

Menu :—" If the debtor be dead, and if *the money borrowed*, was expended FOR THE USE OF THE FAMILY, *it must be paid by that family, divided* or *undivided, out of their* OWN ESTATE."

Catyayana :—" On the death of a father, his debt shall in no case be paid by his sons incapable from nonage, of conducting their own affairs; but at their full age of fifteen years, they shall pay it IN PROPORTION TO THEIR SHARES, otherwise, they shall dwell hereafter in a region of horror."

Nareda :—" A debt contracted by *the wife, shall by no means bind the husband,* unless it were for necessaries at a time of great distress, *a man is indispensably bound to support his family.*" N. B. In *the absence* of a man, his *wife,* his *son,* or even his *slave,* may borrow money *for the support of his family,* and he shall be obliged to pay it.

Catyayana :—" He who *accepts not* a thing which he has bought and secured, and he who *delivers not,* free from blemish, a thing which he has sold, *shall each take back his own property,* FORFEITING A TENTH PART OF THE PRICE?" " Yet, if the thing were not secured, though a formal contract were made, *and the purchaser accept it not,* the same rule for *rescission within ten days* prevails; but *after ten days,* the contract *may not be rescinded.*"

Nareda :—" Should the thing sold be injured, or burned, or carried away, after the time when it ought to have been delivered, *the loss shall fall on the vendor, who delivered it not when he ought.*"

Yajnyawalcya :—" Should a commodity sold, *but not delivered on demand, with tender of payment* BE INJURED BY THE ACT OF GOD, OR OF THE KING, *the loss shall fall on the vendor.*" " If the first vendee *refuse to receive the thing sold, it may be sold to another, and if a loss arise by the fault of the vendee, on him alone shall it fall.*"

Nareda :—" He, who having shown *a specimen of property, free from blemish, delivers blemished property, shall be made to pay* DOUBLE *the price to the vendee, and a fine to the same amount.*"

Vrihaspati:—"The dishonest man, who sells a commodity, *knowing its blemish, but not disclosing it, shall pay* DOUBLE *the price of it to the vendee, and a fine of equal amount to the King.*"

Yajnyawalcya:—"If a man sell to one, *what had been already sold by him to another, or a blemished commodity as unblemished, the fine shall be double the price of the thing.*"

Nareda:—"He who sells a commodity to one man, and delivers it to another unauthorized to receive it, shall also pay double the price, and a fine to the same amount." This must mean, if the transaction be fraudulent.

Yajnyawalcya, cited in the *Retnacara*, and *Chintamonee*:—"*He shall be compelled to pay two-fold*, a sum *received as earnest.*" This is said with respect to a vendee who refuses to receive, when offered, the commodity purchased.

Vyasa:—"By him, who has given earnest, *and appointed no specific time for delivery, it shall be forfeited, if he refuse to accept the commodity when offered.*"

Vrihaspati:—"What has been sold *at a low price, by a man inebriated or insane, or through* fear, *or by one not his own master, or by an idiot, shall be given back,* OR MAY BE TAKEN FORCIBLY, FROM THE BUYER."

Nareda:—"The purchase and sale of all commodities by merchants, are made with a view to gain, and that gain arises from the receipt of the price, be it great or small. Therefore, when a price has not been stipulated, let some merchant, who knows the prices of commodities, fix it according to place and time. *Let him not act crookedly; the straight path is the best in all mercantile business.*"

Yajnyawalcya:—"He who falsifies *scales, market rates, measures,* or *standard coins,* and he *who uses them, shall both be forced to pay the highest amercement.*" "That examiner of coins, who declares *bad money good,* or *good money bad,* shall be compelled to pay *the highest amercement*;" "but he who cheats in weights or measures *to the amount of an eighth part,* shall be forced to pay a fine of two hundred *panas,* and proportionably, if the fraud be greater, or less." "A man who adulterates vendible property, such as *drugs, oil, salt, perfumes, grain, sugar,* or the like, shall be compelled to pay sixteen *panas.*" "The fine for *disguising* the nature of *earth, leather, beads, thread, iron, wood, bark,* and *cloth,* is eight times the amount of the sale." "The fine also, for one who delivers in pledge or sale, a thing *changed under seal,* or a fictitious valuable, is thus regulated, for a thing *worth* LESS *than a pana,* the fine is *fifty panas,* for *one pana,* a hundred, for *two panas, two hundred,* for a *greater value,* a *higher amercement.*" "The *highest amercement,* is directed for traders *combining to maintain the price against labourers and artisans, although acquainted with the rise or fall of the price.*"

Menu:—"A contract made by a person intoxicated or insane, or grievously disordered, or wholly dependent; by an infant, or a decrepit old man, or by a person without authority, is utterly void."

Catyayana:—"What has been given by men under the impulse of lust, or anger, or by such as are not their own masters, or by one diseased, or deprived of virility, or inebriated, or of unsound mind, or through mistake, or in jest, may be taken back."

Vrihaspati:—"What is given by a person in wrath, or excessive joy, or through inadvertence, or during disease, minority, or madness, or under the impulse of terror, or by one intoxicated, or extremely old, or by an outcast, or an idiot, or by a man afflicted with grief, or with pain, or what is given in sport; all this is declared ungiven, and void. If any thing be

given for a *consideration unperformed*, or to *a bad man mistaken for a good one*, or for any illegal act, the owner may take it back."

Catyayana:—"Let the Judge declare void, a sale without ownership, and a gift, or pledge, unauthorized by the owner."

Nareda:—"The owner, finding a thing which had been sold by a stranger, shall recover it."

Menu:—"A gift or sale, thus made *by any other than the true owner*, must, by a settled rule, be considered in judicial proceedings, as *not made*."

Yajnyawalcya:—"In all *other contested matters, the latest act shall prevail; but in the case of a pledge, a gift, or a sale, the prior contract has the greatest force.*"

Although it is declared by statute, that all matters of contract and dealing, between party and party, shall be determined in the case of *Hindoos*, by the laws and usages of *Hindoos*, I never knew, or heard of, an instance in which the Supreme Court was called upon in a case of contract, to decide by such laws and usages. I did not therefore, consider a chapter upon Contracts to be *necessary* in this work, but I conceive that the texts which I have collected, and brought together, will be thought interesting and curious.

Those who may take the trouble of reading *Jagannatha's* commentaries upon this particular subject, will wonder perhaps, at the indefatigable industry with which he has endeavoured to make simplicity, complex; and to render that which is obvious, *unintelligible*.

I have merely given some of the leading texts which relate to the law of

contracts, and to my mind, the system (generally speaking) appears to be rational and moral. No less moral, and possibly more rational, because it is, in a great degree, abstracted from the *Hindoo* religion, and dependent upon ethics alone; upon principles which are universally admitted, which are immutable in themselves, and which cannot but be eternal in their duration.

Whatever may be said by metaphysicians of the moral sense, it is plain that good faith and fair dealing, are required by the institutes of all civilized people; and although there are offices, the performance of which, must depend upon the feelings, and the consciences of individuals—although duties must still be distinguished by those of perfect, and those of imperfect, obligation; honesty and rectitude are enforced in all civil polities, if they can be enforced by a legislative sanction.

The merit of having been founders of their own jurisprudence, cannot be denied to this people; and those who are at all conversant with the decisions of our own Courts, will acknowledge the analogy which exists between some of their doctrines, and some of the texts which I have cited from the *Hindoo* law. Where this is not to be found, a comparison may, in several instances be made, without disadvantage to the *Hindoos.*

But I must restrain myself, for it is not my purpose to run into a dissertation.

There are certainly extravagancies, although I have not brought them forward, even in this part of the system,—but if a prevalence of common sense is to be discovered in the laws of the Hindoos, it must be sought for in that portion of them, containing the precepts by which dealings between one man and another, are to be regulated.

OF JUDICIAL PROCEEDINGS.

I ADD, and I trust I shall be thought excusable in doing so, this and the following chapter, to a work which has already been extended, very far beyond my original design.

The materials of which these two chapters are composed, I got from my son *Mr. William Hay Macnaghten.* He himself was their translator from the original *Sanscrit,* and the subject has never before appeared in the *English* language.

Mr. Macnaghten made his translation from a celebrated commentary entitled the *Mitacshara,* composed by *Vynyaneswara,* whose work is preferred in the province of *Benares,* to all other law tracts. It is a commentary on the institutes of *Yajnyawalcya,* and that part of it, which relates to the law of Inheritance, has already been introduced to the *English* reader, by the learned *Mr. Colebrooke.*

If any thing had appeared in print, from which a knowledge of forensic proceedings, and the *Hindoo* law relating to evidence, could be derived, I should not have thought myself justified in swelling the bulk of this book, by an addition of this, and the next, chapter.

Out of the manuscript from which they are composed, I shall take no more than may be sufficient to convey a general notion of the subject. I shall omit the names of the numerous authors who are quoted as authori-

ties for the several doctrines contained in the work, and I shall abridge the matter as much as possible, consistently with my wish of giving the reader a view of that system, which formerly might have been, but no longer is, necessary to be known.

By some, these two chapters will be deemed curious, and it may by them, be lamented that the translator himself, did not complete and publish all that relates to judicial proceedings, as it is to be found in the *Mitacshara*. His competency to the task is well known, and his labour would have been cheerfully bestowed upon this subject, if he had not thought that it might be more beneficially applied to another.

The translation from which these two chapters are extracted, is of considerable length. Too long to be published entire in such a work as this. I have therefore, in giving an epitome, done what I conceived to be best.

The mode of proceeding in various ordeals, has not been translated by *Mr. Macnaghten*, but I have endeavoured to supply the deficiency by information from the Supreme Court *Pundits*. They had recourse to their books upon the occasion, and although it would be too much to say, upon any question relating to *Hindoo* law, that the information of individuals is to be relied upon implicitly, I believe the account given by these *Pundits* of the forms in question to be correct, for they delivered it at first from memory, and afterwards confirmed their statement by a reference to books of authority.

Contradictions, I must leave others to reconcile as they can. Repetitions, I have with a reasonable degree of care, endeavoured to avoid, and a distinction, will I believe, generally be found, where the same matter may appear to be repeated,

"The protection of his subjects is the chief duty of a consecrated, and

otherwise qualified, King." "The King divested of anger and avarice, and associated with learned *Brahmins*, should investigate judicial proceedings, conformably to the sacred code of laws." "A king *who condemns the innocent*, and *absolves the guilty, subjects himself to great disgrace, and goes to the infernal regions.*"

"Persons who are versed in literature, acquainted with the law, addicted to truth, and impartial towards friend and foe, should be appointed assessors of the Court, by the King."

These assessors are to be three in number; but it has been declared that the number may be either three, five, or seven. "That assembly *in which* seven, five, or three *Brahmins* versed in religious and worldly duties preside, *is equal to sacrificial ground.*"

"A King who investigates together with his chief Judge, ministers, domestic priest, and assessors of the Court, according to law, shall attain paradise."

The difference here is that the *Brahmins* are *not appointed*, and the assessors are. Hence it has been ordained, "A person whether appointed or not, is entitled to furnish legal advice." It behoves those who are *appointed officers, to oppose a King, proceeding illegally*, after they have tendered true Counsel; by acting otherwise, they are culpable. "Those assessors, who follow a King, pursuing the path of injustice, become participators in his act." Hence it follows, that he should be remonstrated with by them. They, on the other hand, who are not appointed formally, become culpable *by offering illegal advice*, or *withholding their Counsel, but not by omitting opposition.* "The *assembly must not be entered, or the truth must be uttered;* for criminality attaches to him, who preserves silence, or speaks falsely."

Some persons versed in trade, should also be called in to assist—" A few merchants should be summoned; men of good family and disposition, of a respectable age, and good conduct, wealthy, devoid of envy or pride."

It has been stated that the King should investigate legal proceedings, but an alternative is propounded—" A *Brahmin*, acquainted with all duties, should be appointed, and associated with the assessors, by a King, who is unable through want of leisure to investigate judicial proceedings."

He should appoint a *Brahmin*, endued with such qualities, as are described in the following text; " *Moderate, subdued, of a respectable family, impartial, temperate, firm, mindful of futurity, virtuous, attentive, uninfluenced by passion.*"

If such a *Brahmin* is not to be found, the King may appoint a *Kshetriya*, or *Vaysia*, but not a *Soodra*.

Judges who act unconformably to the laws, in opposition to the sacred code, or otherwise improperly, under the influence of partiality, swayed by undue bias, avarice, excessive desire of gain, fear, or otherwise subdued by the prevalence of their passions, are to be severally amerced in double the penalty incurred by the losing party; not in twice the value of the thing in dispute; for were such the law, in actions relative to adultery, and the like, there could be no fine.

The specific mention of partiality, avarice, or fear, implies that the penalty does not extend to cases of error, or inadvertence, &c.

"The King is superior to all, except *Brahmins*." From this it must not be inferred that *Brahmins* are exempt from amercement, for the text is intended merely for the purpose of extolling the *Brahminical* tribe. More-

over, it is ordained in the *Sutra*, six things are to be avoided by the King, acting with respect to *Brahmins*. The punishment of flagellation, of death, of amercement, of banishment, of reprimand, and of confiscation; *but the excepted person, "must be eminently learned, skilled in worldly affairs, in the Vedas, and Vedangas, intuitively wise, well stored with fabulous, and historical wisdom; continually revolving these subjects in his mind, conforming to them in practice, instructed in the forty-eight ceremonies, devoted to the observance of his three-fold, and his six-fold duties, and versed in the practice of temporal enactments." The mere order of priesthood, is not sufficient to exempt.*

"When a person aggrieved by another, in a manner contrary to law, or approved usage, represents it to the King, or to the chief Judge, that representation is termed the subject of a judicial proceeding," the component parts of a judicial proceeding are, the declaration or charge, the answer, the deliberation, and evidence, and the decision and judgement.

Allegations are two-fold; presumptive, and positive; "Presumption may arise, from a person's keeping bad company; and certainty, from some visible proof."

An allegation founded on certainty, is of two descriptions; omission and commission; the first is thus exemplified, "He has received gold, and will not restore it;" the other thus, "He has forcibly seized my land;" or as it has been explained, "*He is unwilling to do justice, or, he has done injustice.*"

Subjects of judicial proceedings have been propounded to be of *eighteen* sorts. "The first, *debt*; the next are *bailment, sale without ownership, concerns among partners, subtraction of what has been given, non-payment*

of wages, or hire, non-performance of compacts, repentance of sale or purchase, disputes between master and servant, contests on boundaries, insult, personal or verbal; larceny, violence, adultery, the duties of man and wife, partition of inheritance, gaming and matches."

These also are greatly multiplied by the diversity of claims; "of these also, the distinctions are *an hundred and eight* fold; from the diversity of men's claims, there are *an hundred* ramifications."

"Neither the King, nor his officers, must *ever promote litigation, nor on any account neglect a law suit instituted by others.*"

"The King should thus interrogate a person coming before him (at a proper time, and in a respectful attitude) saying, 'Fear not O man, but disclose by whom, where, when, and for what cause, your grievance arises. He should then, in conjunction with his *Brahmins*, and assessors, deliberate upon the representation thus made, and should it appear reasonable, he shall deliver to the complainant a summons, or depute an officer, for the purpose of citing the adverse party."

"The King should not summon one intoxicated, deranged, or idiotic; or persons in grief, or servants."

"Nor a *young* woman who is of *inferior* tribe, nor any woman born of a noble family, nor one lately delivered of a child, nor one of the highest tribe, nor a damsel. These are termed dependent on their relations."

"But women upon whom their families are dependent, profligates, and harlots, those who are expelled from their families or degraded, may be summoned."

"Having ascertained the time, place, and comparative importance of the charge, the King may summon even those who are sick, causing them to be conveyed slowly in carriages."

"A person being about to prefer a claim, may arrest his adversary (evading it, or not giving satisfaction in the matter) until the arrival of the summons."

"Arrest is four-fold; local, temporary, inhibition from travelling, and the pursuit of a particular occupation."

"One who being arrested at a proper time, breaks his arrest, is to be fined; and one arresting improperly, is liable to penalty."

"One desirous of celebrating his nuptials, afflicted with disease, about to perform a sacrifice, surrounded by difficulties, sued by another party, transacting the affairs of government, cowherds while in the act of tending their cattle, husbandmen in the act of cultivation, artisans engaged in their trades, soldiers engaged in warfare, are not to be detained by order of the King."

"He is guilty of officiousness who is neither brother, father, son, nor constituted agent of the party. Should he interfere, he is liable to amercement."

"What had been alleged by the Complainant must (the Defendant having appeared) be written in his adversary's presence, and before his face. This must correspond with the original statement; if there be any variation, it may prove fatal to the cause."

"A prevaricator, one who needlessly attempts to vitiate the proceed-

ings, one who does not adduce his evidence, one standing mute, and one, who being summoned, absconds; are five persons who are to be nonsuited."

The Complainant's statement, is to be taken down in writing, as well when the original representation is made, as upon the Defendant's appearance; but after such appearance the complaint must be entered with all its particulars, that is, "the thing, its quality, quantity, place, time, motive of forbearance," &c.

"That is termed a charge, or declaration, which is significant, technically precise, comprehensive, unconfused, direct, unequivocal, conformable to the original complaint, provable, uncontradictory, clear, susceptible of proof, concise, not deficient, not adverse to local and temporal usages; comprising the year, season, month, fortnight, day, hour; country, situation, place, village; the complaint and its nature; the tribe, appearance, and age, of the adverse party; the weight and quantity of the property in dispute; the names of the complainant, and his adversary; the names of their respective ancestors, and of the ruling kings; the grievance done, and the names of the original acquirer, and grantor."

A specification of the country, the spot, &c. local circumstances, and of time, is requisite in cases of *immovable* property. "The country, place, site, tribe, name, neighbourhood, dimensions, nature of the soil, the names of ancestors, and of former Kings. These *ten* should be specified in a suit for *immovable* property.'

"Declarations should be rejected as *mere semblances*, if they are unnatural, uninjurious, unmeaning, frivolous, unsusceptible of proof, at variance with possibility;" *unnatural*, as such a person has taken the horn of my hare; *uninjurious*, as such a person transacts business in his own house, by the light of a lamp which burns in mine; *unmeaning*, not having any

signification, as the unmeaning connection of letters; *frivolous*, as this, *Devadutta* warbles a sweet song near my house; *unsusceptible of proof*, as *Devadutta* ridicules me by a supercilious look; as this cannot be proved it is deemed *unsusceptible of proof*, for from the momentary nature of the action, no witnesses can be procured, much less written evidence; and from the trifling nature of the complaint, an oath cannot be resorted to. *At variance with possibility*, as this dumb man cursed me.

"That complaint which is prohibited by the government, or detrimental to the interests of a city, or a country, or to the different trades people, citizens, villagers, and merchants, is pronounced to be inadmissible."

"If one should allege such a one has borrowed silver of me at interest; I have deposited gold with him; and he has taken possession of my field; such a declaration is good."

"The meaning of a declaration involving many issues, being inadmissible, is, that the trial of them all, is not to be entered upon at once."

The declaration may be amended until the answer is given in, but not afterwards, lest there should be infiniteness. "He may amend his declaration until the answer is given in, but being stopped by the answer, the corrections must cease."

"If the Judges cause an answer to be given in, before the declaration is amended, they incur the penalty prescribed for anger and avarice; and the King must investigate the claim, *after having obtained a fresh declaration.*"

"The answer of the party who has heard the declaration, must be written down in presence of the plaintiff."

"The wise, have held that to be an answer, which embraces the declaration, which is *solid, clear, consistent,* and *obvious.*"

"A confession, a denial, a special exception, and a plea of former judgement, are the four sorts of answer."

A *confession* is thus exemplified. The plaintiff declares, "this person is indebted to me in an hundred pieces of silver;" the other answers, "it is true I do owe him that sum." A *denial* is thus, "I do not owe him." A *special exception* is where the defendant admits the demand, and avoids it by pleading a general acquittance, or that he had received the money as a present. The plea *of former judgement,* is when the defendant asserts that the plaintiff has formerly made a complaint against him in the same matter which was dismissed.

"That is not an answer which is dubious, not to the point, too confined, too extensive, or not embracing all parts of the declaration. That which is relative to other matter, incomplete, obscure, confused, not obvious, or absurd, is a faulty answer."

Dubious, if in an action of debt (the plaintiff claiming *an hundred suvernas,*) the defendant should admit that he is indebted *either* in the sum of an hundred *suvernas,* or an hundred *mashas.* *Not to the point,* if in an action for an hundred *suvernas,* the defendant should admit an hundred *panas.* *Too confined,* if in an action for an hundred *suvernas,* the defendant should admit that he owes five. *Too extensive,* if in an action for an hundred *suvernas,* the defendant should admit a debt of two hundred. *Not embracing all parts of the declaration,* if in an action for gold, cloth, and other articles, the defendant should admit the debt of gold, and nothing else. *Relative to other matter,* if in an action for an hundred *suvernas,* the defendant should answer that he had been assaulted by the Plain-

tiff. *Incomplete*, not embracing the particulars of country, place, &c. as if in an action for the recovery of possession of a field, specifying it particularly, the defendant should admit generally that he took possession of a field, without adding any specification. *Obscure*, if in an action for an hundred *suvernas*, the defendant should answer, "Am I alone, indebted to the man?" *Confused*, as if in an action for an hundred *suvernas*, the defendant should say that he received the money, but that he does not owe it. *Not obvious*, as if a person sued for a debt incurred by his father to the amount of an hundred *suvernas*, should answer "by the information of the receiver of the hundred from my father, I know nothing of the *suvernas*," instead of saying, "I did not learn from my father, that he had received the hundred *suvernas*." *Absurd*, as if the plaintiff should claim an hundred *suvernas*, alleged that he had lent it at interest and had received the interest, but not the principal; and the defendant should answer, that he had paid the interest, but had not received the principal.

"In *one* suit, the proof cannot rest on *both* parties, nor can both obtain judgement, nor can two answers be offered at once."

But in an answer involving denial, and a special exception, the proof will rest with both parties for "it has been recorded that, in the case of a total contradiction, the proof rests with the complainant; and in the case of a special exception, with his adversary." Here then, the issues are opposed to each other, in one case, as if in an action for an hundred *suvernas*, and also for an hundred *rupees*, the defendant deny the first claim, and specially except with regard to the other.

But in case of an answer involving a special answer, and a former judgement, the defendant must substantiate both; as if one should say, I received the gold, but returned it; and as to the silver, I was sued for it in a former action, and judgement was given against the plaintiff.

In an answer to a claim made for an hundred *suvernas*, an hundred *rupees*, and cloths; a defendant may deny the first, plead an acquittance as to the second, and a former judgement as to the cloths; and so with an answer, involving four pleas. These when brought forward *all at once*, constitute an answer.

In a case where two pleas apply to one charge, as if a person should charge another, alleging that he had, at a certain time, missed a certain cow belonging to him, which cow had subsequently been found in the defendant's house. The defendant may assert that the allegation is false and that the cow was in his house previously to the time when the complainant declared he had missed it, or that it had been born in his house. This should not be called a faulty answer, because it is calculated to rebut the charge. It is not a simple denial, as it involves a justification; nor is it a special exception, as it does not admit any part of the complaint. But it is an exculpatory negation, and the proof rests with the defendant, in conformity to the rule prescribing that proof of justification depends on the defendant.

"When an answer involves a denial, and a special plea, the special plea is to be first considered."

If a person being sued for an hundred pieces of money, shall admit the receipt, and plead re-delivery, and a former judgement, it is optional with the defendant which of the two pleas is to be first substantiated.

After the answer, the claimant shall immediately reduce to writing the evidence by which his claim is to be made good. That person by whom the affirmative is to be proved, is here understood by the term claimant.

"That is called a judicial proceeding, which in the conflicting interests

of mankind, furnishes a decision founded on law and equity. It has four divisions, namely, *the declaratory, replicative, probatory,* and *adjudicative,* and is termed quadruple;" but in the case of a confession, as there is no adducement of evidence, and as the claim does not require to be substantiated, there is no issue, and the proceeding has only two divisions.

"A person complained against, not having cleared himself, shall not retort, nor shall another charge a person, already labouring under a charge, nor shall any thing foreign to the original complaint be introduced."

Retort does not apply to the plea of former judgement, as former judgement is an exoneration of the party complained against, although it is, in some measure, a retort. The restriction is confined to a retort, *not having a tendency to refute the allegation.*

"That man, who, forsaking his original claim, rests on other grounds, is to be nonsuited, by reason of the confusion of his proceedings."

One who is nonsuited, *is to be fined,* but he does not therefore, forfeit all claim to the subject matter.

"A *verbal error, is not fatal in civil actions.* Should it appear in actions brought *for seduction, for debt,* or *for landed property,* the plaintiff is to be amerced, but it does not annul his claim." From the specification of *civil actions,* it is inferible, that in the case of a criminal prosecution, error is fatal. As if a man at the time of making his *original complaint,* should assert that he had been *kicked on the head,* and at the time of *recording his charge* should allege that he had received a *blow of the fist on his foot.* In this case he is not only to be amerced, but his cause is to be dismissed.

In prosecution for abuse, whether verbal or personal, and in assaults,

that is, attacks committed with poison, or with offensive weapons, &c. recrimination being allowable, the person complained against, may without having refuted the charge, recriminate his accuser. This is not done for the sake of instituting two distinct proceedings, but for the purpose of obtaining a mitigated punishment.

"It is a settled rule that the first aggressor, is the chief delinquent. He also is a wrong doer, who attacks in the second instance, but the punishment of the first will be the most severe. If there can be no distinction found between the parties, and the abuse, assault, or violence be simultaneous on the part of both, their punishment shall be the same."

"A competent surety must be taken from each party for the satisfaction of the judgement." If a party be unable to furnish a competent surety, he is to be guarded; and at the close of each day, is to furnish wages for the payment of his guards."

In case of a denial by the defendant, of the plaintiff's demand, if the plaintiff should prove his case, the defendant shall pay the amount claimed; and besides, a sum equal thereto as a fine to the king. The defendant, in this case, is said to make *a false claim.*

If the plaintiff cannot substantiate his case, he is the *false claimant*, and shall pay to the King, a fine equal to *twice* the amount of the sum which he had demanded. The defendant's failure to establish his plea of *special exception*, or of *former judgement*, will subject him to the same penalty which he incurs by a failure to establish his plea *of denial.* In all these cases the defendant is said to be a false claimant, but in the case of confession by the defendant, there is no fine payable by either party.

These rules relate to actions brought for the recovery of money only, they cannot apply to cases, in which there is no property demanded.

From this injunction, "The claimant shall immediately reduce to writing his evidence of the thing to be proved," it may be inferred, that, in the delivery of an answer, some delay is permitted.

But an exception has been laid down, "In murder, theft, assault, and abuse; where a cow is the cause of action; slander, life and property, and women, here the cause is to be immediately tried; in other cases it is optional."

Murder, by poison, or weapons, or any thing destructive of life. *Theft, larceny; assault*, and *abuse; attack* either on the person, or character. *Cows*, milch cows; *slander*, an accusation tending to loss of property where *either* of these is in jeopardy. These are put in the singular number,—*woman*, women of family, and slave girls. In the former case, character is involved; in the latter, property, the cause shall be immediately tried; the answer, is to be immediately called for, and no delay is to be allowed. Otherwise, in other cases, delay, in delivering the answer has been declared optional with the parties, or with the assessors and judges.

"One who is constantly shifting his position, who licks the corners of his lips, whose forehead sweats, and whose countenance continually changes colour; one whose mouth dries up, and who faulters in his speech, who contradicts himself often; one who does not look up, or return an answer, who contorts his lips; one who undergoes spontaneous changes, whether mental, verbal, corporeal, or actual, such a person, whether making a claim, or giving evidence, is esteemed false."

The changes above noticed are declared to establish, merely a probability of delinquency; not a certainty, from the difficulty of distinguishing between changes which have a cause, and those which are spontaneous. An intelligent man, should declare by what they are occasioned; *but, even*

this is not cause of failure. As people do not perform funeral ceremonies, on the appearance, or the probability of a person dying; so in this instance, although it should appear probable that a person will forfeit his claim, that circumstance does not occasion the loss of it.

When two claimants come into Court together, and prefer a claim; as if one person having obtained a field by gift, and having enjoyed it for some time, and then, on an emergency, goes, with his family, to another part of the country; and another person, having obtained the same field by gift, and having enjoyed it for some time, goes abroad; afterwards, both returning, come into Court at the same time, and claim the field. In such a case who is to adduce the evidence? In answer to that, it is stated; "Both having witnesses, the witnesses of the first claimant are to be adduced, but the first claimant failing, then the second claimant will adduce his witnesses." By the *first* claimant, is meant, not the man who makes the first claim, but the person who claims the first occupancy. "Where there are two claimants, to one cause of action, and each has witnesses, those of the prior claimant are to be examined." This case being distinct from all others, has been provided for specially.

If a wager won, be sued for, or if another demand be joined with one for a wager won, the party against whom judgement goes, shall pay a fine to the King, equal to the amount of the wager. If the plaintiff succeeds in proving the wager lost to him, he shall recover it.

"The King shall investigate judicial proceedings in a *bonâ fide* manner rejecting inadvertencies; but should the claim not be established according to judicial form, failure ensues."

It becomes the Judges and assessors, to use all means, *gentle and other*, to induce the parties to declare the truth; in which case, a decision may

be passed without having recourse to witnesses, or other evidence. But, as it is impossible in every case, to decide according to certainty, a decision must be made according to the witnesses, or other evidence. This is the alternative.

"In a denial *of more than one written claim*, the King shall cause the defendant, should he be confuted in *a part*, to make good the *whole amount* of the claim, but that which has not been represented, should not be received."

In a written allegation, comprising *several* claims, should the defendant deny the *whole;* for instance, in a suit for gold, silver, cloths, and other articles, should a proof of one part of this claim be made (the gold for instance) the King shall cause the defendant to make good the whole to the plaintiff, comprising the silver, and other articles specified. But that thing which *has not been mentioned*, at the time of making *the first* representation, must not be recovered; as if the plaintiff should assert that he had forgotten a certain article, his assertion must not be attended to by the King.

This is not merely a verbal distinction, because the defendant is proved to have been false in one instance, and therefore it is presumable that he is false in another; and because the plaintiff is proved to have been true in one instance, therefore it is presumable that he is true in another. *By the force of reasoning*, therefore, or *inference*, as well as from the express words of the author, it is established that the whole should be caused to be paid.

"Inference, is the mode of discovering the truth; relying on that therefore, let a conclusion be formed." "The King and his Judges are exonerated from blame in such cases."

"In an action comprising many claims, the creditor shall recover that property only, to which he can establish his claim by witnesses or other evidence."—*This text relates to a son, or other heir, who is sued for a debt contracted by his father, or ancestor.*

In this instance, if several claims be preferred against a son, or other heir, and he plead ignorance, he is not a denying party; and if one part of the claim be established, he does not incur the imputation of falsehood. Hence, from the absence of denial, and the consequent absence of the required preference, the text concerning a denial in the case of several written claims, does not apply.

In criminal prosecutions, if *part* of the charge be proved, by witnesses adduced to establish the *whole charge*; the *whole charge is proved, because* this alone is sufficient proof in such prosecutions. "In cases of adultery, murder, and theft, the whole charge is proved, should the witnesses adduced depose to the truth of any part of it."

"A man may unhesitatingly kill a spiritual teacher, or a child, or an old man, or a learned priest, *coming with a hostile intent.* There is no guilt at all imputable to the slayer of a person coming with a hostile intent, whether overt or concealed, *for wrath destroys wrath.* Let a man in battle, strive to destroy a person coming with a hostile intent, even though he may have studied the whole *Vedanta*; by such an act he does not become the murderer of a *Brahmin.*"

These are texts of the municipal code. "Having slain a *Brahmin* unwittingly, such is the prescribed expiation, but there is no expiation permitted for one who wilfully kills a *Brahmin.*" But these extracts should not be quoted as conflicting instances of the sacred and municipal codes, where the former should be held to prevail over the latter.

For as these two do not apply to the same subject, there is no opposition, and consequently, no room to assign relative superiority. "A *Brahmin* may take up arms in defence of religion; so in self-defence, and in defence of sacrificial apparatus, in war, and in guarding *Brahmins* or women, one who lawfully kills another, is not blamable." "*Lawfully kills*," means "kills with lawful weapons."

"A person may slay a spiritual teacher, or others, whose persons are exceeding sacred, if they come with a hostile intent—*a fortiori*, others. From the occurrence of the word "or" in the preceding text, and the word "even" in a former one, prefixed to "though he may have studied the whole *Vedanta*," it is not intended *positively to assert* that spiritual teachers and the like may be slain. The meaning may be gathered from the text of *Soomuntoo*—"There is no crime in killing any one coming with a hostile intent, except a *cow*, and a *Brahmin*." And in the text of *Menu*, "A man must not slay a spiritual teacher, an expounder of science, a father, or mother, *Brahmins*, or *cows*; all these are sacred."

The text, "There is no crime in killing *any one* coming with a hostile intent," &c. must be applied *exclusively* of *Brahmins* and the like.

"An incendiary, and an administerer of poison, one attacking with a murderous weapon, a robber, one who usurps the field, and one who carries off the wife of another; these six, are denominated hostile aggressors. One intent on destroying by sword, poison, or fire, one who has lifted up his hand in a threatening manner, one who destroys by means of incantations, a public slanderer, an adulterer, a malicious detractor; these, and others of the like description, are to be considered hostile aggressors. Such is the general definition of a hostile aggressor."

Hence it follows, that *Brahmins* and the like, being hostile aggressors,

are to be opposed by a person, not meditating their destruction, but for the sake of preserving himself. Should death ensue, *unintentionally*, a slight expiation must be performed, but the King does not award any punishment.

Of the effect of possession it is said, "Loss accrues to him, who for twenty years, observes his *land* enjoyed by another without interfering and in the case of *movable* property for ten years."

It may be objected that twenty years' possession, cannot create proprietory right, because *proprietory right* cannot arise from *non-interruption*; as non-interruption has not been recognized either in practice or theory, (like gift or sale) to cause a transfer of right; and that possession, being merely evidence of right, cannot create the thing to be proved; and moreover, that it is not included among the causes of proprietory right, such as inheritance, purchase, &c. as detailed in the following text:—"An owner is by inheritance, purchase, partition, seizure, or finding; *acceptance*, is for a *Brahmin* an additional mode; *conquest*, for *Cshatrya*; *gain* for a *Vaysya* or *Soodra*." These eight, *Gautama* has declared to be causes of right, but he has not enumerated possession; therefore it is not proper to affirm that twenty years' possession, is a mode of creating proprietory right; and as the causes of inferring proprietory right, are facts of worldly concern, it is incorrect to infer them solely, from a passage of scripture.

"He who *enjoys without right*, even for *many hundred years*, the ruler of the earth should inflict on that sinner the punishment of a thief." To assert therefore that simple possession confers a right of property, would be making an assertion contrary to this text.

"In possession of cattle, male or female, and slaves, &c. force must not be used either by the acquirer, or his son. This is the established rule;"

and besides, loss *cannot accrue from open possession*, because it is not a cause of loss.

It must not be supposed, that the exception in favor of the greater validity of a prior act, with regard to mortgage, gift, and sale, is intended to imply the greater validity of the *posterior act* in a case of this description, provided, that in the instance of landed property, there have been twenty, and in that of personal property, ten years' possession; because in such acts (mortgages and the like) no subsequent transaction can really take effect—"A person is entitled to mortgage, give, or sell his own property, but he has no proprietory right over things already mortgaged, given, or sold." A penalty is propounded for the gift and acceptance of a thing, where there is no ownership—"He who receives a thing which ought not to be given, and he who bestows it; both these are to be punished as thieves, and amerced in the highest penalty."

Nor is the remedy lost. The loss of remedy is indeed declared, in cases of indifference, without good cause; but the property itself is not lost. "*Injury will accrue to the* suit after the expiration of the limited period, where a person *has practised indifference*, and remained passive." So also, "if the property of one, who is neither an idiot, nor a minor, be enjoyed, injury will accrue to the suit, and the possessor will *have a title to the property*." The injury to the *remedy*, is here intended, and not to the *right*. It happens when the possessor puts in this plea, "the plaintiff is neither an idiot, nor a minor. In his presence, I enjoyed the property for twenty years without interruption. Had I unjustly got possession of the property, why did he remain passive all this time? To the truth of this assertion I have many witnesses." In this instance the plaintiff *will be unable to reply*, but his property is not therefore, necessarily lost, as appears from the text; "The King shall investigate judicial proceedings in a *bonâ fide* manner, rejecting inadvertencies," &c. This is the correct interpretation.

It must not be supposed, that as neither the loss of the right, nor the remedy ensues, the text above quoted, *merely intends* an *injunction not to remain passive*, as a person looking on, and not interfering, might be in danger of losing his remedy; for had it been merely intended to convey an injunction against remaining passive, it would have been idle to define a period of twenty years; in as much as there is no reason to apprehend loss accruing on simple possession for any period within the memory of man. If it should be asserted that the definite period of twenty years has been used to obviate any error in the original title deed, according to the text; "He, who by virtue of any title deed, enjoys the property of a competent person for twenty years, the title deed is incontrovertible after that period;" this also is denied, because the construction will not hold good in the case of *mortgages*, *boundaries*, &c. as the capacity of obviating any errors in the title deeds, does not apply to such cases, according to the text. "The ascertained enjoyment of a mortgage for twenty years, in virtue of a title deed, must be upheld, if such title deed be unexceptionable." After the decision of a boundary dispute, a document defining the boundaries, must be granted; any errors which that contains, must be excepted to, in the course of twenty years; and the same rule applies to ten years' possession of personal property.

The loss of the *profits* accruing from the real and personal property, is here intended. *Not the loss of the remedy, or of the right.* So that the meaning is, that although the rightful owner regains his field, after twenty years' uninterrupted possession by another, *yet he loses the intermediate profits.* This interpretation is conformable to the express words of the text; *and is inferible from the fault of the owner in remaining passive.*

But if the possession had been *in his absence, he regains the profits also.*

It is true, that it may be considered improper to propound a loss of accruing profits, because the right to them also exists ; but this can only apply where the profits remain *essentially in statu quo ;* as for instance, in the case of betel-nut, and bread fruit plantations, if the fruit be forthcoming, as well as the trees which yielded it ; but where, from the consumption of the produce ; there is an essential destruction of the profits, there the right to it also, is destroyed.

" He who enjoys without right for many hundred years, the ruler of the earth should inflict on that sinner, the punishment of a thief." From this text it appears, that as, in cases of theft, the amount of the property (unduly appropriated) is to be computed and restored. The rule declaring loss after twenty years, is an exception to the text. But even after twenty years, punishment is to be inflicted, from the possession being unlawful ; and because there is no exception to this part of the text.

Hence, it is established, that from the fault of the owner, consisting in his indifference, and from the express words of the text, after the expiration of twenty years, he cannot recover the produce consumed ; and the same rule applies to personal property enjoyed for ten years.

An exception to this rule, is now propounded ; " except property connected with pledges, boundaries, deposits ; and of idiots, and minors ; and except specified deposits, and the property of kings, women, and learned students."

A pledge, a boundary, a sealed deposit. These *being joined form the plural* pledges, boundaries, and sealed deposits ; an idiot and a minor ; *these terms being compounded form the dual number,* idiots and minors. The property of pledges, boundaries, sealed deposits, and the property of idiots and minors. Sealed deposit, is that which is committed to the care

of another, without any description of its quality or quantity—"That property, which through confidence, is unsuspectingly delivered, is called by the legal term of sealed deposit;" a specified deposit is any thing formally delivered.

The King shall cause the usurper of pledges, &c. to restore the property to the rightful owner, and to pay a fine equivalent to the value of that property, or correspondent to his ability. In the case of mortgages, and the rest, down to the case of the property of learned students, he, who by virtue of long possession, usurps them, should be made to restore the property to the rightful owner. This is merely a repetition of the former text; and the rule respecting the payment of a fine, equivalent to the value of the property usurped, is a new provision.

Where, in the case of usurping lands, houses, &c. an equivalent fine may not be possible; reference must be made to the penalty hereafter propounded, for a removal of landmarks, and an invasion of boundaries. If on account of the great wealth of the usurper, his arrogance would not be subdued by the payment of an equivalent fine, he must be amerced according to his ability. *He must be made to pay so much, as is sufficient to subdue his arrogance.* "It has been declared that a fine is levied for the purpose of correction, and by that the arrogant must be subdued." Hence, it would appear, that the purpose of a fine is entirely penal; but where the offender has not property equivalent to that usurped, he must be amerced in such manner as may subject him to distress.

Where a person is an absolute pauper, correction must be accomplished by way of reprimand, corporal punishment, &c. So says *Menu*, "Recourse must be had, in the first instance, to remonstrance, in the second, to reprimand, in the third, to fine, and in the fourth, to corporal punishment."

Corporal punishment, or that which is inflicted on the person is declared to be ten-fold; and to apply to all but *Brahmins*—"*Menu*, son of the self-existent, has declared ten places of punishment, for the three lower tribes, but the person of a *Brahmin*, is inviolable. The part of generation, the belly, the tongue, the two hands, and fifthly, the two feet, the eye, the nose, both ears, *the property*, and other parts of the body." It should be observed that punishment is to be inflicted on the offending member.

The other methods, are an imposition of labour, or a commitment to prison, as has been propounded; "a person, proved to be a pauper, should be compelled to work at his proper occupation; and, if unable, should, with the exception of *Brahmins*, be committed to prison.

A *Brahmin*, being destitute of property, should suffer dismission from office, &c. "Should he be a delinquent, the punishment of dismission from office, of reprimand, of expulsion, and of branding, should be had recourse to."

"Corporal punishment, deprivation of property, banishment, and branding, are the stated punishments; mutilation is propounded, as punishment for the highest offences; these are declared to be the general punishments." Having premised this, he proceeds; "all these apply to a *Brahmin*, except corporal punishment. A *Brahmin* must not be corporally punished."

The punishment of ignominious tonsure, may be had recourse to; of banishment from the city; of setting a disgraceful mark on the forehead; and of exposure on an ass.

Particular rules have been specified for branding. "For defilement of his spiritual teacher's bed, the mark of a woman's generative parts; for drinking spirituous liquors, the mark of a wine flaggon; for theft, the foot of a dog; for the murder of a *Brahmin*, the figure of a headless man."

But the text of *Apastumba*, directing that a *Brahmin* shall be deprived of vision, must be interpreted to signify, that, at the time of banishment from the city, a cloth should be bound round his eyes, and not that his eyes should be extracted, because such an interpretation would be in contradiction to the texts of *Menu* and *Gautama*; "The person of a *Brahmin* is inviolable." "There is no corporal punishment for a *Brahmin*." It is needless to expatiate further on this question.

Of possession without title. Possession has been declared to be evidence of right, from its being a consequence of it. Should it be objected, that possession cannot afford evidence, because possession may exist without being a consequence of right, it is admitted in reply; "A title is more powerful evidence, than possession, unaccompanied by hereditary succession."

A title, arises from gift, sale, or other cause of right. That is more powerful, or more weighty evidence, in the establishment of right, *because the possession is dependent on a title. Nareda* has said, "Possession, with a clear title, affords evidence; but possession constitutes no evidence, if unaccompanied by a clear title; nor is a title established from mere possession, because possession of another's property, may be obtained by usurpation, or other unjustifiable means." Hence it has been declared, that "he who simply pleads possession, but no title, in consequence of proving such false possession, is to be considered a thief."

But it is now declared, that possession is evidence, when accompanied by the five following conditions; a title, length of time, continuity, non-interruption, and the knowledge of the adverse party. "Possession is five-fold, *titled, long, continuous, uninterrupted, and known to the adverse party*."

By propounding an exception in the case of possession, accompanied

by hereditary succession, it is demonstrated, *that possession, even independent of a title, may be evidence of right.* The connection of the sentence is as follows ; a title, is weightier evidence than possession, provided that possession is unaccompanied by hereditary succession ; that is, the consecutive enjoyment of three ancestors. That again, *is weightier than a title, because, it affords evidence, independently of a title.*

But it must *be understood, that it is independent of the* PRODUCTION *of a title, and not independent of its* EXISTENCE ; for, *its existence is inferible from that possession.*

The exception in favor of hereditary succession, applies to a case beyond the memory of man ; and the text showing the superiority of a title, intends a case within the memory of man ; because, in cases falling within the memory of man, as it is practicable to produce a title ; if such title is not produced, it is certainly inferible that it never existed, and, consequently, in such cases, *the evidence of possession, is dependent on the production of a title ;* but, as from the *non-production* of a title, in cases extending *beyond the memory of man, it is impossible* to *be certain of its non-existence ;* possession, accompanied by hereditary succession may be evidence, in such cases, independently of the production of a title.

It has been clearly laid down by *Catyayana.*—" In cases falling within the memory of man, possession *with a title,* is admitted as evidence. In cases extending beyond the memory of man, the hereditary succession of three ancestors, is admitted as evidence, even though the title be not produced."

The period of one hundred years is defined to be within the memory of man from the text—"The age of man extends to one hundred years." Therefore possession, for upwards of an hundred years ; hereditary, unin-

terrupted, and falling under the observation of the adverse party, confers a right, *as it forms a presumption of its being in consequence of a title.*

But in the case of possession extending even beyond an hundred years, or the memory of man, possession is no evidence, if there be traditional proof of the want of a title. On this is founded the rule—" he who enjoys without right, for many hundred years, the ruler of the earth should inflict on that sinner, the punishment of a thief." " The first occupant, must prove the gift, or other title ; and his successor, possession with a title." Hence it follows that the text, " He who enjoys," &c. must extend indiscriminately to all cases of unauthorized possession.

" That which is held without an apparent title by three ancestors," must be interpreted to mean, without a *demonstrable title, not without the existence of a title ;* for it has already been declared, that right does not accrue, even from the occupancy of centuries, without the existence of a title.

It has been shown that possession, when accompanied by a title, affords evidence of right ; but lest it should be supposed that a title, without reference to possession, affords equal proof ; it is declared, " where there is not *the least* possession, there a title is not sufficient."

Gift, consists in the relinquishment of right by one man, and the creation of it in another. A right in the donee is completed by acceptance of the gift, and not otherwise.

" He, by whom a *title has been obtained,* must produce it when impugned, but his son and grandson, need not ; for *them,* possession is sufficient evidence."

Possession is strong evidence in favor of the second, and stronger in favor of the third, party. But here also a distinction must be made; although in the case of *all three, the property is lost by the non-production of a title;* yet, THERE IS A DIFFERENCE IN THE PENALTY. It has been declared, that "he, by whom title has been acquired, is subject to penalty in case of not producing it; but not his son, or his grandson; though the *possession* of these two also, is forfeited."

"The cause of a litigant party, who dies *pendente lite,* must be taken up by his son. Possession will not decide this suit;" so that it is an established rule, if a litigant party die, while the claim is pending, the suit is not thereby determined.

This is an established rule; a judicial proceeding having been decided by persons specially appointed by the ruler, if a litigant fancy himself aggrieved, an appeal cannot be preferred from them to a community; nor, having been decided by a community, to a corporation; nor, from a corporation, to a family; but having been decided by a family, an appeal may be preferred to a corporation; and by a corporation, to a community; and by a community, to persons specially appointed by the King.

It has been declared by *Nareda,* that after a case has been decided by persons specially appointed by the King, an appeal may be preferred to the King himself. "Families, corporations, communities, and persons specially appointed by the King; these are the tribunals for judicial proceedings, and their relative consequence, is in their consecutive order; a case on which a wager has been laid, on the result having been appealed to the King, and having been decided by him, in Council, and in presence of the authorities who tried the case, the unreasonable appellant must be amerced, if he be cast; but, if he succeeds, the judicial authorities must be amerced."

Next is propounded an instance, in which the decrees of all authorities, are liable to reversal. "He shall reverse cases decided by compulsion, by fear, by women, at night, in the inside of a house, abroad, and those brought forward by enemies."

"An act performed by one intoxicated, or deranged, or diseased, or distressed, or a minor, or compelled, or without interest, &c. is not valid. *Deranged*, disordered in any of the five modes; by a prevalence of phlegm, or of wind, or of bile, or under a morbid influence, or possessed by an evil spirit. It has been established by those versed in judicial proceedings, that the act of him will not be attended to, when it is in opposition to the usages of the city, or country, as appears by the text—"That act, which is in opposition to the usages of the city or country, and that act which has been prohibited by the ruling power, have no validity."

"In a dispute between tutor and pupil, father and son, husband and wife, master and slave, *a judicial proceeding cannot be entertained.*" This is not intended to exclude them altogether, from legal redress, because even between them, judicial proceedings are allowable.

A pupil must be corrected without chastisement; but if this be impracticable, recourse must be had to slender rods composed of strings or cane, and the King will punish one using other instruments than these.

"In a famine, for the preservation of the family, or at a time when a religious duty must indispensably be performed, or in sickness, or during restraint, or confinement in prison, or under corporal penalties, the husband, being destitute of other funds, and therefore taking the wife's property, is not liable to restore it." From this text, it appears, that, *if under other circumstances*, the husband makes away with his wife's property, and being required to refund, and possessing assets, refuses to do so, then a judicial proceeding may be entertained between husband and wife.

"Whatever slave may rescue his master from imminent peril, shall be emancipated, and shall receive a son's share of the inheritance." From this text of *Nareda*, it appears that there is no bar to the institution of a judicial proceeding by a slave against his master, refusing him emancipation, and a share of the inheritance.

Notwithstanding the following text of *Nareda*; "A judicial proceeding, instituted by one, against many, by women, and by a slave, is to be rejected by the legal authorities." Still a judicial proceeding of one, with many, on account *of the same matter*, may be entertained, as appears from the following, and other, texts—"He, who usurps the property of many, he who breaks an agreement entered into with many, and he who has been assaulted by many," &c. The meaning must be, that a judicial proceeding cannot be entertained between one and many, on account of *different matters*, at the same time.

Women also, who are independent, such as milk women, and wives of vintners, may institute judicial proceedings. The exception refers to respectable married women, whose husbands are alive. From their coverture, they cannot sue independently.

Trove property is to be restored by the King, to its owner; but, if he fails to identify it, he shall be amerced in an equivalent penalty.

The rule for the restoration of trove property, is here specially propounded, because finding has been already enumerated among the causes of property; and therefore property, would otherwise in this instance, be consequently established.

"Trove, or waif property, having been recovered by toll keepers, or

police officers, the rightful owner will recover within one year, after which it escheats to the King."

Menu has extended the limitation to three years. "The King shall keep property lost by its owner, three years. The rightful owner, will recover it within three years; after which time, the King will take it." Hence it would appear necessary to keep it in deposit for three years.

If the rightful owner appear within a year, he will recover the whole. "Obeying the dictates of virtuous sages, let the King deduct from trove property, a sixth, a tenth, or a twelfth." Whence it is inferible, that if the owner arrive within a year, the whole is to be restored. If in the second year, a twelfth; in the third, a tenth; and *in the fourth*, a sixth, is to be deducted.

The King is to give a fourth of *his own share*, to the finder. "The King is to keep in deposit unclaimed trove property, *for a year; afterwards a fourth share of it*, goes to the finder, and the King takes the rest."—*Gotama.*

The use of the word "year" here, in the singular number, is *not intended to confine the period to one year;* as is evident from the text—"The king shall keep property lost, in deposit for *three years;*" and the conclusion of the text—"after which the king shall take it;" *merely intends that should the owner not appear within that period, the King is at liberty to use it;* but should the owner subsequently appear, the King, having deducted his own share, *shall restore to the owner a sum equivalent to the property consumed.*

The rules above recited, relate only to gold, and similar valuables; but the rules relative to stray cattle, will subsequently be propounded, under the texts—"He shall pay three *puns* for an animal with uncloven hoofs," &c.

Next is propounded the law relative to gold, &c. *long buried in the earth*, and usually called treasure.

"A king, having obtained *treasure*, shall bestow half of it upon *Brahmins*, but if a *learned Brahmin* be the finder, *he is to keep the whole.* If it be found by *any other person*, the King is to keep it, giving *one-sixth* to the finder. But he, not having represented the finding, and it having been discovered afterwards, the King shall cause him to relinquish the whole, and amerce him."

If a *learned Brahmin*, that is, a priest versed in scriptural lore, and of good conduct, find the treasure, he shall keep the whole; *because, he is the chief being in the world.*

Stolen property is next spoken of. "The King must restore to his subjects, property stolen from them; not restoring it, he incurs the sin of the thief;" not restoring it, the sins both of the robber, and the person robbed, devolve upon him. *Menu* has said; "Stolen property must be restored by the King, to all descriptions of persons. The king consuming it himself, acquires the sin of a thief."

"Having recovered stolen property, he (the King) must restore it, to its right place, or he must pay out of his treasury." "If he be unable to recover the stolen property, the King, so incapable, must restore it, (its value) out of his own treasury."

OF EVIDENCE.

"EVIDENCE is said to consist of *documents*, *possession*, and *witnesses*. In the absence of all these, a *divine test* is prescribed."

Evidence is that, by which a matter is established, or decided. This is two-fold, *human*, and *divine*. Human evidence, is three-fold; *documents*, *possession*, and *witnesses*. Such is the opinion of eminent sages. *Documents*, are of two sorts, *official*, and *private*; *possession*, implies manifest occupancy; *witnesses*, will be treated of hereafter.

Should it be admitted, that documents and witnesses, from their connexion with language, and their capacity of verbal expression, may be evidence; but at the same time, contended that *possession* cannot be evidence, from the absence of this capacity; it is answered, that possession when joined to certain conditions, furnishes presumption, or inference, because it *leads to* a presumption of the *existence*, from its being a *consequence*, of purchase, or other means of proprietary right; or from its not having any independent existence, such right is inferred.

In default of documents, and the other two descriptions of evidence, a *divine test*, the nature, and distinctions of which will be treated of hereafter, is propounded, as another species of evidence to be resorted to, with due attention to *tribe*, *place*, and *time*. This fact is ascertained from the text—"In the absence of all these, a divine test is prescribed;" and also from the nature and distinction of a divine test as evidence, having been declared in the different codes.

"When one adduces human evidence, and the other appeals to a divine test, the king will, in this instance, proceed to examine the human evidence, and will not have recourse to the divine test."

Moreover, where there is human evidence to establish the principal part of a claim, there also recourse must not be had to a divine test; as in the case of a denial of a claim of a debt of one hundred pieces of silver borrowed with interest, should there be witnesses to prove the delivery, but not the amount of it, or the rate of interest specified, and the claimant should offer to prove these facts by divine test, here also notwithstanding the rule regarding partial proof, a divine test cannot be had recourse to, for the purpose of establishing, either the amount of the debt, or the specified interest.

"Where human testimony is applicable to even only one part of the case, that is to be received in preference; and recourse must not be had to persons willing to establish the whole case by supernatural means."

"In the case of a capital offence committed in a desert, in an uninhabited place, at night, or in the interior of a dwelling; and in the case of a denial of a deposit, divine test must be resorted to."

This also is applicable only to the absence of human testimony. Hence it follows, that a decision by divine test, is allowable only in the absence of human evidence. This is the general rule; an exception to it will subsequently be shown.

"In the investigation of a capital offence, or assault and battery, and in all cases of violence *committed long ago, both witnesses, and divine test may be had recourse to.*"

"The proof of established custom among people of the same township, or tribe, depends on *documentary evidence.* There neither divine test, nor witnesses, are available."

So also, in cases relating to pathways, roads, enclosures, and water courses; possession affords the weightiest proof. There, neither divine test, nor witnesses, are available.

In cases relating to the payment, or nonpayment, of wages, between master and servant, to the non-delivery of an article sold, or the non-payment of the price of an article delivered; or when a dispute arises concerning wagers laid at dice, or with sporting animals. In all these cases, the evidence of witnesses must be resorted to, and recourse must not be had to a divine test, or to documents.

In answer to the question proposed, to which of the two parties will the greater weight attach, when each adduces evidence, undistinguishable in point of preference, the one asserting a prior, and the other a posterior, claim? It is declared, "In civil suits generally, the *posterior act, is of the greater validity.*"

Thus if one party proves a loan, by its delivery, and the other pleads that he owes nothing, on account of repayment; here in these two acts of delivery, and repayment, both being established by evidence, the repayment is of greater validity, and the party who pleads the acquittance obtains judgement.

So also, if a person having borrowed one hundred pieces of money at two *per cent,* should, at a subsequent period, agree to pay three *per cent,* and there being evidence of both engagements, that for three *per cent* is of the greater validity, from its having occurred at a posterior date; and because,

were it not to supersede the prior act, it would be inoperative. It has moreover been declared, "A posterior act, not superseding a prior one, has no relevancy."

An exception to this rule has been propounded—"In cases of mortgage, gift, or sale, the prior act is of the greater validity." In these three instances, the prior act is the more valid, as, if a person having mortgaged a piece of land to one person, for a valuable consideration, should subsequently mortgage the same piece of land to another, for a valuable consideration, the right will be with the first mortgagee, and not with the second. So also in the cases of gift and sale.

The nature of oral evidence, is now to be declared. A witness may be either from seeing, or hearing, as has been declared by *Menu*; "Evidence of what has been seen, or of what has been heard, is admissible. Witnesses are two-fold; a witness appointed, and a witness unappointed; an appointed witness, is one nominated to give testimony; an unappointed witness, is one not so nominated."

The appointed witness again, is divided into five classes; and the unappointed, into six; making in all, eleven distinctions, as has been declared by *Nareda*; "Eleven descriptions of witnesses are recognized by the learned in law." Their distinctions also, have been declared by him; "A witness by record, by memory, by accident, by secrecy, and by corroboration."

The nature of a witness by record, and the rest, has been defined by *Catyayana*; "One brought by the claimant himself, and whose name is inserted in the deed, is called a witness by record." "The witness, who for the purpose of giving greater publicity to a transaction, repeatedly ob-

serves upon, and has been reminded of it, is termed a witness by memory. He, who fortuitously arrives at the time of a transaction, and is cited as a witness, is termed a witness by accident. A distinction has been propounded between these two descriptions of witnesses, although they are both unrecorded—"Two witnesses for the substantiation, are termed, unrecorded; one, intentionally brought; and the other, accidentally coming." One who standing concealed, is caused by the claimant to hear distinctly the defendant's words, for the purpose of establishing the allegation, is termed a witness by secrecy. One who subsequently confirms the testimony of witnesses, whether his information be mediate, or immediate, is termed a witness by corroboration.

Nareda has defined the six descriptions of unappointed witnesses—"A Townsman, a Judge, a King, one authorized to manage the affairs of the parties, one deputed by the claimant; and (in family disputes persons of the same family." Here the term "Judge," is intended to include scribes and assessors, from this verse, "when a king investigates a suit, the witnesses are declared to be the scribes, Judge, and assessors, in succession."

He next declares the qualification, and number, of witnesses—"Religious, generous, of honorable family, addicted to veracity, lovers of virtue, candid, having offspring, wealthy, conformers to traditional and written law; and in number three, are to be considered witnesses, according to tribe and order, or indiscriminately."

Religious, addicted to piety; *generous,* habituated to making gifts; *of honorable family,* descended from a noble stock; *addicted to veracity,* accustomed to speak the truth; *lovers of virtue,* not preferring their temporal interests; *candid,* not deceitful; *having offspring,* having sons; *wealthy,* possessing much gold and other property; *conformers to traditional, and*

written law, punctual in the performance of indispensable and enjoined ceremonies.

Such persons, being three in number, are to be considered witnesses ; three, that is, a number not less than three. There cannot be less than three, but any number above that, is optional. Such is the meaning.

According to tribes, that is, not differing in tribe. Tribes, such as the *Moordhabushiktas*, and the like, whether in the direct, or inverse order. Thus *Moordhabushiktas* are witnesses in the cases of *Moordhabushiktas.* So also in the cases of *Ambushthas* and others. *Order,* the *Brahminical* order and the like. Thus *Brahmins,* of the qualification and numbers above mentioned, are witnesses for *Brahmins,* and the same with *Kshetryas* and the rest. So also women, should be made witnesses for women, as *Menu* has said, "Women, should regularly be witnesses for women."

Private* documentary evidence is now treated of. This is of two descriptions ; prepared by the party himself, and prepared by others ; but that which is prepared (written as I suppose) by the party himself, requires no witnesses. That prepared by others, requires witnesses. The mode of proving these two, depends on local, and peculiar usages, as *Nareda* has said, " Documentary evidence, must be considered two-fold, prepared by oneself, or others ; requiring, or not requiring, witnesses. The establishment of their validity depends on the usage of the country.

When any matter is agreed upon, voluntarily, attested documentary evidence, specifying the creditor, is to be employed. This may be supported by witnesses of the prescribed qualifications, or else such wit-

* Public documentary evidence is spoken of in the chapter of Judicial Proceedings.

nesses alone, may be adduced. The act of a party himself, may be proved without documentary evidence.

"The year, month, fortnight, day, name, tribe, family, scholastic title, the names of the parties' fathers, &c. must be specified." *The year*, twelve month; *the month*, as *Cheyt* or other; *the fortnight*, the light or dark side of the moon. *The day*, the first, or other day of the moon's age; *name*, the name of the creditor and debtor; *the tribe*, *Brahminical* or other; *family*, descended from *Vashistha* or other stock. It must be distinguished also with the *scholastic title*, as the title of distinction from having read a certain portion of the *Vedas*. The names of the parties' fathers, that is to say, the fathers of the creditor and debtor. From, &c. must be understood the quality and quantity of the article, the terms, and so forth.

"The matter being concluded the debtor must subscribe his name, with his own hand, and that the above is agreed to by him, the son of such a one."

"The witnesses being equal, should write with their own hands, specifying the names of their fathers, that is to say, such and such persons, are witnesses to the matter in question." *Being equal*, equal in point of numbers and qualifications.

If the debtor, or the witnesses, are ignorant of the art of writing, then the debtor, and each of the witnesses, by means of others, in the presence of all the witnesses, must cause to be written their assent; as *Nareda* has said, "That debtor who is ignorant of the art of writing, shall cause to be written his assent; or if the witness be, by means of another witness, in presence of all the witnesses."

That document written by the defendant, with his own hand, has been

declared by *Menu*, and others, to constitute proof without witnesses, provided it was not obtained by force or compulsion. *Nareda* has declared, "that writing is not proof, which is executed by a person intoxicated, by an idiot, by a woman, by a minor, and that which is obtained by compulsion and by intimidation."

Documents should specify whether or not the loan was accompanied by a pledge, according to peculiar local usages, and should be consistent with respect to the import and language. This is all that is requisite. It is not necessary to express the terms in learned language. It may be written in the local dialects.

Where the parties are not of the same tribe or order, as *Moordhabushiktas* and the rest, and *Brahmins* and the rest, may be made witnesses for each other, reciprocally.

Incompetent witnesses, have been declared by *Nareda* to be of five descriptions —"By those skilled in the law, witnesses who are incompetent have been found to be of five kinds, by reason of interdict, of delinquency, of contradiction, of self-appointment, and of intervening decease. Those who are incapacitated by interdict are "learned students, religious devotees, superannuated persons, ascetics, and the like." By the term, *and the like*, is meant persons disobedient to their fathers, &c. as *Sancha* has said; "Persons disobedient to their fathers, resident in the families of their spiritual preceptors, ascetics, inhabitants of the forest, and infidels, are incompetent witnesses."

Those who are incompetent by reason of delinquency, are "Thieves, public offenders, irascible persons, gamblers, cheats. These are incompetent from delinquency. There is no truth in them." *Irascible persons*, those subject to anger; *gamblers*, those who engage in dice.

"Of witnesses recorded and summoned by a litigant party, should *one* utter a contradiction, *all* will be rendered incompetent by that contradiction."

Witnesses incompetent by reason of self-appointment. "He who not having been summoned, comes and offers his evidence, is technically called *Seoochee,* or spy. Such testimony is not available."

Incompetent by reason of intervening decease. "How can any person give evidence, touching a claim, not having ascertained the nature of it previously to the decease of the claimant?" The meaning is this; as to what claim, or in whose behalf shall the witnesses depose, the plaintiff or defendant not being in existence, or being dead, the claim not having been preferred, and the nature of it not having been explained, by the parties, to the witnesses; and they not having been desired to bear witness in the matter? These are incompetent witnesses by reason of intervening decease.

When sons, or others are instructed by a father, or other person at the point of death, or even in health, to give evidence in a certain matter, they may be witnesses after decease; as *Nareda* has said, "after the death of the claimant, except those instructed by him on the point of death;" also, "a witness may give evidence in a matter, touching the six species of deposits, after the death of the claimant, having been, in a *boná fide* manner instructed by him to bear witness."

Other incompetent witnesses have also been enumerated. "A woman, a minor, an old man, a gamester, an intoxicated person, a madman, an infamous person, a juggler, an infidel, a forger, one deformed, one degraded from caste, a friend, one interested in the subject matter, a partner, an enemy, a robber, a public offender, one convicted, an outcast, and others

are incompetent witnesses." *An old man*, one whose age exceeds eighty years; *one deformed*, destitute of an ear, or other organ; *a public offender*, one relying on his own violence; *one convicted*, one whose falsehood has been proved; *an outcast*, one deserted by his relations.

By the term, "*and others*," is indicated those incompetent witnesses, who are pointed out in other texts.

By consent of both parties, even one person of virtuous knowledge may be a witness.

"Every man may be a witness in cases of abduction, robbery, assault, and offences against the public." But even here, those cannot be witnesses who are incompetent by reason of delinquency, or of contradiction, or of self-appointment, because the reason of incompetency, i. e. there being no truth in them, exists here also.

"The witnesses should be made to depose, having been placed near the plaintiff and defendant." They need not speak when questioned apart. "The Judge, being in the assembly, will interrogate the witnesses placed near the plaintiff and defendant. He will require their testimony, except in the case of *Brahmins*, in the presence of the gods, and priests. In the forenoon, let the Judge being purified, severally call on the twice-born, being purified also, turning either to the north or to the east. Having called the witnesses, he shall interrogate by the solemnity of a heavy imprecation, all those persons acquainted with the rules of evidence, and the circumstances of the case."

Menu has propounded a rule to be observed in taking the depositions of *Brahmins* and others. "Let the Judge imprecate a priest, by his veracity; a soldier, by his horse, elephant, and weapons; a merchant, by his

kine, grain, and gold; a mechanic, or servile man, by imprecating on his own head, if he speaks falsely, all possible crimes." The meaning is, he shall adjure the *Brahmin* by saying, if you speak falsely, your truth will be destroyed; a *Kshetrya*, by saying, your horse, elephant, and weapons, will become useless; a *Vaisya*, your cattle, seeds, and gold, will be unproductive; a *Soodra*, if you speak falsely, all sins will be on your head.

"Regenerate men, who tend herds of cattle, who trade, who practice mechanical arts, who profess dancing and singing, who are hired servants, or usurers, let the Judge exhort and examine, as if they were Soodras."

If a defendant take exception to witnesses, and if it be susceptible of occular proof, as in cases of minority, the exception must be tried by that; but in cases not susceptible of such proof, it rests upon the defendant's assertion, and on popular report, but not on other evidence, so that there may not be infiniteness.

"A person failing to establish an exception openly made against witnesses, should be punished; but, if proved, the witnesses are to be dismissed, and deprived of the privilege of giving evidence."

"Should the claimant, relying solely on the veracity of his witnesses, be defeated, he shall be caused to pay a fine."

"Those places assigned to offenders, and to heinous sinners, and those places assigned to house burners, and those assigned to the murderers of women and children, he who gives false evidence, will attain. All the virtues practised by you in hundreds of other worlds, will accrue to him, whom by your falsehood you have injured." This must be understood as relating to the servile class, and regenerate men who tend herds of cattle, &c.

This is declared solely for the purpose of creating awe in the witnesses.

Nareda has said, "By ancient virtuous texts, and by exaggerating the qualities of truth, and by denunciating falsehood, he will forcibly inspire them with awe."

He, who having agreed to give evidence, and having been admonished, remains entirely mute, must be caused to pay to the creditor, the whole debt with interest, together with a tenth part of the amount of the debt, which will go to the king.

"That mean person, who, though acquainted with the nature of the affair, does not give evidence, is equal in point of sin, and of punishment, to false witnesses."

"Whenever false evidence has been given in any suit, the King must reverse the judgement, and whatever has been done, must be considered as undone."

"In a contradiction, the assertion of the majority; where the numbers are equal, that of the respectable party; where there is a contradiction among respectable witnesses, that of the most respectable," must be received.

Where respectable persons are few, and others are many, there also the assertion of the respectable party is to be received. This is inferible from the text, "By the consent of both parties, even one person of virtuous knowledge, may be a witness," which demonstrates the great superiority of good qualities.

"He will be successful, whose witnesses depose to the truth of his statement, but the defeat will certainly be his, whose witnesses depose contrariwise."

That assertion which is unpremeditated should be received, as has been declared, "That assertion which is unpremeditated and blameless, should be received, and, having been made, the witnesses should not be perpetually interrogated by the King."

"Having departed from strong evidence, he who relies on weak, cannot recur to the former means of proof, after the decision has been given against him." "Even witnesses who were not originally named, should be preferred to a divine test." From the text, "A wise man will reject the evidence of divine test, if witnesses are procurable;" but if witnesses are not procurable, recourse must be had to divine test. After this, recourse cannot be had to any other means of proof. Therefore, the proceedings must be here terminated.

Where the defendant takes exception to his own witnesses, being not content with the testimony given by them, as the liberty of adducing other means of proof, has not been extended to a defendant, the purgation of his witnesses must be effected by a delay of seven days, for the appearance of calamity, to be inflicted by Providence, or the ruling power. If the exception be established, the witnesses must pay the debt, which was the subject of suit, and are to be amerced according to their ability. If the exception be not established, the defendant must rest content.

Menu has declared—"The witness who has given evidence, and to whom, within seven days after, a misfortune happens, from disease, fire, or the death of a kinsman, shall be condemned to pay the debt, and a fine."

The proof of a negative, is dependent on the establishment of an affirmative; and the establishment of an affirmative, is not dependent on the proof of a negative. Therefore, the proof of the affirmative only, is pro-

per. The mode of proceeding, is invariably propounded with reference to the nature of a plea. " When a special exception, or former judgement, is pleaded, the defendant shall adduce the proof; in a total denial, the plaintiff; in a confession, there is no issue." In one suit, the proof cannot rest on both parties.

" In the case of two claimants to the same matter, both having witnesses, the witnesses of the first claimant must be received," that is to say, *the witnesses of him who made the first representation.* This rule indicates whose witnesses should be received in the case of two claimants to the same property, *by right of inheritance, without any ascertainable priority, as to the time of acquisition;* and the rule " evidence having been given," &c. is an exception to it. Thus, the witnesses of prior and posterior claimants, being equal in point of number and quality, those of the prior claimant must be interrogated; but his adversary's witnesses must be interrogated, where the witnesses of the posterior claimant are greater in point of respectability, or double in point of number. *Here there is not proof* of a negative, as both parties assert an affirmative; and the case being unconnected with the four descriptions of answer, the settled rules of pleading do not apply to the example cited. Should it be urged that it is equally allowable to assign two means of proof to both parties, as two means of proof to one party in the same cause, still the holy preceptor does not acquiesce in such reasoning, as it is not inferible from the use of the term " even," nor from the context, nor from the subject matter.

" Suborners, and witnesses guilty of falsehood, should be severally punished in a penalty double that of the suit, and *Brahmins* should be expelled." He, who by means of a donation of grain, or other article, induces witnesses to depose falsely, is a suborner; and they who falsely depose accordingly, are to be punished severally, in a penalty double

that which is awarded on the loss of each suit; and Brahmins are to be expelled from the country, but not punished.

This must be understood as having special relation to a case, where the operation of avarice, or other passion, has not been ascertained. *Menu*— "If he speak falsely, through covetousness, he shall be fined a thousand *panas;* if through distraction of mind, two hundred and fifty, or the lowest amercement; if through terror, two mean amercements; if through friendship, four times the lowest; if through lust, ten times the lowest; if through wrath, three times the next or middlemost; if through ignorance, two hundred complete; if through inattention, an hundred only." By the numerals one thousand, &c. are always to be understood *panas*, or copper pice.

A just king will punish the three inferior tribes causing false evidence by amercement, but he will expel a *Brahmin.* This relates to a case of repetition, as is denoted by the use of the present time. Having amerced the three tribes *Kshetryas*, and the rest, with the fines above specified, he will punish them with stripes, &c. Corporal punishment, includes cutting off the two lips, and amputation of the tongue; and extends to the deprivation of life; and this must be understood as being proper to be inflicted, with reference to the nature of the false evidence.

Menu says, "Never shall the king slay a *Brahmin*, though convicted of all possible crimes;" and proceeds, "no greater crime is known on earth, than slaying a *Brahmin:* and the king therefore, *must not even form in his mind, an idea* of killing a priest."

"He, who having been called on for his testimony, being influenced by his passions, conceals it from others, should be punished eight-fold, and, if a *Brahmin* should suffer expulsion." The meaning is, he who being

called on for his evidence conceals it from the rest of the witnesses saying, "I am not a witness in this case," should be amerced in eight times the amount awarded on the loss of a claim; and if a *Brahmin*, and *unable to pay this fine*, he should suffer expulsion. "*Bibasum*" or expulsion, must here be interpreted *denudation, destruction of house and home*, or banishment from the country, according to the circumstances of the case. When all the witnesses conceal, they are equally culpable. But when, after having given their testimony, they contradict it, they must be punished with reference to the motive. *Catyayana* has declared, "Persons having spoken afterwards, contradicting, should be amerced as prevaricators."

Witnesses, cited by one party, should not be secretly approached by the other. *Nareda*—"He shall not secretly approach a witness summoned by another, neither should he seduce him by means of another; a person so practising, loses his suit."

Standing mute, and deposing falsely, have been generally prohibited. To this an exception is propounded; "*A man may speak falsely in a case involving death to any of the tribes.* Where it is probable, that by speaking truth, death may happen to a *Soodra*, a *Vaysya*, a *Kshetrya*, or a *Brahmin, there a witness may speak falsely. He should not speak truth.*"

Where, in an accusation, supported by circumstantial, or other, evidence, if by speaking truth, death will ensue to any of the four tribes, and by speaking falsely, death will not ensue, *in that case falsehood is enjoined*; but where by speaking truth, death will ensue to one party; and by speaking falsehood, death will ensue to the other, there silence is enjoined, should the King consent. But, should the King by no means, admit of silence, the evidence should be nullified by contradiction; and if that cannot be effected, the truth must be told; because, by speaking falsely,

there will be the double offence, of the homicide of one of the tribes, superadded to that of falsehood; but by speaking truth, there will be the offence of homicide of one of the classes only.

In this case, expiation must be performed, according to law. "A *Saruswuttee* oblation must be presented by regenerate men, for the sake of purification from the offence." Belonging to the goddess *Saruswuttee*, therefore called *Saruswuttee*. The oblation consists of sound, warm, boiled rice.

Although, in other instances, by the removal of a graver offence, the removal of its concomitant slighter offence is occasioned; yet, in this instance, from the expression of the authority, and the injunction of the expiation, the graver offence is removed, and its concomitant offence, though slighter, is not removed. The authority to speak falsely, must also be understood, as extending to travellers, and others, in answering general questions in cases where the lives of any of the tribes are in danger; nor is any expiation necessary in such a case, for, as there is no express prohibition, no penalty shall attach to witnesses or others, on the truth of the story appearing in another cause, and at another time. This also, is inferible from the text.

There are two descriptions of private documentary evidence; one prepared by the party himself; and one prepared by others. That prepared by the party himself does not, and that prepared by others does, require witnesses. The mode of proof depends upon local, and peculiar usages. *Nareda* has said, "A document must be considered as two-fold; prepared by himself or others; requiring, or not requiring witnesses. The establishment of their validity depends on local usages."

In the case of an instrument prepared by others, the agreement having

been voluntarily entered into between the plaintiff and the defendant, whether relating to gold, or other valuables ; then a writing must be executed, fixing the period of payment, and the monthly rate of interest, for the purpose of establishing the fact at the expiration of that period ; and it must be attested by witnesses of the description already mentioned ; with the insertion of the creditor's name in writing ; or else witnesses of the description before mentioned, may be employed, as appears from the following text :—" For the purpose of proving any act done by the party transacting it, witnesses may be relied on, in judicial proceedings. The act of a party may be good without an instrument."

" The year, month, fortnight, day, name, tribe, family, scholastic title, the names of the parties' fathers, &c. must be specified."

An agreement having been prepared, the debtor should sign his name with his own hand, and should add, " what is above written is agreed to by me, the son of such a one."

The witnesses also, being equal, should write with their own hands, specifying the names of their fathers, that they, being such and such persons, are witnesses to the matter in question. " Those persons, who are specified in the instrument, as being witnesses, should each individually, write with his own hand, that he, such a one, is a witness in the matter in question. *Being equal*, signifies equality in point of number and qualifications.

" The debtor who is ignorant of the art of writing, shall cause to be written his assent ; or if the witnesses are ignorant, by means of another witness, in presence of all the witnesses." The scribe, being solicited by both parties to the instrument, shall write at the foot of it, " I *Devadutta*, (or other name,) the son of *Vishnumitra*, (or other name,) have written the above."

A document written by the party himself, may be held to be proof without witnesses, provided it was not obtained by force, &c. The instrument which has been written by the obligor, with his own hand, has been declared by *Menu*, and other sages, to constitute proof, without witnesses, provided it were not obtained by force, &c.

An instrument written by a party himself, or by another, should specify whether or not it is accompanied by a pledge. It should be made out according to local usage, and should be consistent with respect to the import and language. This is all that is requisite. It is not necessary that its conditions should be expressed in technical terms. It may be written in the peculiar local dialect. Here it is not, as in the case of a public and royal instrument, necessary that it should be expressed in technical language.

"A debt specified in writing must be paid by three persons," that is by the obligor, his son, and his grandson; not by the fourth in descent, or those after him.

An exception is now mentioned—"A pledge may be enjoyed, until the debt is repaid." This text has been recited, lest it should be supposed from the number being limited to three, that in the case of a bond debt, *accompanied by a pledge*, he who is exempt from the payment, is not entitled to redeem the pledge. It implies that until the *debt is discharged by the fourth or fifth in descent, the pledge* may be enjoyed. It follows that the fourth, or those after him, in descent, are entitled to adjust a debt, accompanied by a pledge. Should it be objected that this exception is superfluous, from the occurrence of a former text; "An usufructuary pledge is never forfeited;" it is replied, were it not for this exception, that text might be considered to extend to three persons only.

"An instrument being in another country, or badly written, or destroyed, or effaced, or stolen, or torn, or burned, or divided, he shall cause another to be executed."

Nareda has declared, "In the case of an instrument being deposited in another country, or destroyed, or badly written, or stolen; should it be in existence, time must be allowed; should it not be in existence, *ocular evidence* must be resorted to." A period of time must be allowed for the purpose of producing an instrument, which is in another country, in existence, and forthcoming; but should it not be in existence, and not forthcoming, the cause must be decided by having recourse to the *ocular evidence* of such witnesses as have formerly seen it. But where there are no witnesses, the decision must be according to a divine test; as appears from the text, "Recourse must be had to a divine test, in a case where there is no writing or witnesses."

This relates to a private document. But the same rule is applicable to a royal document; there is this distinction. In all causes, that which is termed a royal document, is signed with the King's hand, and sealed with his seal.

Another species of royal document has been defined by *Vriddha Vashistha*. "That is termed a decree, which comprises the matter adduced to be proved, the pleadings, the answer, and the decision; sealed with the royal seal, and signed by the chief Judge. The subject matter being proved, he shall give the decree to the successful party." The assessors also, shall give it under their hands, that they, being sons of such and such persons, approve the judgement. From the following text of *Menu*; "Those assessors, who are there present, conversant in the holy texts, shall give their signatures, under their own hands according to the usual

custom." The cause is not divested of doubt, unless all the assessors are unanimous, as *Nareda* has declared; "Where all the assessors are unanimous in opinion, that is right, the cause is divested of doubt, otherwise it remains doubtful." This applies to a suit, consisting of four divisions, from the text; "That which establishes the thing to be proved, which consists of four divisions, and which bears the royal seal, is termed a decree *pro*."

But where the cause is lost, "as in the five cases, one who contradicts, a prevaricator, one who does not attend, one who stands mute, and one, who being summoned absconds;" in such cases there is not a favorable decree, but a decree *contra*. This is awarded for the purpose of adjudging amercement at a future period. But a decree *pro*, is for the purpose of enabling the party to plead a former judgement. This is the distinction.

He next treats of the means of clearing up doubt from a document. "Any doubt attaching to a document, may be cleared up by persons who wrote the *manuscript*, &c. by reconcilement to probability, by evidence, by a distinguishing mark, by relation, and by means of inference." The ascertainment of the fact, whether a document is genuine or fabricated, may be by those who wrote it. The meaning is, that one document may be proved by means of another written by the same person; and if the writing assimilates, here is proof. From the, &c. must be understood, the comparison of the hand-writing of the attesting witnesses, and the scribes, by means of other documents. Reconcilement *by means of probability*, is the meaning of the term, *reconcilement to probability*; reconcilement of the relation between the property, and the time, place, and persons, that at such a time, and in such a place, such a person is likely to have possessed so much property. This is the reconcilement to probability. By evidence, means that of the attesting witnesses. By a dis-

tinguishing mark, some peculiar mark, such as *Sree*, &c. By relation, that is, the former relation of money transactions between the parties, on account of mutual confidence. By means of inference, is the consideration as to probability of the receipt of so much property, from such a person. These are the means, and the import is, that by these means, doubt attaching to the document may be cleared up. But where the doubt cannot be cleared up, then recourse must be had to witnesses, for the purpose of decision, as *Catyayana* has declared, "Where a document is impugned, the claimant must adduce the witnesses named therein." This text relates to a case, where the witnesses are forthcoming; but where they are not forthcoming, the text of *Harita* applies; "Having impugned a document, by saying, this document was not executed by me, but must have been fabricated by him, the decision must be by divine test."

In answer to the question, what is to be done after the doubt has been cleared up? He replies; The document having been cleared from doubt it follows that the debt must be discharged. But in answer to the question, what is to be done in the event of the debtor's being unable to discharge the whole debt? He replies, the debtor having paid by degrees, shall record the payments on the back of the document, and the creditor shall write with his own hand the amount of his receipts; or a creditor should give to the debtor, a written receipt for what has been repaid, drawn up in his own hand-writing.

"Having discharged the whole debt, he should tear up the writing, or cause another to be executed for acquittance." This whether by degrees, or all at once. "The repayment of an attested debt, should be attested." One should repay an attested debt, in presence of its former witnesses.

The three-fold description of human evidence, documents, witnesses,

and possession, have been propounded. Now being about to treat of divine test, in its proper place, he states the general definition of a divine test—commencing with the text, " Scales, water, fire," &c. He now declares the divine tests; " Scales, water, fire, poison, and sacred libation, are the divine tests for purgation."—According to the sacred code, five ordeals, commencing with scales, and ending with sacred libation, are to be administered for the purpose of purgation; or the removal of suspicion, in a doubtful matter; grains of rice, are added to the above ordeals. Hot beans form the seventh mode. And how then, can there be only those enumerated? Those are for heavy charges. Should it be objected, that in trifling charges also, sacred libations are made use of from the text; " In a trifling case, sacred libations are to be administered."—It is admitted, but the enumeration of sacred libations, together with scales, and the rest, is not intended to confine its use to heavy charges, but for the sake of including its use, in a charge supported by an asseveration—otherwise it might be confined to the case of a presumptive charge from the text; " The ordeals of scales, and the rest, should be administered to persons under a charge supported by asseveration—but, in cases of presumptive charges, grains of rice, and sacred libations. In this, there is no doubt."

An ordeal, is not like human evidence, confined to an affirmative only, but it extends indiscriminately, both to affirmatives and negatives; so that in the case of a total denial, or a special exception, or a plea of former judgement, ordeal may be resorted to, at the option either of the plaintiff, or the defendant.

An exception has been propounded to the rule concerning binding asseverations. " Let him act, without binding himself to abide by the award, in the case of treason against the king, or of a grievous offence." " Let an ordeal be administered, without binding by the award, to persons accused by kings and others," &c. But the ordeal, by grains of rice, is only for

petty thefts, as appears from the text of *Pitamaha*—" The ordeal by grains of rice, is to be administered in cases of theft, but not in other cases. This is certain"—" The ordeal by hot beans has been propounded, for those who are accused of robbery."

Moreover, other divine tests are used on trifling occasions. " By his veracity; by his horse or elephant, and his weapons; by his kine, grain, and gold; by the deities; by his ancestors; and by the relinquishment of the fruit of virtuous actions—or let him touch the heads of his children, and wife; or on all occasions make use of sacred libation."

These divine tests, propounded by *Menu*, are declared by *Nareda* and others, to be applicable to trifling occasions. Should it be asserted that these are in the nature of an ordeal, from the decision not being founded on human evidence; it is replied, that, although these are ordeals, according to popular acceptation, yet there has been a distinction propounded between these, and the ordeals by scales, &c. the decision in the latter case, being immediate, and in the former, future. But the divine test, by sacred libation, is classed with the ordeal of scales, &c. not that the decision by it, in common with the ordeal of scales, &c. is immediate, but because, in common with those, it is applicable to weighty charges, and charges supported by a binding asseveration. But the ordeal by grains of rice, and hot beans, is not classed with the ordeal of scales, &c. although the decision by both modes is immediate, because they are applicable to trifling occasions, and presumptive charges. These ordeals, and divine tests, are to be resorted to, in cases of debt, and other occasions, according to circumstances.

But the text of *Pitamaha*—" In actions, relative to immovable property, ordeals are to be avoided," is explained by the interpretation, that they are to be avoided, *in case documents and neighbouring witnesses*, are forthcoming.

Should it be objected, that in other actions also, recourse cannot be had to ordeals, where there exist other means of proof, it is admitted; but in actions for debt, and the like, should witnesses of the prescribed qualifications, be adduced by the plaintiff, and should the defendant bind himself to abide by a penalty, and rely on an ordeal, then an ordeal may be resorted to, *because there may be some fault in witnesses, and because, there cannot be any fault in an ordeal, from its being an indication of the reality and a sign of truth.* As *Nareda* has declared, "truth consists in reality, and litigation is dependent upon witnesses." In a case admitting of divine decision, recourse must not be had to oral, or documentary evidence. The text of *Pitamaha*, is propounded, not for the purpose of excluding ordeals altogether, but for the purpose of excluding the supposition, that in actions relative to immovable property, the decision by ordeal, may be resorted to by a defendant who, binding himself to abide by a penalty, relies on ordeal, *there being documents, and neighbouring witnesses.* Should this not be the interpretation, then in actions relative to immovable property, there could be no decision in the absence of documents, and neighbouring witnesses.

"Having called the person fasting, at sun rise, who has bathed with his clothes on, let him administer the ordeals, in presence of the prince, and of *Brahmins.*" The Judge shall administer the ordeals, having called the person, who is so subjected to them, *in the morning, at sun rise, fasting, having bathed in his clothes*, in the presence of the prince, and of the attendant *Brahmins.* "Ordeals for purgation, are always to be administered to a person, fasting for three nights, or for one night in a wet garment." The difference here propounded by *Pitamaha*, as to the degree of fasting, must be regarded in practice, according as the matter is grave, or trifling; great, or small. The rules regarding fasting, should be applied also, to the Chief Judge; from the text of *Nareda*, "Let the Chief Judge transact

all matters by ordeal, fasting, in the same manner as sacrificing priests conduct sacrifices by order of the king."

Although the time of sun rise, is here propounded without distinction, yet by approved practice, ordeals are to be administered on Sundays. In the morning, the ordeal of fire, in the morning the ordeal of scales, must be administered. In the forenoon, that of water must be administered, by a person desirous of discovering the truth. The purgation by sacred libation, is propounded for the first part of the day. In the latter part of the night, when it is very cool, the ordeal by poison, must be administered. These distinctions, propounded by *Pitamaha*, must be observed. As no particular time has been propounded for the ordeals by grains of rice, and hot beans, they must be administered in the morning, from the following general injunction of *Nareda*; "The administering of all ordeals, has been declared proper in the morning."

"The day being divided into three parts; the first part is termed the morning, the second, the forenoon, the third, the evening. The distinction of time must depend on the cases of injunction, or prohibition. The cases of injunction are now declared. The frosty, and cold seasons, and the rainy seasons, are declared the proper times for administering the ordeal by fire; water, in the autumn, and summer season; poison in the frosty and wintry months, *Cheyt*, *Aughun*, and *Bysaakh*. These three months are common, and not adverse to any ordeals. Sacred libation may be given at all times, and the scales are not confined to any particular period." As no distinction has been propounded for the ordeal by grains of rice, it is not limited to a particular period.

The cases of prohibition are as follow:—"Purgation should not be by water in the cold weather, nor should purgation be by fire in the warm weather; nor should poison be administered in the rainy weather, nor

the purgation by scales in the windy weather ; *nor in the afternoon, nor in the evening, nor in the forenoon.*

" Ordeal by scales, is declared for women, minors, old men, blind, and lame persons, *Brahmins*, and sick persons. Fire, and water, or seven barley corns of poison, for a man of the servile tribe." The term *women*, implies the sex in general, without respect to tribe, age, or condition. The term *minors*, signifies those who have not attained the age of sixteen years, without respect to tribe. *Old men*, those who have attained their eightieth year. The ordeal by scales alone, is declared fit for the purgation of the persons above enumerated. A red hot ploughshare, or hot beans, for a *Kshetrya*, and water for a *Vaysya*, as appears from the disjunctive term " or." Seven barley corns of poison, are for the purgation of a man of the servile tribe, and from the declaration of scales being for *Brahmins ;* and from the declaration in the text " or seven barley corns of poison," that poison is the ordeal for *Soodras*, it is proper to apply the ordeals of fire and water, to *Kshetryas* and *Vaysyas*.

This has been explicitly declared by *Pitamaha ;* " Ordeal by scales is to be administered to a *Brahmin*, and fire to a *Kshetrya ;* water is declared for a *Vaysya*, and one should cause the ordeal by poison to be administered to a *Soodra*.

But the text, depriving females of ordeal, namely, " When the truth is sought after, an ordeal will not be administered to those who are doing penance, or severely afflicted, or sick, or devotees, or women," has been recited for the purpose of taking away the alternative allowed in other cases, namely, " *by consent* either party may have recourse to it."

In a charge accompanied by a binding asseveration, women, &c. being the parties charged, the ordeal is to be administered to those making the

charge; and where those, that is to say women, &c. are the parties making the charge, the ordeal is to be administered to the party charged; but where such parties accuse each other, there is an option.

This text, is for the purpose of defining the ordeals of women and the rest, because, in the months of *Cheyt*, *Aghun*, and *Bysaakh*, which are common to all ordeals, all might be applicable to them. Nor are all times fit for the ordeal of scales being administered to women. The ordeal by poison, has not been declared for women, nor has that by water been propounded for them. "By the scales, by the sacred libation, and the rest, their hidden secrets must be exposed." The injunction of the scales, sacred libation, fire, &c. excluding poison and water. The same rule is applicable to minors, and the others enumerated. The injunction as to the use of ordeal by scales, &c. for *Brahmins* and the rest, does not make scales alone common to all seasons, as is evident from the text of *Pitamaha*.

The purgation by sacred libation, is declared applicable to all tribes. *All these are declared applicable to all, except poison to Brahmins.* Hence, the text has been propounded, for the purpose of determining that the ordeal is to be by scales, &c. in a season which is common to all, and where many ordeals would be admissible.

In the rainy season, fire alone, is for all. In the wintry and frosty season, there is an option either of fire or poison to *Kshetryas*, and the other two tribes; but only fire to *Brahmins*, and never poison, from the prohibition, "except poison to Brahmins."

To those who are afflicted with peculiar diseases, in which the use of fire, and other things is prohibited, such as those described in the following text:—"Let one keep away fire from leprous persons, and water from

the feverish, and let one keep poison away from those oppressed with bile and phlegm." To them, even at the proper time for fire, and other things, let the ordeal of scales, and others which are common to all times, be administered.

"Water, fire, and poison, must be administered to persons in health." From this text, it is inferible, that to them, as well as to weakly persons, the ordeals suitable to the tribe, condition, and age, of the parties, are to be administered, without contravening the seasons and periods fixed by the injunctions and prohibitions.

"The ordeal of scales, &c. is applicable to heavy charges." He now explains what constitutes a heavy charge; "One should not take a red hot ploughshare, under a thousand, nor poison, nor the scales;" that is, one should not administer the ordeal of a ploughshare, of poison, or of the scales, under a thousand *panas*; nor that of water, which is included, as has been declared—"In heavy charges, one should cause to be administered, the ordeal of scales, down to that of poison."

In such cases, that of sacred libation, should not be resorted to, from the text—"In a trifling case, sacred libations are to be administered."

Should it be objected that fire, and the other three ordeals, have been declared by *Pitamaha* applicable to cases under a thousand in the following text; "One should administer the scales in the case of a thousand. In the case of five hundred, iron. In the case of two hundred and fifty, water. Poison is declared applicable to the case of an hundred and twenty-five," the objection is admitted; but the text of *Pitamaha*, applies to a case where the taking involves degradation, and the text of *Vynyanashwara* applies to other cases. This is the practice; and these two texts apply to the cases of theft and robbery.

Catyayana makes a distinction in the case of a mere denial; "In the case of a mere denial of receipt, evidence must be resorted to; but in cases of theft and robbery, an ordeal may be administered, even though the property involved be trifling."

"Having ascertained the number of *Suvernas*, if an hundred be lost, poison has been declared the ordeal; and if eighty have been lost, fire. If sixty have been lost, water is to be administered. If forty, the scales; and sacred libation is propounded in the case of a loss of twenty or ten. In case of the loss of five, or more, or half, or quarter of that number, grains of rice. In case of the loss of half or quarter of that again, let him touch the heads of his children, or other relations. But in a case involving the half or quarter of that again, the usual means have been enjoined. A King so distinguishing, does no injury to spiritual, or temporal interests."

The term "loss" here, is intended to express "denial." "He should not take the ploughshare under a thousand;" this must be understood to mean a thousand copper *panas*.

Should it be objected that the text, "One must not take the ploughshare under a thousand," is irrelevant, because these ordeals are prescribed in cases of high treason, and felonious offences, as appears from the text—"Let them always undergo it, *being pure*, in cases affecting the King;" the meaning of which is, let persons resort to these ordeals, being purified by fasting, and other means, when under an accusation of high treason, or grievous offences. The answer is, that a distinction exists between them, with respect to place, as propounded by *Nareda*:—"It must be placed steady, being worshipped, with frankincense, garlands, and ointments, in the assembly, or at the gate of the royal family, or in a temple, or at a cross road." "*It* must be," &c. that is, the scales must be.

And the practice has been laid down by *Catyayana;* "Use should be made of the place of *Indra* for excommunicated persons, and grievous offenders; and of the gate of the King, for those involved in high treason. The ordeal should be administered to those *descended from the inverse order of the tribes*, in a place where four roads meet. The wise know that the ordeal is to be administered in other cases, in the midst of the assembly."

Thus is concluded the introduction to trial by ordeal.

I have at the commencement of the chapter which is headed "Judicial Proceedings," stated how I became possessed of the manuscript from which that chapter, and this last, have been taken; and considering them to be of some curiosity, and little use, my object was to convey a general notion of their contents, in as few words as possible.

I have omitted much; and in some, although in very few instances, I was obliged, for the sake of brevity, to alter the expression; but I hope, I have throughout preserved the meaning, and conveyed it precisely as it will be found in the translation itself. That is what I endeavoured to accomplish, but I think it proper to give this explanation, to prevent, in case I should have failed, an imputation of blame to the translator. There are some parts perhaps, which cannot be thoroughly understood; but for them, I venture to say, that neither the translator nor I, ought to be held responsible. The texts, are distinguished by inverted commas, and I have, I believe, given them verbally as I found them. In the chapter on Judicial Proceedings I have generally omitted the names of the authors quoted. They are extremely numerous; so much so, that a mere insertion of them, would have considerably lengthened the work, and could not have tended to any useful purpose.

I now add an account of the ordeals, as I received it from the *Pundits*

of the Supreme Court. Their account does not entirely correspond with that in the manuscript, and they have spoken of ordeals which the manuscript does not notice. The mode of their administration, I am enabled by the *Pundits* to describe.

In the ordeal by scales, the party is to bathe; he then goes into one of the scales with his clothes wet, and the other is brought to an exact equipoise by the means of weights. He is then taken out, and incantations, as well as religious ceremonies, appropriate to the occasion, are used. These rites being concluded, the party is replaced in the scale; if it continues in equilibrium, he is considered as culpable, but not to the full extent of the matter charged. If his scale should rise above the other, he is innocent; and if it should preponderate, guilty.

In ordeal by rice, the grain is first steeped in water, and then given to the party to chew. If it should come out of his mouth pulverized, or coloured with the blood of his gums, guilt is the inference. If, after mastication, the grain should appear moistened with *saliva* the party is supposed to be innocent. In cases of theft, this is a very common test all over India, even at the present day.

In ordeal by poison, he who takes it is considered innocent if he continues unaffected by the dose, throughout the day on which it is administered. The poison is not to be absolutely deleterious in itself, and must be animal or vegetable, not mineral. In the rains the weight of four grains of barley are to be administered. In the hot weather, the weight of five grains; and in the cold weather the weight of seven grains; between the rainy and cold seasons, a less quantity than four grains is to be administered.

There are two ordeals by fire; one the ploughshare, which consists of a

piece of iron in the shape of a ploughshare, made red hot. The party charged, is to lick it with his tongue. If injured by this operation, he is guilty; if uninjured, innocent. This iron is to be the breadth of four, and the length of eight, fingers; and the measurement is made, not by the length, but by the thickness, of fingers.

The other fire ordeal is by a ball in circumference equal to the palm of a man's hand. This ball is made red hot, and the subject then places his hands close to each other, and keeps them open. Seven green leaves of the *Pakoor* tree, one above the other, are laid on the hands, and the red hot ball above the leaves. The party under this trial then walks seven paces, carrying the ball on his hands. If he should be burned he is deemed guilty; if not, innocent.

The *Pundits* tell me that what they understand by "sacred libation," is the ordeal performed with water in which one of the deities has been bathed. The quantity of this water to be taken, is three times as much as can be contained in the palm of the hand. If the person swallowing this quantity of such water, continues in health for fourteen days afterwards, he is considered to be innocent; and if, within that time he becomes diseased, guilty.

An ordeal by water is thus described; a *Brahmin* stands in the water, and the accused person dives down, and lays hold of the *Brahmin's* legs. By continuing under water for a certain time, he evinces his innocence; by emerging within that time, his guilt is established. The time of immersion is to be ascertained in the following manner:—A powerful man is to discharge an arrow from a bow, with all his might. This he is to do three times beginning the second and third time at the place where the first and second discharged arrows fell. Having thus got the length of three bow shots, the whole distance is to be equally divided, and a man

stationed at the central point. The archer stands close to the tank, or water, in which probation is to be made. The man at the middle of the three bow shots makes a signal, upon which the person under ordeal, dives. The archer at the same instant runs to him who made the signal, and if, before his return, the head of the accused shall appear above water, it is taken as a proof of his guilt.

The ordeal by hot beans, if the description given by the *Pundits* be right, appears to be miscalled; an iron vessel of the diameter of sixteen, and the depth of four, fingers, is procured. Into this vessel sixteen *chittacks* and a half of *ghee* (about 2 pounds) is put; the *ghee* is boiled; and a piece of gold, made in the shape of a *mauskullye* (a species of bean), or sometimes a gold ring, is dropped into the boiling *ghee*. The person accused is to take this bean, or ring, from the bottom of the vessel (the ghee still boiling) with his naked hand. If he succeeds in doing so, unscalded, he is innocent, but if scalded in the attempt, he is guilty.

There is another ordeal by two images; one representing guilt, and the other innocence; the former, black; the latter, white. These images are enclosed in two different vessels, and the party accused, does not know which image is in either vessel. He is brought in to make his election, and if he chances to elect that which contains the white image, he is innocent; if that which contains the black one, guilty.

These, will necessarily, be thought very uncertain modes of purgation. In the rice and ploughshare ordeals however, some reason may be discovered, for the mouth is supposed to become arid, when one is conscious of having done that, with which he is charged. This would prevent the moistening of rice upon mastication; and would deprive the tongue of all defence when applied to the hot ploughshare; but it will occur to every body, that the best of these trials makes a very little, if any, approach to-

wards a test of the truth; and that the least objectionable criterion enumerated, will produce a result more depending on the nerves, than on the guilt, or the innocence, of the parties accused.

It might be easy to show a similitude between these, and the ordeals of other countries and ages; but such an undertaking would be quite inconsistent with the plan of this work. The test by chewing rice, and that of the *corsned*, or morsel of execration, may possibly be founded upon the same principle; that of the salival secretion being impeded by a consciousness of guilt. This effect being produced, the rice will remain dry, and in case of the *corsned*, the power of deglutition will be prevented.

ADDENDUM

TO THE

CHAPTER OF ADOPTION.

I HAVE more than once spoken of the disadvantages under which this book has been written, and the consequent defect of method will, I fear, be but too apparent. Yet although this addition will furnish further evidence against me, I shall not suppress it.

The following opinions, and the case out of which they arose, will be found illustrative of the law of adoption. As I was looking over papers, preparing for my departure from *India*, I accidentally laid my hand upon these.

In page 136, I have expressed myself as follows :—" From what has been already said, I conclude that *two* men, could not, at any time, have *adopted the same son*."

In page 124, it will be found that the two sons of *Siva* are said to have "attained heavenly salvation" by means of a son *begotten* by *one* of them; and the same principle is acknowledged throughout—See page 123.

Notwithstanding the decision of the *Sudder Dewannee Adawlut* in 1806, by which it was adjudged that a boy, a near relation by the father's side,

might be taken in adoption after the age of five years, it will be seen that the Supreme Court *Pundits* in 1821, were of opinion that a boy is not eligible to adoption after having attained that age—See page 142.

In the year 1821, *Sir Edmund Stanley*, Chief Justice of *Madras*, applied to me to procure for him the opinions of *Pundits*. The case was as follows :—

There were two *Hindoo* brothers who had joined in an adoption of the same son. Neither of the brothers had male issue, but the elder one had a daughter. This daughter married the son who had been so adopted ; and her father (after the adoption, and marriage of his daughter) took a wife by whom he had a son. The adopted son was said by some to have been, when taken in adoption, fifteen ; by others he was said to have been twenty years of age.

The contest, in the Supreme Court at *Madras*, was between the adopted son, and the son who had been begotten afterwards. How it terminated I have not heard ; but several questions of *Hindoo* law arose out of the litigation. These I need not state more particularly, as they will sufficiently appear by the answers which were obtained from the Supreme Court, and *Sudder Dewannee Adawlut Pundits*.

I consulted the Supreme Court *Pundits* personally, and received the following information.

Two men, whether brothers or not, cannot adopt the *same boy* as a son.

An attempt to do so, must fail ; but if attempted, that will not prevent the boy so intended for adoption, from marrying the daughter of one of the brothers who wished to adopt him. It will not prevent the marriage, because it cannot be an adoption. The boy so intended for adoption, will,

even after a performance of the adopting ceremonies, continue in no other relation to the parties who proposed to adopt him, that he stood in before a performance of any of the ceremonies. The attempt at adoption will not, and cannot, make any difference.

A *Soodra* may adopt a son, and solemnize his marriage on the same day; but if his marriage be first solemnized, he cannot then be adopted.

The three superior classes must assume the *Poitah*, or characteristic string, before marriage, and they cannot be adopted after having assumed the *Poitah*.

After the age of five years, a boy cannot be adopted.

The two ceremonies, marriage and adoption, cannot take place simultaneously.

A man cannot marry his daughter to his adopted son. It is incest.

The adoption by a man, of a boy who had been married to his daughter, will be utterly void. It cannot be.

The marriage of an adopted son, to the daughter of his adopting father will be null and void.

If a man give his daughter in marriage, to a son whom he had adopted, the adoption will stand good, and the marriage will be void. If he adopt a son who had married his daughter, the marriage will stand good, and the adoption will be void.

In the absence of my son from *Calcutta*, *Mr. Courtenay Smith*, a judge

of the *Sudder Dewannee Adawlut*, was so good as to obtain for me, from the *Pundits* of that Court, their answers to the following questions. I framed the questions, so as to embrace all the points upon which *Sir Edmund Stanley* required information.

Question 1st. "Can two *Hindoo* brothers A and B, adopt the same person (C) as a son?"

Answer. "They cannot, any more than two persons can marry the same girl."

Question 2d. "Can a *Hindoo* be adopted at any age; or having attained a particular, and what age, is he incapable of being adopted?"

Answer. "Of the four casts; *Brahmin*, *K'hetree*, *Bice*, and *Soodder*, the three first may be adopted before they assume the string, not afterwards. The *Soodder* before marriage, not after."

Question 3d. "Can an adopted son marry the daughter of his adopting father?"

Answer. "He cannot; she standing to him in the relation of a sister."

Question 4th. "Can a *Hindoo*, having been married, be adopted by the father of his wife?"

Answer. "He cannot; for before marriage he must have assumed the string; after which (as above said) he cannot be adopted. This applies to the three first casts; of the *Soodder* it has been declared, that, after marriage, he cannot be adopted."

Question 5th. "If the marriage should have taken place, what will be the consequence of a subsequent adoption?"

Answer. "The adoption is void."

Question 6th. "If the adoption should have taken place, what will be the consequence of a subsequent marriage?"

Answer. "The same penance would be incurred, as for a marriage between brother and sister. (They added orally) the marriage would be void; and the husband at liberty to marry again, but not the wife."

Question 7th. "Can the marriage and adoption be contemporaneous acts; and, if they have been so in fact, and cannot be so in law, what will be the consequence of the contemporaneous marriage and adoption? Will both, or either, and which of them, be void?"

Answer. "They cannot, strictly speaking, be contemporaneous; that is, take place simultaneously; one must follow the other. From this answer, and the additional one connected with it, it appears, that whichever of the two, first took place would be valid, the other void."

"Upon their answer to the 2d question, they were asked, after what age the *Brahmin*, *K'hetree*, and *Bice*, could not assume the string; and whether after the assumption of the string became illegal, they could legally be adopted? They answer, that the *Brahmin* cannot assume the string after *fifteen;* the *K'hetree*, after *twenty-one*, and the *Bice*, after *twenty-three;* and that the assumption of the string, having from the lapse of the proper age, become illegal; their adoption becomes so likewise. Being asked, whether the answers they have given, are applicable to *Madras*, they say that with the exception of the age, beyond which the string cannot be ta-

ken, which is at *Madras*, for a *Brahmin sixteen*; for a *K'hetree, twenty-two*, and for a *Bice twenty-four*. Every thing else above written is the law at *Madras*, as well as here."

It will be observed that the *Pundits* of the *Sudder Dewannee Adawlut* are silent upon the subject of *age*. They say truly, that in the three superior classes, a boy cannot be adopted after an assumption of the string; and that in the *Soodra* class, a boy cannot be adopted after marriage.

Marriage in the three superior classes cannot take place before the age of five years, because the string cannot be assumed at an earlier period; but adoption in those classes, may take place at any time of life, however early; and the earliest, is recommended, as the most proper, for adoption. In the superior classes however, a boy is certainly eligible to adoption until the attainment of his fifth year, because he cannot assume the *Poitah*, or be married, sooner; but a *Soodra* may be married at any age, and may therefore, be sooner disqualified for adoption, than those in the superior classes can be.

Because adoption cannot take place after the characteristic string has been assumed in the three superior classes, or after marriage in any of the four classes, it does not follow that a person may be adopted after a certain age, although he is not compellable to marry, or to assume the mark of his class until long afterwards. The general opinion, and that which certainly stands upon the best authority is, that a boy cannot be adopted after the age of five years; adoption at a later period of life, is said to be sanctioned by usage alone. See page 141 *et seq.* and page 145 particularly.

APPENDIX.

No. I.

THE following is the "*Remark*" made by the *Sudder Dewanny Adawlut* on the case of *Eshanchund Rai* v. *Eshorchund Rai.*

"ADMITTING the father's disposition of his estate in favor of his eldest son, to have been an improper exercise of power on his part, as possessor of the *hereditary* patrimony, still the *validity* of a gift *actually made* by a father is *affirmed by Jimuta Vahana* (ch. 2. § 29 and 30). For since the gift of the *entire estate* to a *stranger* would have been *valid,* (however *blamable* the act of the giver might be), the donation in favor of *one* son, with provision for the support of the rest, would seem to be equally *valid* according to the doctrines received in the province of Bengal. And after extending to the case of sons, no less than to that of strangers, *Jimuta Vahana's* position, respecting *gifts valid though made in breach of the law,* it becomes necessary to the consistency of the doctrine equally to *maintain,* that a father's *irregular distribution* of the *patrimony* at a *partition* made by him in his lifetime, in portions *forbidden by the law* (*Jimuta Vahana,* ch. 2. § 17), shall in like manner be held *valid,* though on his part *sinful.* No opinion was taken from the law officers of the *Sudder* court in this case. But it *has been received as a precedent,* which *settles* the question of a father's *power* to make an *actual disposition of his property,* even *contrary to the injunctions of the law,* whether by *gift* or by WILL, or by *distribution* of shares."

No. II.

THE case of Ramkoomar Neaee Bachesputtee—appellant, v. Kissenkunkur Turkabhoosun—respondent, decided by the *Sudder Dewanny Adawlut.*—It is case 18 of the year 1812.

I shall here observe that in the remark on the case of *Eshanchund Rai* v. *Eshorchund Rai* a transfer by *gift* in the father's lifetime, was put upon the same footing with a *will.*

The following question was put to the *Sudder Dewanny Adawlut Pundits* in the case of *Ramkoomar Neaee Bachesputtee* v. *Kissenkunkur Turkabhoosun*—"If a person of the *Brahmin** tribe during the lifetime of his *eldest* son transfer by gift the *whole* of his Estate *real* and *personal*—*ancestrel* or *acquired* to a *younger* son, is such a gift *valid* or *not valid* according to the law authorities *current in Bengal?*—The Pundits in their answer declare that *such* a gift *is valid*—though, the gift of the *whole ancestral landed* property being forbidden, it is *immoral.*—The court accordingly, under the opinion of the law officers, upheld the appellant's deed of gift and passed a final decree, reversing the decision of the Provincial Court—and affirming the decrees of the Registrar and the Judge—costs of suit in the Provincial Court and *Sudder Dewanny A-*

* The particular tribe is said not to vary the case.

dawlut to be paid by the *Respondent*.—To this case there is the following note added to the Report—viz: "This doctrine was followed in a former case—*Eshanchund Rai* v. *Eshorchund Rai*, vide Reports, 1st vol. page 2, 1st part."

N. B. This cause was decided first by the Registrar in favor of the *appellant*.—The *Respondent* appealed to the *Judge* and he affirmed the *Registrar's* Decree.—The *Respondent* then appealed to the *Provincial* Court of Appeal and that court *reversed* the two former decisions.—The *appellant* now appealed to the *Sudder Dewanny Adawlut*, and the decision of the *Provincial* Court of Appeal was *reversed*, whereby the decisions of the *Registrar* and the *Judge* were *affirmed*.

No. III.

THE following is the "*Remark*" made by the *Sudder Dewanny Adawlut* on the case of *Bhowanneechurn Bunhoojia* v. the Heirs of *Ramkaunt Bunhoojia*.

"*Although* the pundits of the Sudder Dewanny Adawlut have differed upon some points, in their *bewustas* delivered in this case, they concur in opinion that a father, in the partition of *ancestrel immoveable property* amongst his sons, is *not* authorised by the authorities of Hindoo law, which are admitted to prevail in the province of Bengal, to make *any unequal distribution* of such property, beyond a twentieth part, in favor of the eldest son Chutoorbhooj states on this point that 'because *no* mention occurs in the *Dayabhaga* or other law tracts, of the 'legality of an unequal distribution of ancestrel immoveable property, beyond the authorised de-'ductions of a twentieth, half a twentieth, &c.; because a father has not unlimited discretion '*with respect to ancestrel immoveable property*; and because where the *Dayabhaga* upholds the 'validity of a prohibited gift or sale, *it is always understood as a proviso that the donor be vested* '*with power to make such transfer*; an unequal distribution (over and above the authorised de-'ductions before alluded to) of ancestrel immoveable property, cannot be maintained as va-'lid.'

"In like manner Soobha Shastree, after declaring that the deed of partition exhibited in this cause 'is invalid, and not binding on the parties mentioned in it, as far as it goes to make 'an unequal distribution of the ancestrel immoveable property;' and after defining the full authority which a person has over his own acquired property, 'to consist in the power of alien-'ing it at pleasure;' adds—'as the father has not full authority (as defined above) over the '*ancestrel immoveable property*, any distribution he may make, other than that which the law 'directs, must be considered invalid, and not binding on the parties concerned.'

"The above concurring opinion of the Hindoo law officers of the Sudder Dewanny Adawlut, which is confirmed by other pundits who have been consulted on the subject, *and appears to be fully established* by texts cited from the *Dayabhaga*, and other authorities, renders it necessary to qualify the remark annexed to the report of a cause decided by this court in the year 1792; viz. that of Eshanchund Rai, appellant, *vers.* Eshorchund Rai, respondent (vol. i. p. 3, of these Reports.) It was observed in the remark here referred to, that 'after extending to the case

'of sons, no less than to that of strangers, *Jimuta Vahana's* position, respecting gifts valid 'though made in breach of the law, it becom s necessary to the consistency of the doctrine 'equally to maintain, that a father's irregular distribution of the patrimony at a partition made 'by him in his lifetime, in portions forbidden by the law, shall, in like manner, be held valid, 'though on his part sinful.'—It was added, however, that 'no opinion was taken from the law 'officers of the Sudder Court in this case;' and from the opinion now delivered by them as well as from the authorities quoted by them, *it is manifest that the validity of an unequal partition of ancestrel immoveable property*, such as is expressly forbidden by the received authorities of Hindoo law, cannot be maintained on any construction of that law, by *Jimuta Vahana* or others.

"It may further be deduced from the *bewustas* of the pundits in this case, and the authorities cited by them, that if a father make *an unequal* distribution among his sons of *his own acquisitions*, and be influenced by the desire of giving one son a larger portion on account of his piety, or from any other motive sanctioned by the law, his act is *moral, legal* and valid If he make an *unequal distribution arbitrarily*, without being actuated by any of the motives which the law sanctions, his *act is immoral, but valid.* If in making such distribution he acts under *perturbation of mind*, or under the operation of *any cause* which the *law pronounces* to render the father *incompetent*, of giving more to one of his sons than to another, or in other words, to disqualify him for such a distribution, his act is immoral, illegal and invalid; and the partition made by him is absolutely null and void.

"With reference to the decision passed in the case of Eshanchund Rai *vers.* Eshorchund Rai (cause 2, vol. i, of these Reports,) and to a later decision in the case of Ramkoomar Neaee Bachesputtee *vers.* Kissenkunkur Turkabhoosun (cause 18, of the year 1812,) in both of which it *was assumed* that a father's gift of the *entire ancestrel immoveable estate*, to *one* of his sons, though forbidden by the Hindoo law, and condemned as immoral, is notwithstanding *a valid donation*, according to the *Dayabhaga*, and other authorities received in the province of Bengal, it appears proper to state, in this place, (as closely connected with the question of a father's legal competency to make an unequal partition amongst his sons of immoveable ancestrel property,) that *the result of an inquiry on the subject affords great reason for doubting the correctness of the two decisions above noticed, as far as they respect the ancestrel immoveable estate.* No exposition of the Hindoo law was taken from the law officers of the Sudder Dewanny Adawlut in the first case, as already mentioned. In the second case (that of Ramkoomar Neaee Bachesputtee *vers.* Kissenkunkur Turkabhoosun) the *bewusta* given by the pundits Chutoorbhooj and Soobha Shastree, was *verbatim*, as follows:—'Should any brahmin, during 'the life of an elder son, make over by gift *the whole of his property moveable and immoveable, ancestrel and acquired*, to his younger son, the gift is *valid; but the act is sinful*, as the gift 'of the whole *ancestrel property, moveable and immoveable*, is prohibited by the *Shasters.* This 'bewusta is given according to the authorities current in Bengal.'

"Authorities in support of the above opinion—1st. The text of *Vishnu* cited in the *Dayabhaga:* 'When a father separates his sons from himself, his will regulates the division of 'his own acquired wealth.' 2d. A quotation also from the *Dayabhaga:* 'The father has own-'ership in gems, pearls and other moveables, though inherited from the grandfather, and not re-

'covered by him, just as in his own acquisitions; and has power to distribute them unequally 'as *Yajnyawalcya* intimates: "The father is master of the gems, pearls and corals, and of all "other moveables, but neither the father, nor the grandfather, is so of the whole immoveable "estate." Since the grandfather is here mentioned, the text must relate to his effects. By again 'saying "*all*" after specifying "*gems, pearls,*" *&c.* it is shewn, that the father has authority to make 'a gift or any similar disposition of all effects, other than land, &c. but not of immoveables, 'a corrody and chattels, i. e. slaves. Since here also it is said "*the whole*" this prohibition 'forbids the gift or other alienation of the whole, because immoveables and similar posses- 'sions are means of supporting the family. For the maintenance of the family is an indispen- 'sable obligation; *as Menu* possitively declares: "The support of persons who should be main- "tained is the approved means of attaining heaven. But hell is the man's portion if they "should suffer. Therefore let a master of a family carefully maintain them." The prohibiti- 'on is not against a donation or other transfer of a small part not incompatible with the support 'of the family, for the insertion of the word "*whole*" would be unmeaning if the gift of even 'a small part were forbidden.' 3d. The text of *Yajnyawalcya* cited in the *Praguschctta viveh:* 'From the non-performance of acts which are enjoined, from the commission of acts which 'are declared to be criminal, and from not exercising a control over the passions, a man 'incurs punishment in the next world.'

"The Authorities cited in the above *bewusta* not appearing to support the opinion given in it, the surviving pundit, Soobha Shastree, was called upon for any explanation he might have to offer; and the following is a translation of his answer.

"The father is master of the gems, pearls," &c. This text according to 'the *Dayabhaga* ex- 'tends to the property of the grandfather, according to which authority also the father has 'ownership in all the property inherited from the grandfather. This appears to be the case, 'because having propounded the texts "for they have not power over it while their parents "live,"—"for sons have not ownership while their father is alive and free from defect," the 'author concludes by observing that these texts declaratory of a want of power and requiring the 'father's consent must relate also to property ancestrel. In the *Daya crama Saugraha* after 'propounding the text declaratory of equal ownership between the father and sons in immoveable 'property inherited from the grandfather, *Sricrishna* remarks that this text is not to be con- 'strued literally because it is impossible that while the father, the owner of the grandfather's 'wealth, survives, the sons should possess any ownership therein. The same author in his 'commentary on the *Dayabhaga* in the chapter treating of partition made by a father of pro- 'perty ancestrel and of his own acquisitions expresses himself as follows:—"Although the "father be in truth lord of all the wealth inherited from ancestors," &c. The word *prubhoo* or 'master which occurs in the two members of the text—*The father is master of gems, &c.* cannot 'mean merely *swamee* or owner, but must be intended to signify a person having the power of 'disposing of the wealth at pleasure. Accordingly the text of the *Dayabhaga* declaring that 'the father is not (as he is of his own) lord of all the grandfather's wealth has been thus com- 'mented on by *Sricrishna Tercalancara*: "Still the right here meant is not merely ownership, "but competency for disposing of the wealth at pleasure; *and the father has not such full domi-* "*nion over property ancestrel.*" Now in the latter part of the text commencing—*The father*

is master, &c. and concluding *but neither the father nor grandfather is so of the whole immoveable estate*, the meaning simply is that the father is not competent to dispose of such wealth at pleasure. If on the contrary it be made to signify that the father is not owner, then it would follow as there is no declared distinction between them, that the grandfather would not have ownership in his own acquired wealth: therefore if a father make a gift of the whole immoveable estate, it is valid, as the gift is made by one having ownership. But as the gift of the whole immoveable estate withdraws the means of supporting the family, the gift is sinful merely. It is declared in the *Dayabhaga* that the word *whole* occurring in the last member of the text, *The father is master, &c.* intends a prohibition, forbidding the gift or other alienation of the whole because immoveables and similar possessions are means of supporting the family. For the maintenance of the family is an indispensable obligation as *Menu* has said —"The support of persons who should be maintained," &c. Immediately afterwards the author states,—"The prohibition is not against a donation or other transfer of a small part not 'incompatible with the support of the family. From the express mention of immoveables a "prohibition is inferred by the analogy exemplified in the loaf and staff, against the gift or other "transfer of a corrody or slaves." 'In the above passages and others of a similar nature, 'the word *prohibition* has been made to apply, and wherever the gift of immoveable property 'has been prohibited, the reason, viz. it affording to the family means of support, has been assigned, therefore the word *master* occurring in the latter member of the text is used to show the 'incompetency of the father to make a disposition at his own will, because immoveable property is the means of supporting the family, and if those means be withdrawn the guilt is incurred of depriving the family of subsistence. In short as there exists a prohibition against 'the gift or sale of such immoveable property, if it be nevertheless given or sold, the precept 'is infringed.'

"Ramtunnoo, the other pundit of the Sudder Dewanny Adawlut, (who succeeded the late Chutoorbhooj), being called upon for his opinion on the point in question, delivered the following:—

"'The gift of the whole ancestrel estate (not consisting of immoveable property, a corrody 'or slaves) such as pearls, gems, &c. and of the whole of his own acquired property by a father to one son exclusively, while there are other sons living, is a valid act. If the father make 'a gift of a small part of the ancestrel immoveable property not incompatible with the support of the family, the act is valid; but if he make a gift of the whole ancestrel immoveable 'property, or of a corrody or slaves, the act is not valid. This opinion is in conformity with 'the *Dayabhaga* and other authorities current in Bengal.'

"Authorities in support of the above opinion,—1st. An extract from the *Daya crama Sangraha*: 'But the father possesses a power in regard to ancestrel property other than land (and the descriptions above-mentioned) such as pearls, gems, &c. similar to that which he has in the disposal of his own acquired wealth.' *Yajnyawalcya* declares: "The father is master of the gems, "pearls and corals, and of all other moveable property: but neither the father nor the grand-"father is so of the whole immoveable estate." 'Here by the specification in the first instance 'of *gems, pearls* and *corals*, and afterwards by the use of the word *all*, gold and other effects,

'exclusive of the three descriptions of property, consisting of land, &c. are intended. The word 'whole, again, which occurs in the second portion of the above text, is made use of for the purpose of shewing, that a prohibition does not exist against a gift of immoveable property, not 'incompatible with the due support of the family. Thus it is stated in the *Dayabhaga*.' 2d. Text of *Bhuvudevu Turkalancara*: "The father has power to make a gift or other transfer of "his own acquisition and of the ancestrel property consisting of gems, pearls, &c. This con-"clusion may be deduced from *Jimut i Vahana's* exposition." 3d. An extract from the *Daya crama Sangraha*: 'A father has not the power to make an unequal distribution of ancestrel property, consisting either of land, or a corrody or slaves, even though any of the causes before 'mentioned, namely, the superior qualifications of one particular son, &c. should exist; and the 'text of *Yajnyawalcya* which declares, "The ownership of father and son is the same in land "which was acquired by the grandfather or in a corrody or in chattels," is intended to restrain 'the exercise of the father's will.' 4th. The text of *Bhuvudevu Turkalancara*: The following 'text of *Vyasa* cited in the *Dayabhaga*, "A single parcener may not without consent of the "rest make a sale or gift of the whole immoveable estate, nor of what is common to the family," relates to the prohibition of a transfer of ancestrel immoveable property, or of immoveable property acquired at the expence of the ancestrel estate.'

"In consequence of the above difference of opinion between the present* Hindoo law officers of the Sudder Dewanny Adawlut, the following question was proposed to the pundits of the Supreme Court, Tarapershad and Mrityoonjyee; to Nurahurree, pundit of the Calcutta provincial court; and Ramajya, a pundit attached to the College of Fort William.

"*A person, whose elder son is alive, makes a gift to his younger, of all his property moveable and immoveable, ancestrel and acquired. Is such a gift valid according to the law authorities current in Bengal or not; and if it be invalid, is it to be set aside?*

"The following answer, under the signatures of the four pundits above mentioned, was received to this reference, on the 21st of September, 1818.

"'If a father, *whose elder son is alive*, make a gift *to his younger*, of *all his acquired property*, 'moveable and immoveable, and of *all the ancestrel moveable* property; the gift is *valid*, but the 'donor acts *sinfully*. If *during the life time of an elder son*, he make a gift to his *younger*, of *all* 'the *ancestrel immoveable property*, such gift is *not valid*. Hence *if it have been made, it must* 'be set aside. The learned have agreed that it must be set aside, because such a gift is *à fortiori* invalid; in as much as he (a father) cannot even make an *unequal distribution* among his 'sons of *ancestrel immoveable property*, as he is not master of all; as he is required by law *even* 'against his own will to make a distribution among his sons of *ancestrel property not acquired by* 'himself (i. e. not recovered); as he is *incompetent to distribute* such property among his sons 'until the mother's *courses* have *ceased*, lest a son *subsequently born should be deprived of his share*; 'and as, while he has children *living*, he has *no authority* over the ancestrel property.'†

* *Soobha Shastree* and *Ramtunnoo*. † i. e. *immoveable*.

" Authorities in support of the above opinions: —

1. *Vishnoo*, cited in the *Dayabhaga:*— " His will regulates the division of his *own acquired* " wealth."

2. *Yajnyawalcya*, cited in the *Dayabhaga* :—" The father is master of the gems, pearls, corals, " and of all other *moveable* property."

3. *Dayabhaga:*—" The father has ownership in gems, pearls and other *moveables*, though *in-* " *herited from the grandfather*, and not recovered by him, just as in his own acquisitions."

4. *Dayabhaga* :—" *But not so*, if it were *immoveable* property inherited from the grandfather; " because they have an equal right to it. The father has *not* in such case an unlimited discre- " tion." *Unlimited discretion* interpreted by *Sricrishna Tercalancara* to signify a competency of disposal at pleasure.

5. *Dayabhaga* :—" Since the circumstance of the father being lord of all the wealth is stat- " ed as a reason, and that cannot be in regard to the grandfather's estate, an *unequal distribu-* " *tion* made by the father, is *lawful only in the instance of his own acquired wealth.*"—Commentary of *Sricrishna* on the above text:—" Although the father be in truth, lord of all the wealth " inherited from ancestors, still the right here meant is not merely ownership, but competency " for disposing of the wealth at pleasure; and the father has *not such full dominion over proper-* " *ty ancestrel.*"

6. *Dayabhaga:*—" If the father *recover* paternal wealth seized by strangers, and not reco- " vered by other sharers, nor by his *own father*, he shall *not, unless willing, share it with his* " *sons*; for in fact it was *acquired by him.*" 'In this passage, *Munoo* and *Vishnoo* declaring that 'he shall not, unless willing, share it, because it was acquired by himself, seem thereby to in- 'timate a partition amongst sons even against the father's will, in the case of hereditary wealth 'not acquired (that is, recovered,) by him.'

7. *Dayabhaga:*—'The condition "when the mother is past child-bearing," regards wealth 'inherited from the paternal grandfather. Since other children cannot be borne by her, when 'her courses have ceased, partition among sons may then take place: still, however, by the 'choice of the father. But if the hereditary estate were divided, while she continued to be ca- 'pable of bearing children, those, born subsequently, would be deprived of subsistence. Nei- 'ther would that be right: for a text expresses, "They who are born, and they who are yet un- " begotten, and they who are actually in the womb, all require the means of support; and the " dissipation of their hereditary maintenance is censured." *Sricrishna* has interpreted, *the dissi-* 'pation of hereditary maintenance, to signify the being *deprived of a share* in the ancestrel wealth.'

Dwitanirnaya :—" If *there be offspring*, the parents have *no* authority over the *ancestrel* wealth, " and from the declaration of their having *no authority* any *unauthorized act committed by them* " *is invalid.*"

Text of *Vijnyaneshwara* cited in the *Medhatithi* :—" Let the judge declare *void a* sale with-" out ownership, and a gift or pledge unauthorized by the owner." The term *without ownership*, intends incompetency of disposal at pleasure.

Text of *Nareda* :—" That act which is done by an infant, or by any person not possessing au-" thority, must be considered as *not* done. The learned in the law have so declared."

No. IV.

The following is the opinion given by the Supreme Court Pundits to the Master in Equity of the Supreme Court.

MASTER'S OFFICE, April 5th, 1821. } *Ranjkistno Bonnerjee &c. and others,* vers *Tarraneychurn Bonnerjee and others.*

Petruse Astwa Chater, Sworn to interpret. *Tarrapersaud Bhuttacharjee Nayaboosun* and *Ramjoy Bhuttacharjee Turkalunkah* produced on behalf of the Complainants and interrogated by Mr. Thomas.

Question. Can a father give an unequal share of *ancestorial landed* property to one of his sons to the prejudice of the others?

Answer. He cannot give *all* to one son. If one son has a *larger family* than the others, or is *infirm*, the father *may* make an *unequal* distribution in his favour.

Question. Can a father in his life time give away an *ancestorial Talook* to one of his sons?

Answer. Yes, provided he leaves at the time of his death sufficient for the support in a respectable manner of the rest of his family.

Question. Can he give away such *ancestorial Talook* to *one* son although he has *not* a larger family than the other sons and although he is not infirm?

Answer. Yes he can, if the son to whom he gives such Talook is *more attentive* to him than the others.

Question. Who is to judge of the son's being *more attentive* than the others?

Answer. The father, but he must judge according to the Shastras.

Question. If a father has eleven sons, some of age and some under age, who all behave to him *equally* well, can he in his life time without contemplating a division of his estate or his own death, give to his eldest son a *Talook being ancestorial property*, worth a Lac of Rupees, the whole property being worth ten Lacs? Is such gift valid?

Answer. He can; and *such gift is valid. He could give it to any son.*

Question. Does such gift deprive the son, so obtaining it of his proportion of the remainder of the property on its coming to be divided?

Answer. It does *not deprive him of his proportion.*

Question. To what extent can a father give *ancestorial property* to one son?

Answer. There is no proportion specified.

Question. Out of ancestorial property worth ten Lacs, how much in your opinion could a father give to one son?

Answer. He might give to *any extent* if he leaves enough for the other sons.

Question. Can the father make such gift of ancestorial property to any person not his son?

Answer. He cannot. He may give a small proportion, about one biggah in fifty for instance for charitable purposes.

শ্রীতারাপ্রসাদশর্ম্মণঃ
শ্রীরামজয়শর্ম্মণঃ

E. C. MACNAGHTEN, *Master.* P. A. CHATER, *S. Int.*

(A true Copy.) E. C. MACNAGHTEN.

No. V.

Relating to the adoption of a son by the three widows of Luckinarain Takoor under and by virtue of Luckinarain's Will.

The Will of Luckinarain Takoor.

Sri Luckinarain Thakoor.

"7 Sri Sri Huree
"Shoronong.—
"To Srijut Juggomohun Mullick; may the highest felicity attend him.

"I, Sri Luckinarain Takoor, make this will. I am sick in body and no body knows what "may happen or when; through Divine Agency I therefore of my free pleasure in my sound "understanding and senses appoint you Attorney of my Estate in Cash and so forth whatever "there is you will take all the above Estate and so forth under your controul and pay my "debts and obtain payment of my dues you will bring the annual Interest of my Company's "Paper and defray the expence of my family and the Rites, Ceremonies, and so forth, and "purchase Company's Paper with the amount of Interest remaining, Sicca Rupees (10,000) "ten thousand remains out of all the above Estate for purposes of my future bliss and you will "perform pious and the like acts occasionally.

"You will pay according to the particulars what I give to individuals: as to the fifteen thou-"sand Rupees which I give to my three wives at (5000 five thousand Rupees each specified "in the above mentioned particulars you will pay five thousand Rupees to her who shall live in "my family fulfilling her duties and you will pay only the Interest on the aforesaid five thou-"sand Rupees to her who renounces the performance of her duties and conducts herself im-"properly or does not live in my family such shall have no concern with the principal as to my "estate in cash and so forth, remaining over and above the particulars below my younger wife "is pregnant the son or the daughter that is born of such her pregnancy shall be owner of "the wealth. If any harm happens to that child my three wives shall adopt a son with mu-"tual consent. If they three do not agree in that case my eldest and second wives shall with "mutual consent adopt a son and if they d sagree my youngest and second wives shall adopt "a son with mutual consent and that adopted son shall be owner of my wealth and hold the "right of performing the ceremonies to be performed after me and no body else shall have

any concern with all the above estate and so forth. If my three wives continue in the performance of their duties severally the aforesaid adopted son shall maintain them and cause rites, ceremonies, &c. to be performed. To this purport I make this will of my free pleasure in sound understanding and sense, year 1221. Dated 10th Cartick, Tuesday morning.

Particulars of sums.	*Sa. Rs.*
For purposes of my own future bliss,	10,000
Spiritual Teacher,	500
Poorohit,	200
To my Sister,	500
Sister's Daughter,	200
To my eldest Wife,	5000
To my second Wife,	5000
To my youngest Wife,	5000
To Gour Bundo of the house,	500
	26,900
Pay an excess to my second Wife,	1,000
	27,900

The sums of Twenty-seven Thousand Nine Hundred Rupees.

(ON BACK.)

Witnesses.

Sri Burshnobdoss Mullick. Sri Lalbehary Sen.

Sri Soroopchunder Sen. Sri Gourhury Bondopadhya, in Balee.

MASTER'S OFFICE, SEPT. 19th, 1823. *Srimutty Degumberry Daby, versus Srimutty Taramoney Daby, and others.*

Ramjoy Turkalunkah, one of the Court *Pundits,* produced to be examined on behalf of the Complainant. *Petruse Astwa Chater,* sworn to interpret.

Question. A *Brahmin* leaves three widows, and a child is directed to be adopted, which of the three widows is to receive the child on its adoption?

Answer. The widow of the *Brahmin* who had a child of her own.

Question. If one of the widows is related to the child it being her uncle's son, can she receive the child?

Answer. No, that is an obstacle.

Question on the part of the Defendants. Where is the law prohibiting the widow who is related to the child from receiving the child if the husband directs the adoption?

Answer. It is to be found in the *Dhuttuck Chundrika* and *Dhuttuck Meemangsha* and in other books.

Question. Is it prohibited for a husband to adopt his wife's relation?

Answer. It is not prohibited generally, but some relations cannot be adopted; a husband cannot adopt his wife's uncle's child, nor any child so nearly related.

Question. Is there the same prohibition against adopting a child who is related that there is against receiving a child in adoption that is related?

Answer. Yes.

Question. If a *Brahmin* leaves more wives than one, and the child to be adopted is related to one of them, which of the wives is to adopt?

Answer. That one wife cannot adopt or receive the child in adoption but the child may be adopted and received in adoption by one of the other wives.

Question. Can three widows adopt one of them, being related to the child?

Answer. Only one can adopt, the three may agree upon the child to be adopted but only one of the widows can adopt.

Question. Does the child so adopted become the child of the widow adopting, or the child of the three.

Answer. The child becomes the child of all three.

Question. Suppose the child to die after adoption which of the widows inherits his property?

Answer. The widow adopting him, if he should die under age, she will be called the mother and the others the step-mothers.

Question. Suppose one of the widows at first to have opposed the adoption, but afterwards agreed to it, can she be the person to adopt.

Answer. Yes, after she has agreed to it. Her former opposition will not stand in the way of her being the person to receive the child in adoption.

Question. Which of the widows is the person to have the care and management of the child adopted?

Answer It is not stated particularly in the *Shasters*; all three ought to take care of him.

Question. Suppose the widows to disagree and separate, which of them is to have the custody of the child.

Answer. The widow who adopted the child, she may take the child with her, even if she pleases unreasonably to quarrel with the others.

শ্রীরামকর শর্ম্মণ

Rughooram Seeromoney, the other Court Pundit, agrees in the answers given to the above questions.

শ্রীরঘুরাম শিরোমণি

E. C. MACNAGHTEN, *Master.* P. A. CHATER, *S. Int.*

MASTER'S OFFICE, SEPT. 23rd, 1823. *Srimutty Degumberry Daby, versus Srimutty Taramoney Daby, and others.*

Petruse Astwa Chater, sworn to interpret. Present, the Court *Pundits* and others, from the *Sudder Dewanny Adawlut*, and from the College, to whom the following questions are proposed on the part of the Complainant.

In the case of an adoption into the family of a deceased *Brahmin* what child ought to be preferred, one from the relations of the deceased, or one related to a widow of the deceased?

Answer. A child from the relations of the deceased ought to be preferred.

Question, on the part of the Defendants. May not any child of the same cast be adopted?

Answer. Yes, the adoption is good. A child under the age of five years and of the same cast as the deceased must be chosen.

Question on the part of the Complainant. If the widows of the deceased (having authority to adopt a child, should take one for the purpose, not from the relations of their deceased husband, would they do wrong?

Answer. Yes it would be impious, but a stranger may be adopted.

Question. Is it not usual amongst *Brahmins*, when they adopt a child in their life time, to take one related to themselves?

Answer. They usually adopt a child of their brother.

The elder of the Court Pundits is asked, if he conceives it would be an impiety in the widows to adopt a child not of the family of their deceased husband, in preference to one of his family and states. It would not be an impious act but an improper act, not of much consequence. The other *Pundits* declare, that according to the *Shasters*, a child ought to be adopted from the family of the deceased on being required to give their authority; for this they refer to "*Duttodeedhittee.*"

Question on the part of the Defendants. Supposing the deceased to have been upon bad terms in his life time with his own relations ought his widows to adopt a child from the family of those relations?

Answer. They may, and if there is no other child related to the deceased, they ought to adopt from the family of those relations. The quarrel is gone on the death of the husband of the widows. There is nothing about this in the *Shasters.*

E. C. MACNAGHTEN, *Master.*

শ্রী রামনাথ শর্ম্মা শ্রী রঘুরাম শর্ম্মদাস শ্রী রামতনু শর্ম্মদাস
শ্রী রামজয় শর্ম্মণ শ্রী তারাপ্রসাদ শর্ম্মণ০

P. A. CHATER, *S Int.*

MASTER'S OFFICE, JAN. 5th, 1824. *Srimutty Degumberry Daby, versus Srimutty Turamoney Daby, and others.*

Ramkoomar Sevomoney, a *Pundit* from the College, produced and interrogated on behalf of the Defendants. (*Lewis Nancy*, Interpreter.)

Question. A *Brahmin* left three widows, and directed that a child should be adopted. a child for that purpose has been selected, which of the three widows is to receive the child from its natural parents on its adoption?

Answer. The eldest widow is to receive the child.

Question. If two of the widows had each a child and the other not, would this circumstance make any difference?

Answer. It would make no difference; the eldest widow is the person to receive the child in adoption.

Question. One of the widows, the second is related to the child proposed to be adopted, the child being the son of her father's brother, does this circumstance prevent her from being the person to receive the child in adoption?

Answer. This does not prevent the eldest from receiving the child; and according to the *Dhuttuck Dhedittee*, the second might receive the child in adoption notwithstanding the relation, supposing the eldest widow to be out of the way. I do not remember passages in other books which would authorize the second widow to receive the child in adoption under these circumstances

Question. Having read the passages referred to by the Court *Pundits*, do you find any thing contravening the authority to which you refer?

Answer. As the passages stand by themselves, they appear repugnant to the authority I have referred to in the *Dhuttuck Dhedittee*, but by reading what precedes and what follows, they are consistent with it.

Question on the part of the Complainant. Were you ever examined in this Court respecting the adoption of a sister's son?

Answer. No; I never gave a written opinion on the subject.

Question. What are the degrees of relation which prevent a child from being adopted?

Answer. In the *Dhuttuck Memanshai* and *Dhuttuck Chundrika*, it is laid down that a contrary relationship (*"Verooddha Sambhandha"*) prevents adoption taking place. The author of the *Dhuttuck Dhedittee* has defined the meaning of "contrary relationship," by stating the persons comprehended in the term; these are, a sister's son, a grandson by a daughter, a brother, a father's brother, or a mother's brother. These are the five persons excluded. This was the case of a *Brahmin's* family, and the exclusion applies to the *Brahmin*, *Khittry* and *Bhoice castes*, but not to *Soodras*. The relationship to be considered is that between the deceased and the intended adopted son. I do not say that relationship to the widow is not to be considered. The precept applies to relationship with the deceased.

Question. Can a widow adopt her own sister's son?

Answer. There is no prohibition. She can adopt him.

Question. Can she adopt her own brother?

Answer. It is not prohibited in the *Dhuttuck Dhedittee*, but he may be excluded under the passages in the *Dhuttuck Chundrika.*

Question. May a sister's son be so excluded?

Answer. No, he cannot; what I state is according to the Sages and Legislators; there is no reason given for what is laid down. I conceive that the widow's sister's son does not come under the description of "Contrary relationship," and that a widow's brother does.

Question. Suppose one of the three widows had a child which survived the deceased husband, would this make any difference?

Answer. It would make no difference.

Question on the part of the Defendants. Are you aware of any explanation of the words "Contrary relationship" except that given in the *Dhuttuck Dhedittee?*

Answer. I do not at present recollect any other passage, but I believe there is an explanation in both the other treatises.

Question. In these books is the relationship spoken of the relationship between the adopting father and the adopted child?

Answer. Yes.

শ্রীরামকুমার শিরোমণিপণ্ডিতস্য

Cossinauth Turkapunchanund, Nilmoney Nayalunkah, Ramtonoo Biddiabageesh and *Ramkoomar Nayapunchanund* being present, are asked on the part of the Defendants if they have heard, and if they agree in the law as laid down by the *Pundit*, who has been interrogated?

Answer. We all agree so far as this, that the eldest widow is the person to receive the child in adoption notwithstanding the others have had sons. We disagree as to the adoption of a sister's son.

E. C. MACNAGHTEN, *Master.*

L. NAMEY.

শ্রীরামতনু বিদ্যাবাগীশস্য
শ্রীনীলমণি ন্যায়ালঙ্কারস্য
শ্রীকাশীনাথ তর্কপঞ্চাননস্য
শ্রীরামকুমার ন্যায়পঞ্চাননস্য

MASTER'S OFFICE, JAN. 7th, 1824. *Srimutty Degumberry Daby, versus Srimutty Taramoney Daby, and others.*

Ramkoomar Seeromoney, is produced to be interrogated in continuation. *Lewis Namey*, Interpreter.

He is asked on the part of the Complainant to give his authority for stating, as he did on the 5th instant, that the eldest of the three widows was the person to receive the child from its natural parents in adoption.

Answer. There are texts in the *Dhurmah Shastras* which prohibit other widows from performing any religious acts whilst the eldest is living.

He refers to a passage in *Yaggiawalkiah, Vivadabhangarnava*, and *Sree Bhagabut.*

Question. What is your authority for having said a widow may adopt a sister's son?

Answer. It is no where prohibited.

Question. Did you ever know of a case of adoption by one widow where there were several widows?

Answer. I do not immediately recollect a case.

Question. In any of the books are instructions given as to adoption where there are several widows?

Answer. I do not remember any.

Question. Which wife, according to *Hindoo* law, is most esteemed, the wife who has had a child, or the one who is childless?

Answer. The eldest widow, although she has not had a child, is superior. I can shew authority for a widow who has not had a child; being entitled to adopt a son in preference to a widow who has had a child.

He refers to the *Dhuttuck Memanshai* and *Dhuttuck Dheditee*, where the childless person in the enumeration of those who may adopt, is placed in order before the person who has had a child who is dead.

Question. Have you any other authority for stating, that the eldest widow is entitled to perform all religious ceremonies to the exclusion of the other widows?

Answer. There is a passage in the *Ramayana*, and there may be others.

Question. Do you mean to say, if a man leaves a younger widow pregnant of a son, which is born and lives for a time, that this widow has no preference over his other widows who never have had a child?

Answer. Even in this case the eldest widow is entitled to be preferred.

Question. Would the eldest widow in such case get the estate on the death of the son?

Answer. No.

Question. Has the widow who had the son, no preference?

Answer. No; the eldest widow is preferred.

Question. During the life time of the son, which of the widows has the preference, both as to worldly and religious acts?

Answer. Whilst the son lives he has the superiority, and the mother of the child must of course have superiority in the management of her son's wealth during his minority.

Question. Did you ever hear of an authority to adopt given by a man when one of his widows was pregnant?

Answer. I never heard of any case but this one. It is not prohibited.

Question on the part of the Defendants. Has the widow who has a son any superiority in the management of religious ceremonies during her son's life time?

Answer. None; all religious ceremonies are performed by the son, or by others on his behalf.

Question. Can a *Brahmin* marry two sisters?

Answer. Yes.

শ্রীরামকুমার শিরোমণিপণ্ডিতস্য

Ramtonoo Biddiabageesh, Cossinauth Turkapunchanund, Nilmoney Nayalunkah, and *Ramkoomar Nayapunchanund,* being present, are asked if they have heard and agree in the law as laid down by the Pundit who has been interrogated.

Answer. Yes.

E. C. MACNAGHTEN, *Master.*

L. NAMEY.

শ্রীরামতনু বিদ্যাবাগীশস্য
শ্রীনীলমণি ন্যায়ালঙ্কারস্য
শ্রীকাশীনাথ তর্কপঞ্চাননস্য
শ্রীরামকুমার ন্যায়পঞ্চাননস্য

MASTER'S OFFICE, SEPT. 11th, 1822.

Srimutty Degumberry Daby,
versus
Srimutty Taramoney Daby, and others.

Present, the Court *Pundits,* who are interrogated by *Mr. Thomas Petruse Astwa Chater,* sworn Interpreter. A person desires by his will, that a child should be adopted by his widows after his death. It is not necessary in such a case, that the nearest relation should be adopted. In the case of a *Brahmin,* the boy to be adopted must be between the age of two and five years. It would be better to select a child from the relations of the father, but it may be done from the relations of the mother. The person to be adopted need not be related in any manner to

the family. Having been adopted, he can perform all necessary ceremonies. The child must be of the same *cast* as the deceased; he ought to be of a good family, that is, the son of a respectable father and ought not to be sickly. If there is no direction given by the deceased as to the child to be adopted, a child related to the husband's family ought to be preferred, if he is equally healthy and as good in all respects as a child related to the deceased's widows.

শ্রীতারাপ্রসাদশর্ম্মণঃ
শ্রীরামময় শর্ম্মণঃ

E. C. MACNAGHTEN, *Master.* P. A. CHATER, *S. Int.*

MASTER'S OFFICE, } *Srimutty Degumberry Daby,*
JUNE 14th, 1823. } *versus*
Srimutty Taramoney Daby, and others.

Nilmoney Deb Surmona, a *Pundit*, produced to be examined on the part of the Defendants. *Petruse Astwa Chater*, sworn to interpret.

A *Brahmin* may adopt any child he pleases of the same cast as himself, provided the child is not above five years old. A *Brahmin's* widow having authority to adopt, has the same extent of choice as her husband had. The child must be of the same *cast*, and not above five years old. This is the only limitation.

Examined on the part of the Complainant.

Preference ought to be given to a child of the nearest relation. To adopt another child is not impious according to the *Shasters*. It is not enjoined by the *Shasters* to adopt a child of the nearest relation.

শ্রীনীলমণিদেবশর্ম্মণাম্

Ramjoy Turkalunkah, the Court Pundit, is present, and concurs in what has been stated by *Nilmoney Deb Surmona.*

শ্রীরামজয় তর্কালঙ্কার স্য

E. C. MACNAGHTEN, *Master.* P. A. CHATER, *S. Int.*

MASTER'S OFFICE, } *Srimutty Degumberry Daby,*
JAN. 7th, 1824. } *versus*
Srimutty Taramoney Daby, and others.

Guddadhar Turkabageesh, a Pundit from the College, is produced on behalf of the Complainant. *Lewis Namey*, Interpreter.

Question. A *Brahmin* left three wives, one pregnant who bore a son, this son having died, which of the widows is entitled to receive a child in adoption, under a direction to adopt from their husband?

Answer. The widow who had a son.

Question. If the eldest widow was childless, if the second widow had a child who died in the husband's life time, and if the third widow was left pregnant of a son who was born alive and afterwards died, which of these three widows is entitled to receive a child in adoption?

Answer. Each of the two widows who have had a child, has a right.

Question. If the child to be adopted is the son of her father's brother, does that disqualify one of the widows from receiving him in adoption?

Answer. It does.

Question on the part of the Defendants. Where is the authority for saying that the widow who has had a child is to be preferred to the other widows in receiving the child in adoption?

Answer. In *Munoo*, chapter 9, verse 8. I have not searched for other authorities.

Question Where is your authority for saying that a widow cannot adopt her father's brother's son?

Answer. It is in the *Dhuttuck Chundrika*, but I have not brought my own book and I cannot find the place.

E. C. MACNAGHTEN, *Master.*

শ্রীগঙ্গাধরশর্ম্মা
L. NAMEY.

IN THE SUPREME COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

IN EQUITY. *Srimutty Degumberry Daby,* versus *Srimutty Taramoney Daby, and others.*

In pursuance of an order of this Honourable Court made in the above cause and bearing date the seventh day of July in the year of our Lord one thousand eight hundred and twenty-three whereby amongst other things it was referred to the Master to enquire and report what will be a suitable sum to be paid out of the funds in the hands of the Accountant General to the credit of this cause for the purpose of performing in a suitable manner the ceremonies for the adoption of Tarracoomar Surmono as the son of Luckeynarain Tagore, deceased, and to whom such sum ought to be paid, and further that the Master should enquire and report to this Court who is the proper person to receive from his natural parents the said Tarracoomar Surmono at the ceremony of adoption; I have been attended by Mr. Thomas Bruce Swinhoe, as Attorney for the complainant and by Mr. William Denman, as Attorney for the defendants, and in their presence I have made the enquiry by the said order directed, and having heard and considered the evidence adduced and the observations made by the said Attornies on behalf of their clients respectively I find that the sum of Sicca Rupees one thousand and nine hundred is a suitable sum to be paid out of the funds in the hands of the Accountant General to the credit of this cause for the purpose of performing in a suitable manner the ceremonies for the adoption of Tarracoomar Surmono as the son of Luckeynarain Tagore, deceased, the particulars of which sum of Sicca Rupees one thousand and nine hundred are set forth in a schedule hereunto annexed which I pray may be taken as part of this my report. And I further report that the defendant Srimutty Taramoney Daby, the eldest widow of the testator Luckeynarain Tagore, deceased, is the proper person to receive from his natural parents the said Tarracoomar Surmono at the ceremony of adoption and that the aforesaid sum of Sic-

ca Rupees one thousand and nine hundred ought to be paid to her. All which I humbly submit to this Honourable Court. Given under my hand this ———— day of January, in the year of our Lord one thousand eight hundred and twenty-four.

A true Copy.

E. C. MACNAGHTEN.

SCHEDULE TO WHICH THE ANNEXED REPORT REFERS.

Hoom and Parbunnow Sheraud, ...	50	0
Jewels for the Child, ...	450	0
Present to Learned Brahmins, ...	300	0
Presents to Cooleens or Brahmins of high rank, ...	300	0
Feeding Brahmins, &c.	550	0
Cloth to the Relations, ...	150	0
Presents to be given to Brahmins by the relations, ...	100	0
Sa. Rs.	1,900	0

No. I. BENARES COURT OF APPEAL.

ANSWER.

A person named *Ramtonoo*, in his last illness leaves directions with his wife (*Huripriya*) to adopt a son and dies leaving his father (*Ramhury*) surviving him. *Ramhury* having been satisfied with the sanction which his son expressed to his wife to adopt a son, desires his daughter-in-law to select a boy from among his brother's sons and to adopt it. Afterwards he, *Ramhury*, dies, and also his brother. *Huripriya* adopts a son, *Ramcrishna*. Under these circumstances a question was put by the Judges whether *Ramcrishna* is entitled to succeed to the wealth of *Ramtonoo* only or to that of *Ramhury* also. The answer is as follows :—*Ramcrishna will take the property of both the deceased persons.* He is a substitute for a true son of *Ramtonoo* and also for a grandson of *Ramhury*. "Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased." All the twelve sons of men may succeed to their father's wealth. "The son of the body, and the son of the wife may succeed to the paternal estate ; but the ten other sons, can only succeed, in order to the family duties and their share of inheritance." It appears that on failure of a son of the body and the son of a wife, a *given son* is entitled to succeed to his father's wealth. *Menu:* "Of the man, to whom a son has been given, adorned with every virtue, that son shall take the heritage, though brought from a different family. "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 funeral oblation is extinct." The property of the son given, in the estate of the giver, ceases ; and his relation to the family of that person, is annulled, the funeral cake pursues the family and estate of him in whose family he enjoys wealth and he will present the funeral cake in his name and be his son. The offering of the funeral oblations, &c. to the donor (his natural father) by him, will cease, but he will do some benefit for him in the next world. *Ramcrishna* will take the whole

estate of *both persons.*" *Menu:* "By a son, a man conquers worlds; by a son's son, he enjoys immortality; and afterwards, by the son of a grandson, he reaches the solar abode." It appears from the treatises on the subject of the partition of heritage specifying the succession of a son or on failure of him a grandson, that the children of a son have the right to take the ancestrel property to the exclusion of a widow and other claimants to the estate. *Yajnyawalcya* says, "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels." A widow is competent to adopt a son with *permission of her husband, otherwise incompetent.* The doctrine of *Vashishtha* quoted in the *Dattaka Mimansa:* "Let not a woman either give or receive a son in adoption; unless with the assent of her husband." The adoption of a son of equal class who may not have been initiated in ceremonies down to that of tonsure under the family name of his natural father and who may be between three and five years old, is the most eligible. This opinion is conformable to the authority of the *Dattaka Mimansa.* By the adoption of a son, after the ceremony of tonsure he is termed *Dwyamushayana* or son of two fathers and he will be connected with both families and be initiated under both the family names. *Vriddha Gautama* forbids the participation in inheritance, of one, not of the same tribe, thus, "should one of a different class be taken as a son in any instance, let him (the adopter) not make him a participator of a share, this is the doctrine of *Saunaka*" laid down in the *Dattaka Mimansa.* The nearest relative must be taken for adoption, on failure of him a remote kinsman.—*Vasishtha* declares, "A person being about to adopt a son, should take an unremote kinsman, &c." Similarity of tribe is prescribed for all the classes not a difference of tribe. But a daughter's son, and a sister's son, are affiliated by *Sudras.* For the three superior tribes, a sister's son, is no where (mentioned as) a son. Here also the term "sister's son," being mentioned as an exception, the general rule holds good relative to the prohibited connection. On the part treating of the initiation of a given son *Vriddha Gautama* says, "having adorned with clothes and so forth, the boy bearing the reflection of a son." The adoption of a son of the paternal uncle is illegal. It is not clearly mentioned in the question that the son so adopted in this case was the son of *Ramtonoo's* father's brother or one of his other relations; under these circumstances according to the question the answer is given conformably to the opinions of the learned. In the case of adoption of a prohibited relation, the act is valid, but both parties donor and donee must perform expiatory penances. The command of the *Gooroo* is received by all men with veneration. The father-in-law is the *Gooroo,* and any act performed by his command is undoubtedly legal and valid.

No. II. ZILLAH ALLAHABAD.

ANSWER.

Nareda.—A son begotten by a man himself in lawful wedlock, a son begotten on his wife by a kinsman and the rest are declared to be twelve sons.—In the *Cali* age a son of the wife, a son of a twice married woman, a son of a young woman unmarried, a son of a pregnant bride, a son of concealed birth, must not be adopted for offspring.—The son of the body, the son of an appointed daughter, a *son given* and others have the right to participate on account of their offering the funeral cake. A given son succeeds to kinsmen. *Menu.* "The son be-

gotten by a man himself in lawful wedlock, the son of the wife begotten in the manner before mentioned, a *son given* to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." *Vrihaspati:* "A *son given*, a son rejected, a son bought, a son made through adoption, and a son by a Sudra; these, if pure by class, and irreproachable for their conduct, are held in a middle degree of estimation.—As *Yajnyawalcya* declares treating of the succession of the true legitimate son and succedaneous sons to the heritage."—Among these, the next in order is heir, and presents funeral oblations, on failure of the preceding. *Menu:* "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 funeral oblation is extinct." The adoption of a son is only as a substitute of a true son; the son so adopted *is entitled to succeed to the wealth of his adopting father. According to the authorities of Nareda, Menu, Yajnyawalcya,* and *Vrihaspati, Ramcrishna* is competent to take the *heritage of his* (*adopting*) *father and his adopting father's father and grand-father.*

No. III. ZILLAH BANDA.

ANSWER.

In the present age the son of the body and the *son given* are principal in consideration, as appears in the *Nirnaya Sind'hoo* and *Vrihannaredeya* treating of things which should be avoided in the *Cali* age; "No other sons should be received than the son of the body and the *son given* for offspring." The doctrine of *Vishnu* cited by *Yajnyawalcya* in his work.—"If one die leaving neither son, nor grandson, the daughter's son shall inherit the estate." The authority of *Menu Sunghita;* "To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grandfather,) is the funeral cake ordained; the fourth in descent is the giver of oblations to them, and their heirs, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake." The son of the body and the grandson have the right to the estate of the grandfather and so forth, *and the succedaneous son has also.* "By a son, a man conquers worlds." In this case a given son is competent to succeed to the adopting father's father, &c. *Ramcrishna* who, according to the form ordained for adoption, was adopted as the son of *Ramtonoo, will take the heritage of his adopting father's father* (*Ramhury.*)

No. IV. NORTHERN DIVISION OF BUNDLEKUND.

ANSWER.

A widow adopts a son with the consent of her husband, should her husband and father-in-law die leaving no children, that son, so adopted, on account of his being the representative of a true son, *will succeed to the property real and personal of both the deceased persons.* This opinion is conformable to *all the laws of inheritance;* and the authorities for it are the doctrines of *Menu,* &c. laid down in the *Mitacshara* and other books, "He is called a *son given* whom his father, or mother, affectionately give as a son, being alike and in a time of distress, confirming the gift with water." "A son, formed of seminal fluids and of blood, proceeds from his

father and mother as an effect from its cause: both parents have power for just reasons, to give, to sell, or to desert him; but let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors." "Nor let a woman give or accept a son, *unless with the assent of her lord.*" "Of the man, to whom a son has been given, adorned with every virtue, that son *shall take the heritage,* though brought from a different family." "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 sons, the funeral oblation is extinct." "By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson he reaches the solar abode."

No. V. BENARES CITY COURT.

ANSWER.

It is declared in the *Nirnaya sindhoo* and *Prayashcheetta ratna* on the subject of acts to be avoided in the *(Cali)* present age that "the son of the body and the *son given* will be affiliated for offspring." Under this view of the case in the *Cali* age no filiation is legal but that of a son legally begotten by a man himself and of a *son given* by his natural parents. It is *clearly laid down* in books of law treating of inheritance that the wife and other heirs down to the degree of the fellow-student, derive the right of succession to the estate of a deceased person on failure of his true legitimate or succedaneous son and so in default of a true legitimate son, the claim of inheritance of a (succedaneous given son is established. "Among these, the next in order, is heir, and presents funeral oblations, on failure of the preceding." According to the doctrine of *Yajnyawalcya*, the son given has a legal claim to the *whole property* of his adopting father. "A son begotten by a man himself on a faithful wife, the son of his wife begotten by a kinsman, a son by a twice-married woman, the son of an unmarried girl, the son of an appointed daughter and a son of concealed birth, are heirs to kinsmen. A son given by his parents, a son brought, a son rejected, the son of a pregnant bride, a son self-given, *and a son made by adoption are not heirs to kinsmen;*" according to this *latter doctrine* it would appear that a *given son has no right* to inherit from his (adopting) father's kinsmen, but it *must not be alleged that he is incompetent to take his grandfather's heritage. Menu:*—"The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a *son given* to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the kinsmen *and heirs.* The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a *Sudra,* are the six kinsmen, but not heirs to collaterals." *Baudhayana:*—"Participation of wealth belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, *a son given, a son made* by *adoption,* a son of concealed birth, and a son rejected by his natural parents. Consanguinity denoted by a common family appellation, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a *priest by a Sudra.*" *Vrihaspati:*—"*A son given,* a son rejected, a son bought, *a son made through adoption,* and a son by a *Sudra;* these, if pure by class and irreproachable for their conduct, are held in a middle degree of estimation." According to the doctrines of *Menu, Baudhayana,* and *Vrihaspati,* (who is the heavenly teacher,) the right of inherit-

ance of a *given son* to the estate of his *kinsmen* is *clearly established. Nor is* there *any discrepancy* between the doctrines of *Harita* and of those *holy saints* already named; *Mitra misra reconciles* the doctrine of *Harita*, by referring it to the case of a *given son* of a *different* tribe, but not to the case of him of equal class to which the doctrines of *Menu* and others are referred. But the following doctrine recognizes his right of succession to the estate of his father; "A son, son's son and great grandson have the right of inheritance from their ancestors;" this doctrine is conformable to the authorities above stated. The term '*son*' in *its legal acceptation* includes the *great grandson.* "The legitimate son is the sole heir of his father's estate." *Menu* declares treating of the right of succession of a true legitimate son, 'Not brothers, nor parents, but sons, if living, or their male issue." By the *same rule* the inheritance devolves also on a *succedaneous* son, as the term son here used includes both them and the great grandson. Without reference therefore to the texts declaratory of his right to succeed to kinsmen, should a widow adopt a son *Ramcrishna* to be the son of *Ramtonoo* and grandson of *Ramhury* according to the forms ordained for adoption with the consent of both her husband and father-in-law, that son by virtue of his becoming the son of the adopter and this grandson of his father, succeeds to their estate. *A given son* of equal class, is competent to take the heritage of his *adopting father* and *also* of his *adopting father's father; this exposition* is *conformable to law.*

No. VI. ZILLAH JOUNPORE.

ANSWER.

According to law *Ramcrishna* is *entitled* to succeed to the property, *real and personal,* left by both *Ramtonoo* and *Ramhury.*

AUTHORITY.

Mitacshara:—"As the son, grandson, and great grandson have the right to the estate of their ancestors, so on failure of the preceding heirs a brother's son derives a right of succession."

No. VII. ZILLAH GHAZEEPORE.

ANSWER.

Ramtonoo, (a brahmin,) three days previous to his death, desires his wife *(Huripriya)* to adopt a son and dies; afterwards his father, *Ramhury,* hears of the direction, and having given his assent thereto, dies. The consent of the father-in-law is superfluous. *Ramcrishna,* who was adopted for offspring, *has the right to the estate* of *Ramtonoo and also of Ramhury.*

AUTHORITIES.

Gautama:—"A son, begotten after partition, takes exclusively the wealth of his father."

Menu:—"By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson, he reaches the solar abode." "Of the man, to whom a son has been given, adorned with every virtue, that son shall take the heritage though brought from a different family."

Yajnyawalcya:—"The attainments of worlds, immortality and heaven, depend on a son,

grandson and great grandson." "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow-student on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all persons and classes."

The adopted son *Ramcrishna* is one of the twelve descriptions of sons, and *Ramhury* gave his consent to his adoption; in this case he becomes the son of *Ramtonoo*, and the grandson of *Ramhury*, and *is entitled* to succeed to *their estate*. No other person can legally claim the heritage while a son or grandson exists. According to the authority of *Gautama*, the right of a person to the estate of his father and grandfather is established at the time of his birth. According to the doctrine of *Yejnyawalcya*, "the term *apootra* (a person leaving no male issue") signifies a failure of descendants down to the great grandson.

No. VIII. ZILLAH MIRZAPORE.

ANSWER.

If a woman, in pursuance of her husband's desire, adopted a son, *he is heir to the estate* of his *(adopting) father*. These twelve sons have been propounded for the purpose of offspring, being sons begotten by a man *himself*, or procreated by another man, or received (for adoption) or voluntarily given. Among these, the first six are heirs of *kinsmen;* these are enumerated by *Devala*.

Of the man to whom a son has been given adorned with every virtue, that son shall take his heritage, though brought from a different family.

As *Menu* says, "*A given son* must *never* claim the family and estate of his natural father." Whatever widow adopts a son *with the permission of her father-in-law*, the adopted son may be *his* heir. It is laid down in the *Menu Sunghita*, "To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grandfather) is the funeral cake ordained: the fourth in descent is the giver of oblations to them and their heirs, if they die without nearer descendants, but the fifth has no concern with the gift of the funeral cake." If a person has no legitimate son of his *own son*, his *grandson* of *another description may be his heir*.

No. IX. ZILLAH GORUCKPORE.

ANSWER.

A widow of a childless person, with the consent of her late husband, adopts, agreeably to the prescribed forms, a boy in every respect fit for adoption. Such son so adopted, *is entitled to succeed to the property of his adopting father's father*, if the latter died leaving neither son, grandson, nor great grandson.

AUTHORITIES.

The doctrine of *Culluca Bhutta* commenting on the Text of *Menu*:—"To three ancestors must water be given at their obsequies, for three is the funeral cake ordained, the fourth is the giver of oblations to them, but the fifth has no concern." The meaning of this verse is that to three, that is the father, his father, and the paternal great grandfather, water must be offered; to the same three must oblations of food be made. The fourth in descent is the offerer of the oblations and libations, but the fifth is not included. Therefore subsidiary grandsons acquire a

right to the estate of their adopting father's fathers who die leaving no male issue, in the same manner as true grandsons whose right is established by the following text:—"By a son a man conquers worlds. By a son's son he enjoys immortality," &c. The adopted son obtains the lineage both of the maternal and paternal grandfather by means of his adopting father. According to the doctrine of *Kashnayana*, "As many as there may be degrees of forefathers, to so many the adopted sons and the rest," &c &c. It is also stated in the *Dattaka Mimansa* that the grandson of the adopted son should offer oblations to three ancestors, one of whom is the father of the adopting father.

The texts of *Catyayana;* "The rule shall be the same with regard to the debts of the grandfather." "After the death of his father, the debts of his grandfather must be carefully discharged by the grandson." Those and other texts declaring that a grandfather's debts must be paid by a grandson with interest, if there are assets, and without interest if there are none, denote that the grandson succeeds to the estate. His compliance with the terms of succession is the cause of his right, as wages are the recompence of a person hired for a certain task. "The son, grandson, and great grandson, confer great benefits on their father and ancestors. Propinquity in the order of succession depends on the greater or less degree of benefit conferred. This has been expressly assigned to be the cause. Now it is obvious that the son, grandson, and great grandson, confer great benefits, and whoever confers the greatest benefit on a deceased proprietor succeeds to his wealth. The text ordaining that debts are to be paid by sons and grandsons, and the text treating of ancestral property which declares the ownership of father and son to be equal. In treating of the succession to the grandfather's property, it is laid down that the son and grandson must pay the debts; also that the ownership of father and son is equal. It follows therefore, that so long as there is a grandson in the male line, the grandson in the female has no title to the inheritance; for the grandson in the male line confers both spiritual and temporal benefits by paying off his debts and offering the funeral oblations, whereas the grandson in the female line only offers the oblations. It is on this account that the daughter is inferior to the son. In treating of the succession of a daughter, it is laid down that a grandson, even though he do not inherit any wealth from his grandfather, should nevertheless pay off his debts and perform his obsequies in order to ensure his ancestors' permanent bliss in heaven, and that on the conferring of those benefits alone, the succession depends, and that the benefits conferred by a grandson in the female line are less than those conferred by a grandson in the male line. This is according to the *Viramitrodaya*. In the *Dayabhaga* it is stated, that the conferring of the benefits on the deceased, constitutes the foundation of the right to his property. As the father, grandfather, and great grandfather, are released from the debt due by them to their ancestors by means of the offering performed by their sons, grandsons, and great grandsons; the three latter succeed to the estate of the former. "*A woman should not of her own authority adopt a son.*" "An only son should not be adopted." "He is the means of salvation to many generations." These texts of *Apararca* or adoption, and cited in the *Dattaka Mimansa*, are all corroborative, and it also appears from the text of *Hemadri* cited in the *Nirnaya sindhoo*, that the funeral obsequies for an adopting father should be performed in the same manner as for a natural father. *Logical inference* also establishes this doctrine, as appears from the text of *Vrihaspati;* "If no decision were made according to the reason of law, or according to the immemorial usage, (for the word *Yucti* admits both senses), there might be a failure of justice." From this text of *Vrihaspati* it is

understood that *(Yucti)* ratiocination is a principal body of law. Under these circumstances it appears that the right of inheritance of such subsidiary grandsons *should be admitted to the property of their adopting father's fathers. Jimuta-vahana* makes the term "father" to include the father, grandfather, and great grandfather. The text of *Yajnyawalcya*:—"The ownership of father and son is the same in the land which was acquired by his father." *Vrihaspati* says, "Of property acquired by the grandfather, whether moveable or immoveable, equal shares are ordained for the father and son." *Vishnu* says, "In the estate inherited from the grandfather, the ownership of father and son is equal." *Yajnyawalcya* says, "Daughters share the residue of their mother's property, after the payment of their debts." Here the term "mother" is used for the succession of a grandson to his paternal grandmother's estate. On failure of a son, grandsons are entitled to inherit from their grandfathers. *Gautama* ordains: "He who has received the estate of a proprietor, must pay the debts of the estate." "The son and grandson must discharge the debts contracted by their ancestors." By the discharge of the debts of a paternal grandmother by her grandson, he acquires the right of inheritance. As is laid down in the *Mitacshara*; "The inheritance first goes to a son of the body next to the son's son, and lastly to the great grandson." "The son and grandson must discharge the debts contracted by their ancestors." Therefore by virtue of the satisfaction of the debts by a grandson and by his presenting the funeral cake, he takes his heritage in the like manner as a maternal uncle acquires the right inheritance. *Menu* says, "Then on failure of such kindred, the distant kinsman shall be heir." The word distant kinsman *(Saculya)* includes the *Sugotras, Samanodacas*, maternal uncles, &c. three descriptions of *Bundhoo* or kinsmen. According to the doctrine of *Yajnyawalcya*, the term *(Bundhoo)* or kinsman, means the maternal uncle, &c. If this interpretation be not received, how can a maternal uncle and his son inherit. The author of the *Viramitrodaya* explains the words *Saculya* and *Bundhoo* contained in the doctrines of *Menu* and *Yajnyawalcya*, by supposing them to denote the maternal uncle. The following doctrine of *Menu* as adduced in proof of the opinion; "The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before-mentioned, a son *given to him*, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." According to the exposition of *Culluca Bhutta* and of the authors of the *Mitacshara* and *Viramitrodaya*, a given son of a brother may succeed to the estate of his adopting father's brother on failure of his son and other legal heirs by reason of his conferring benefits on him. *Under these circumstances if it be alleged that a subsidiary grandson who confers the benefits on his adopting father's father, is not entitled to inherit from him in like manner as from his adopting father, the declaration is wrong.* *Yajnyawalcya* says, "The ownership of father and son is the same," &c. Any *Parvana* or double rite performed for the sake of the grandfather, must be considered as offered to the other ancestors of the same family. The word father means the sons of the *propositus*. The word son includes all those persons who are competent to perform the *Parvana* or double rite. This exposition is given by *Sricrishna Turcalunkara*.

No. X. BARELLY PROVINCIAL COURT OF APPEAL.

ANSWER.

It is understood that one *Ramtonoo*, the legitimate son of *Ramhury*, died previously to partition, in the life time of his father. *Ramcrishna* is the adopted son of the widow *Huripriya* who obtained permission of her husband *Ramtonoo*, to adopt a son, and of the said *Ramhury* (her father-in-law,) in this case the adopted son of *Huripriya*, (the widow of *Ramtonoo*,) who is the son of *Ramhury* is *entitled* to succeed to the *whole property both of his father (Ramtonoo) and his grandfather (Ramhury.)* This opinion is delivered according to the doctrine laid down in the *Mitacshara*, *Vivada-chintamani*, *Vivada-chundra*, *Vyavahara Mayucha* and *Duya Datta*.

AUTHORITIES.

To the wealth acquired by the grandfather, his son, and grandson have an equal right. *Vrihaspati:*—"In wealth acquired by the grandfather whether it consist of moveable or immoveable, the equal participation of father and son is ordained." *Yajnyawalcya* declares, "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels." *Catyayana:*—"It is proper that an equal distribution of the grandfather's estate be made among the father and brothers." *Yajnyawalcya:*—"But to grandsons by different fathers shall be allotted the portions of their respective fathers." *Vishnu:*—"The ancestral property should be divided by the heirs according to the shares of their respective fathers." *Catyayana* propounds, "Should a son before partition die, his share shall be allotted to his son, provided he had received no portion from his grandfather's estate. That son's son shall receive his father's share from his uncle, or from his uncle's son; and the same proportionate share shall be allotted to all the brothers, or if that grandson be also dead, let his son take the share, beyond him succession stops."

No. XI. ZILLAH AGRA.

ANSWER.

An adopted son has a right to the property of his *adopting father's father*, &c. should he leave no male issue. *Culluca Bhutta* has recognized his right of succession in illustrating the doctrine of *Menu*. Should the son be adopted according to the forms ordained for adoption, he will take the wealth of his adopting father's father, &c. who died without issue, and will offer the funeral cake to him. The authority for this is contained in the passage of *Yajnyawalcya*. *Menu:*—"To three ancestors must water be given at their obsequies, for three (the father, his father, and the paternal great grandfather,) is the funeral cake ordained; the fourth in descent is the giver of oblations to them and their heirs, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake." *Yajnyawalcya:*—"Among these, the next in order, is heir, and presents funeral oblations, on failure of the preceding." On failure of the son of the body, and of so forth, a given son succeeds to the wealth of his father, this opinion is declared in the *Munmastha Mookavalee;* "Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased."

No. XII. ZILLAH ALLIGURH.

ANSWER.

Should a widow adopt a son with the consent both of her husband and father-in-law, *that son succeeds to the whole property of his father and also to that of his grandfather*, if he (the given son) be of equal class and adopted according to the mode prescribed by *Vasishtha* and *Shounaka* for adopting a son; that he has a right to the estates of both his father and grandfather is *established by the doctrines of Menu, Yajnyawalcya*, and of other lawyers laid down in the *Munmastha Mookta-valee, Bhugabunta-Bhaskara*, and *Viramitrodaya*.

AUTHORITIES.

Menu:—"Of the man to whom a son has been given, adorned with every virtue, that son shall take the heritage, though brought from a different family." If brought from the same family he succeeds a fortiori.

Baudhayana:—"He pronounces the real legitimate son, the son of an appointed daughter, the wife's son, the son given and made, the son of concealed origin, and the deserted son also, participators in the estate,—the son of an unmarried daughter, the son received with a pregnant bride, the son bought, the son of a twice-married woman, also the son self-given, and the *Nishada* or son of a *Sudra*, he pronounces partakers of the family."

Menu:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen, and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." It appears that the son of the wife and the rest are competent to succeed to the estate of their grandfather, &c. *Menu* subjoins; "To three ancestors must water be given at their obsequies."

Yajnyawalcya having propounded the son of the wife and the rest, says, "Among these, the next in order is heir, and presents funeral oblations, on failure of the preceding." Under these circumstances from the use of the term *(Rikta)* "wealth;" from the passage "six are heirs of kinsmen," and the passage "To three ancestors must water be given at their obsequies." It follows that a *given son is entitled to succeed to the whole wealth of his (adopting father and succeeds to his grandfather in like manner as a true legitimate son, through his adopting father.* A given son is a substitute for a true legitimate son of the body, and where the substitution is admitted, the son so substituted obtains the rights.

No. XIII. ZILLAH BARELLY.

ANSWER.

A person named *Ramtonoo* leaves directions with his wife to adopt a son, and then dies, leaving his father *(Ramkury)* him surviving. Afterwards *Ramkury* dies. The widow *Puripriya* adopts a son *Ramcrishna*. In this case is the son entitled to take the property of his *adopting father only* or that of his adopting father's father also? To the above the following is

the reply. A widow is competent *with the consent both of her husband and* father-in-law to adopt a son by procuring the ceremonies of *Homa* or burnt-offering, &c prescribed in law to be performed by a *brahmin*. The right of the son given who may have been adopted in due form to the estate of his natural father and his relation to that person will cease, but he acquires connection with the estate and family of his adopting father by virtue of the adoption. The filiation of a son adopted by a wife is legal and in the like manner a son adopted by a daughter-in-law becomes her father-in-law's grandson. On failure of a principal a substitute is allowed "As oil is substituted by the virtuous for liquid butter."

The son, son's son and great grandson; the next in order, according to the doctrine of holy saints, succeed to the estate of a deceased, on failure of the preceding. In default of the succedaneous son and of the true son, grandson and great grandsons, "the wife, and daughters, and so forth, on failure of the first among these, the next in order is indeed heir to the estate of one who so parted for heaven." The word 'son' includes a *given son*, and the term "on failure of a son" means in default both of the true and succedaneous sons. The objection should not be raised that the term son includes an adopted son, but that the term grandson does not include the adopted son of a son. The son adopted by a widow is appointed to perform the funeral ceremonies, and to preserve from extinction the family of her father-in-law and husband, on which his right succession is founded, not on relationship. It is declared in the law of inheritance that the heir derives his right to it by performing benefits towards the deceased.

That *Ramcrishna* adopted by *Huripriya* with the consent of her husband and father-in-law *succeeds to the entire estate of his adopting father and of his grandfather may hence be inferred*; both have died without leaving sons, this opinion is agreeable to the doctrines of the *Mitacshara*, the *Viramitrodaya*, the *Vyavahara-mayucha*, and other authorities.

No XIV. ZILLAH CAWNPORE.

ANSWER.

Ramcrishna, the person duly adopted by *Huripriya*, is empowered to offer the funeral cake and water at the appointed seasons to *Ramhury* and *Ramtonoo*, and being competent to perform all the observances of his tribe, becomes an adopted member of the family and heir to the property of *Ramhury* and *Ramtonoo*. This opinion is agreeable to the doctrines of *Menu*, the *Mitacshara*, the *Dattaka Mimansa*, the *Dattaka Chandrika*, and accords with the established usage of the country. The authority of *Vriddha Gautama* laid down in the *Dattaka Chandrika*, "The sons given, purchased, and the rest, who are adopted, from those of his own general family, by observance of form, acquire the state of lineage (*gotrata*) to the adopter. But the relation of *sapinda*, is not included."

Menu declares, "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 funeral oblation is extinct,"

No. XV. ZILLAH MEERUT.

ANSWER.

A person destitute of male issue, previously to his death, desires his wife to adopt a son and then dies. Afterwards his father approves his directions, giving his assent thereto, and dies before the adoption. The widow subsequently adopts a son; that son *is entitled to succeed to the whole estate* of both *of his (adopting) father* and *adopting father's father;* as appears from the commentary by *Cullooca Bhutta* on the doctrine of *Menu*:—"To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal great grandfather) is the funeral cake ordained; the fourth in descent is the giver of oblations to them, and their heirs, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake." The meaning of this verse is, that to three, that is, the father, grandfather, and great grandfather, water must be offered, and to the same three must oblations of food be made; the fourth in descent is the offerer of the oblations and libations, but the fifth is not included. Successaneous grandsons acquire the right of inheritance to the estate of their grandfathers who die leaving no male issue. "By a son, a man conquers worlds; by a son's son, he enjoys immortality." The succession of a grandson to his grandfather's estate is ordained by law. The following doctrine of *Baudhayana* is laid down in the *Viramitrodaya*:—"Participation of wealth belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, a son given, a son made by adoption, a son of concealed birth, and a son rejected by his natural parents." The question merely goes to ascertain, whether a given son is competent to inherit the wealth of his adopting father's father; yet from the mention of *Ramkury's* intention of adopting one of his brother's sons, it is presumed that one of these relations is also a claimant; but it appears that no adoption did actually take place until after the death of *Ramkury,* after which event *Ramkrishna* was adopted. The claim therefore of the nephew in opposition to that of the *adopted son, is totally nugatory* and *groundless; were it otherwise, all the laws relative to adoption would be superceded.*

No. XVI. ZILLAH SAHARUNPORE.

ANSWER.

According to the doctrine of the *Mitacshara,* AND INDEED ALL OTHER AUTHORITIES, *Huripriya* not having made the adoption in the presence of *Ramkury,* the latter dying previously without leaving either son, grandson, or wife, *Ramcrishna* (adopted after the decease of *Ramkury*) is NOT ENTITLED *to succeed to his estate, the rightful heirs being* first his brothers or their legitimate children, and in the event of none existing, his other relations, according to the rules of Inheritance. *Huripriya,* who adopted *Ramcrishna* with the consent of her husband, became after his death heir to his property; and will be succeeded on her decease by *Ramkrishna.* The consent of *Ramkury* to the adoption is established, but by reason of the adoption not being made during his life, and likewise as he did not expressly constitute *Ramcrishna* his heir, in the presence of a *Punchayet,* the latter cannot obtain his property. Had however the

adoption been made during the life of *Ramhury, Ramcrishna* unquestionably would have been entitled to succeed to his estate.

Mitacshara:—The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow-student, on failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue. This rule extends to all (persons and classes.)"

No. XVII. ZILLAH MORADABAD.

ANSWER.

Ramtonoo, (a *Hindoo,)* in his last illness and a few days before his death, desires his wife *Huripriya* to adopt a son. *Ramtonoo* dies, leaving his father (*Ramhury)* surviving him. *Ramhury (Ramtonoo's* father) lives about three years after his son *(Ramtonoo)* and then dies leaving neither widow nor child;—a short time after the death of *Ramtonoo, Ramhurry* hears of his *(Ramtonoo's)* having left directions with his *(Ramtonoo's)* wife *(Huripriya)* to adopt a son, and he approves those directions. *Huripriya*, after the death of *Ramhury*, adopted a son *Ramcrishna* (perfectly eligible for adoption) as her own son. There are eleven descriptions of sons besides him who is begotten by a man himself in lawful wedlock; among those sons the given son is enumerated. Adoption is only intended to obviate a failure in the offering of the funeral oblation to the father and grandfather (if they died childless) and for the purpose of creating an heir. Under these circumstances, according to the *Dhurma Shastra* or law of Inheritance, *Ramcrishna,* who is adopted by *Huripriya,* the widow of *Ramtonoo,* with the consent of both her husband and father-in-law *(Ramhury) is competent to present the funeral cake* and *water* to those persons deceased, and they will receive them by him, in consequence of which *Ramcrishna* is *entitled to succeed to the property* left by *both (Ramtonoo,* the husband of *Huripriya,* and *Ramhury,* the father of *Ramtonoo,)* according to the doctrines of *Menu* laid down in the *Menu Sunghita* in the 9th chapter; passages one hundred and eighty-five and six, and also of *Vridhee Vrihaspati* and *Yajnyawalcya.*

AUTHORITIES.

Menu:—"He is called a son given, whom his father, or mother, affectionately give as a son being alike, and in a time of distress, confirming the gift with water.

Sages declare, "these eleven sons (the son of the wife and the rest) as specified to be substitutes for the real legitimate son; for the sake of preventing a failure of obsequies."

Vridhee Vrihaspati:—"As oil is substituted by the virtuous for liquid butter, so are eleven sons by adoption substituted for the legitimate son, and appointed daughter."

Menu:—"Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased." "To three ancestors must water be given at their obsequies, for three (the father, his father, and the paternal grandfather) is the funeral cake ordained: the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants, but the fifth has no concern with the gift of the funeral cake."

To the wealth of a childless person, his grandson, of another description, derives a proprietory right; amongst these, the next in order, is heir, and presents funeral oblations, on failure

of the preceding; not brothers, nor parents, but legitimate sons, on default of them the illegitimate sons are heirs of the deceased. In the *C li* age, the sons of another description must not be taken as offspring but only the son of the body, and the son given; so also in the present age a voyage beyond sea and the slaughter of a bull at a sacrifice must be avoided.

No. XVIII. ZILLAH FURRUCKABAD.

ANSWER.

The doctrine of *Karshnayani* declared in the *Hamadri*:—"As many as there may be degrees of forefathers: with so many, their own forefathers, let sons given and the rest associate the deceased. In order, their sons with two forefathers, their grandson with *(Samam)* one, (should do) the same. The fourth degree is excluded. This relation (of *Sapindas)* extends to three degrees." There is no particular offering for the forefathers on ordinary occasions; but on the anniversary of the death, the obsequies should be performed with due form for a single ancestor. The *parvana* or double right of a given son should be performed for both his natural and adopting fathers. The son, grandson, and great grandson will perform the rites for the father, grandfather, and great grandfather. The fourth in descent his (adopted son's) great grandson is excluded. A given son must not confine himself to the ceremony for his adopting father but must perform that also of his natural father. The obsequies of the forefathers generally should be celebrated in ordinary occasions and in the *Amavasya*, (full moon.) The following is the comment on the doctrine of *Devala* treating of the twelve descriptions of sons, made by *Jimutavahana* in the *Dayabhaga*:—"These twelve sons have been propounded for the purpose of offspring. Among these, the first six are heirs of kinsmen. The true legitimate son and the rest, to the number of six, are not only heirs of their father but also heirs of kinsmen; that is, of *Sapindas* and other relations. The others are successors of their (adopting) father but not heirs of collateral relations *(Sapindas, &c.)* A given son is competent to take the heritage and to offer the funeral cake to his three ancestors." *Menu*:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father but kinsmen." All descriptions of sons are entitled to inherit from their respective fathers. "Sons are sole heirs to the deceased." *Menu* rejoins; "To three ancestors must water be given at their obsequies; (for three, the father, his father, and the paternal grandfather,) is the funeral cake ordained." *Culuca Bhutta* comments on this doctrine to the effect that the succedaneous grandsons derive the right to the estate of the adopting father's father, &c. who dies leaving no male issue. The property of a person goes to his nearest *Sapinda*, male or female, on failure of such relative, a given son is entitled to inherit from his adopting father's kinsmen, this is the explanation of the passage of *Menu* laid down in the *Mitacshara*. The doctrine of *Menu* declared in the *Bhugavunta-Bhaskara* and *Vyavahara-mayucha*; "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 funeral oblation is extinct." By virtue of the extinction of the funeral oblation the family and estate of his natural father ceases, the same rule holds good with respect to his brothers and uncles, &c. So also the son of a given son in performing his father's *Sapinda-kurana, Parvana, &c.* should associate his father's adopting father, and the same rule applies to his son. The same practice will be followed by a son received according to the *Dwyamushyayana* form

of adoption. *Catyayana* says, "To three ancestors must the funeral cake be offered." On failure of the son, the son given inherits from his adopting father's kinsmen. He is entitled to a fourth part of the estate where a son of the body exists. The son of an appointed daughter, the son of the wife, a son given, and the rest, are of two descriptions; the absolutely adopted son and *Dwyamushayana* or the son of two fathers. Upon which *Vridha Yajnyawalcya* and *Devala* say; The *Dwyamushayana* sons should offer the funeral cake and water to two separately. To two they should offer six *Pindas*. By such practice they act virtuously. To two, the meaning is to two sets of fathers. The will of the person adopting is essential to adoption. For this reason the right of succession and filiation are both established. The text of *Catyayana*; "Whatever a woman does by the order of her father, or her husband, or her son, is commendable if done by their desire. Whatever she may be directed to perform, she should perform without loss of time." As the widow *Huripriya* adopted a son (*Ramcrishna*) with the consent of her husband and father-in-law, *that son is entitled to take the heritage of both* his (adopting father *Ramtonoo*, and adopting father's father *Ramhury*, and to offer the funeral cake to his three ancestors.

No. XIX. ZILLAH ETAWAH.

ANSWER.

Should *Huripriya* with the consent of her husband and father-in-law adopt a son, he *will succeed to the entire property according to the doctrines of Menu* and *Yajnyawalcya*; "Of the man, to whom a son has been given, adorned with every virtue, that son shall take the heritage though brought from a different family." "On failure of the first among these, the next in order," &c. Should it be objected that *Huripriya* herself is entitled to inherit the estates of both her husband and father-in-law, and therefore that the son (*Ramcrishna*) adopted by her cannot be entitled to succeed; or should it be objected that the widow herself has no right and a *fortiori* her adopted son has none, from the following texts of *Nareda* and *Menu*; "Among brothers, if any one die without issue, or enter into a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord; but if they behave otherwise, the brethren may resume that allowance." "Of him who leaves no son, the father shall take the inheritance, or the brothers." The following texts are adduced in reply; "Let the wife of a deceased man, who left no male issue, take his share, notwithstanding kinsmen, a father, a mother, or uterine brother be present;" this is the doctrine of *Yajnyawalcya*. "The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share;" this is ordained by *Menu* and others, and by these texts *Huripriya* is *declared competent to succeed to the wealth of her husband.* The texts reciting the opposite doctrine refer to a case of undivided property between a brother and widow but not to that of a divided estate. Should it be asserted that a widow has a right to succeed to the *personal* but not to the *real* estate by reason of the following texts; "Let the wife on her husband's death take his *personal* property but *not* his *real* estate. Even though she live retired, a woman is not entitled to take real property." The following *texts are adduced in reply*; "Dying before her husband, a virtuous wife partakes of his consecrated fire: or, if her husband die (before her, she shares) his wealth: this is a primeval law. Having taken

his *moveable* and *immoveable* property, the precious and the base metals, the grains, the liquids, and the clothes, let her duly offer his monthly, half yearly, and other funeral repasts." By this text of *Prajapati*, the right of a widow to the *immoveable* property is *clearly* established. The texts reciting the opposite doctrine refer to the case of a polluted widow who is incompetent to inherit the real property. *Ramcrishna*, through his adopting mother *Huripriya*, succeeds to the estate of *Ramtonoo*. It should not be alleged that he has a right to the estate acquired by *Ramtonoo* only, but not to that of *Ramhury*. A son derives the right to his father's acquisitions, and by that son a grandson acquires the right to them. *Yajnyawalcya* says, "The ownership of father and son is the same in land which was acquired by his father, or in a corrody, or in chattels." Should *Ramtonoo* have been entitled to succeed to the wealth of his father, through him *Ramcrishna* the adopted son of *Huripriya* will succeed to the estate also. If *Ramtonoo* should have been excluded from the inheritance of his father on account of some fault, *in this case Ramcrishna* is *not entitled* to inherit from *Ramhury*. Opinions should be delivered according to the respective usages of different countries. "A person must follow the usage of the country in which he resides, and the law established for his family, provided he be independant."

No. XX. MOORSHEDABAD PROVINCIAL COURT OF APPEAL.

ANSWER.

In the *(Kali)* present age from the absence of *(Sugoon)* good qualities, the adopted son is *only entitled to inherit from his adopting father* but *not from the grandfather;* in other words *Ramcrishna* having been adopted in the present age is *(Neergoon)* void of good qualities; in this case he shall *only take the heritage of his father* but *not of the grandfather*. There is no particular doctrine which declares his right of succession by reason of his having been adopted with the sanction of the grandfather. The doctrines of *Nareda* and *Devala* are thus laid down in the *Vivada-chintamani*.

AUTHORITIES.

Nareda:—"A son begotten by a man himself in lawful wedlock, a son begotten on his wife by a kinsman, the son of an appointed daughter, the son of an unmarried girl, the son of a pregnant bride, and a son of concealed birth, a son by a twice-married woman, a son rejected, a son given by his natural parents, a son bought, a son made by adoption, and a son self-given are declared to be twelve sons: among these six are heirs to kinsmen, six not heirs but kinsmen."

Devala:—"These twelve sons have been propounded for the purpose of offspring being sons begotten by a man himself or procreated by another man or received (for adoption) or voluntarily given among these, the first six are heirs of kinsmen and other six inherit only from the father.

The doctrine of *Menu* is cited by *Vachuspati Misra* in the *Vivada-chintamani*, which doctrine indicates that a given son is one of the first six. According to this enumeration, a given son may inherit from his father's collateral kinsmen *(Sapindas)* but his succession should be limited to the case of his being endued with good qualities and not otherwise; this interpretation is

not clearly expressed in the *Vivada-chintamani*, but in the *Mitacshara* there is the following passage.

Although *Menu* having premised two sets of six sons, declares the first six to be heirs and kinsmen and the last to be not heirs ; 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. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra* woman, are six not heirs but kinsmen. *That must be expounded* as signifying, that the first six may take the heritage of their father's collateral kinsmen *(Sapindas and Samanodacas)* if there be no nearer heir; but not so the last six, "yet" the variation which occurs in the institutes of *Vasishtha* and the rest, respecting the enumeration must be understood as founded on the difference of good and bad qualities; in consequence of which the author of the *Dhurmarutneeya Dayabhaga* did not cite the passage of *Menu* in his work but used the doctrines of *Devala*, &c. by reason of the absence of good qualities in the present age.

No. XXI. ZILLAH BEERBHOOM.

ANSWER.

Ramtonoo dying, and leaving no heirs of his body, and *Ramhury* his father shortly after likewise dying childless, the son adopted conformably to the *Shastras* by *Ramtonoo*, succeeds to *all the property* both real and personal (whether derived by descent or otherwise acquired, *both of his adopting father and of his grandfather* since by adoption the filiation of the son is created complete in every respect. This is the doctrine of the *Dayabhaga*, *Dattaka Durpana*, and other authorities current in *Bengal*.

AUTHORITIES.

The doctrine of the *Calica-purana* is thus laid down in the *Dattaka Durpana*: "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 have been completed; he becomes the son of another, under whose family name it is performed."

They take the whole estate of a father, who has no legitimate issue by himself begotten, but, if there be a true son, such of them, as are of the same tribe with the father, take a third part, this doctrine is declared in the *Dayabhaga*.

No. XXII. ZILLAH DINAGEPORE.

ANSWER.

Ramtonoo (a Hindoo) in his last illness, and a few days before his death, desires his wife to adopt a son; *Ramtonoo* dies leaving his father *(Ramhury)* him surviving. *Ramhury (Ramtonoo's* father) lives about three years after his son *(Ramtonoo)* and then dies leaving neither widow nor child. A short time after the death of *Ramtonoo*, *Ramhury* hears of his *(Ramtonoo's)* having left directions with his *(Ramtonoo's)* wife to adopt a son and he approves of those di-

rections. Children of the brother of *Ramkury* were brought to *Ramkury* in order that he might chuse one for adoption. He selected one of the children to be adopted by *Huripriya (Ramtonoo's* widow) but its adoption was prevented by the death of its father (*Ramkury's* brother.) *Ramkury* spoke of his intention of getting *Huripriya* (the widow of *Ramtonoo*) to adopt this child, and he *(Ramkury)* after that disappointment spoke of his having trusted to *Huripriya* (*Ramtonoo's* widow) to select a proper person for adoption. *Huripriya*, after the death of *Ramkury*, does select a proper person. In this case that son *has a right* to the property real and personal *left by both the father Ramtonoo and grandfather Ramkury*, because *Menu* and others have said, "On failure of the son, the grandsons have the right of succession." So in default of a legitimate son the adopted son derives a right of inheritance.

No. XXIII. MOORSHEDABAD CITY.

ANSWER.

According to law, *Ramcrishna succeeds to the estate of Ramtonoo his adopting father, and also to that of Ramkury his adopting father's father*, who died leaving no children; because *Ramcrishna* is entitled to present the funeral cake to his grandfather, &c. The grandfather gave permission to *Huripriya* to adopt a son, consequently the son so adopted shall inherit from him; this opinion is agreeable to the doctrine of *Menu* who holds the first rank among legislators. *Menu* having premised two sets of six sons, declares the given son is one of the first six who are both heirs and kinsmen, but it appears from the doctrine of *Devala* laid down in the *Dayabhaga* that in the enumeration of the twelve sons, he having taken the given son from the first six who are heirs of kinsmen, that is to say of the collateral relations, &c. places him among the number of the last six, who inherit only from the father but not from collateral relations, &c. As this doctrine contradicts the authority of *Menu*, therefore it is a settled rule that the given son shall not be debarred from the inheritance of his grandfather, who left no legitimate issue by himself begotten.

AUTHORITIES.

Menu:—"Of the twelve sons of men, whom *Menu* sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose parents cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals."

Vrihaspati:—*Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Veda;* no code is approved, which contradicts the sense of any law promulgated by *Menu*.

No. XXIV. ZILLAH RUNGPORE.

ANSWER.

A woman having by her husband's desire, and with the consent of her father-in-law, adopted a son, such son succeeds *to all the property* real and personal of *his adopting father* and *also of his adopting father's father*, should the latter have no lineal male descendant. This doctrine is agreeable to law. Authorities laid down in the *Dayabhaga*. So *Devala*, after having described the twelve sons, expressly declares, "These twelve sons have been propounded for the purpose of offspring; being sons begotten by a man himself, or procreated by another man, or received (for adoption or voluntarily given. Among these the first six are heirs of kinsmen, and the other six inherit only from the father. The true legitimate son and the rest, to the number of six, are not only heirs of their father, but also heirs of kinsmen; that is, of *Sapindas* and other relations; the others are successors of their adopting father, but not heirs of collateral relations *(Sapindas, &c.)* They take the whole estate of a father, who has no legitimate issue by himself begotten." *Menu*:—"The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen but not heirs to collaterals."

No. XXV. ZILLAH RAJSHAHY.

ANSWER.

The consent of the husband is indispensible to the validity of the adoption, but that of the father-in-law is superfluous. *Ramtonoo* dies, leaving directions with his wife to adopt a son, and his father *Ramhury* gives his sanction to the adoption and then dies; consequently the adoption of *Ramcrishna* is valid, but the adoption confers on *Ramcrishna no title* to the property of his *kinsmen*, that is of *(Sapindas)* collateral relations. In this case according to the doctrine of *Jimuta-vahana* (the author of the *Dayabhaga*) *Ramcrishna cannot succeed* to the estate of *Ramhury* but is entitled to that of *Ramtonoo* alone. The authorities for this are the doctrines of *Vasishtha* and *Devala* as quoted in the *Oodvahatutwa* and *Dayabhaga*.

AUTHORITIES.

"A son formed of seminal fluids and of blood, proceeds from his father and mother as an effect from its cause, both parents have power for just reasons to give, to sell, or to desert him; but let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless *with the assent of her Lord*. He, who means to adopt a son, must assemble his kinsmen, give humble notice to the king; and then, having made an oblation to fire, with words from the *Veda*, in the midst

of his dwelling house," &c. The wife has unquestionably power to give or receive on gift a son with permission from her husband.

"In a partition among sons of the wife and the rest with a true legitimate son, such of them, as are of the same class with the adopting father and superior by tribe to the true son, whether they be the sons of an appointed daughter, or issue of the wife, or offspring of an unmarried damsel, or secretly produced, or abandoned (by the natural parents,) or received with a bride, or born of a twice-married woman, or given, or self given, or made or bought; shall be entitled to the third part of the share of a true son." So *Devala*, after having described the twelve sons, expressly declares, "These twelve sons have been propounded for the purpose of offspring; being sons begotten by a man himself or procreated by another man, or received (for adoption) or voluntarily given. Among these, the first six are heirs of kinsmen, and the other six inherit only from the father. The true legitimate son and the rest, to the number of six, are not only heirs of their father, but also heirs of kinsmen, that is, of *Sapindas* and other relations. The others are successors of their adopting father, but not heirs of collateral relations (*Sapindas*, &c.) The authors of the *Vivada-rutnacara*, *Mitacshara*, and *Vivada-chintamani* reconciled the difference between *Devala*, *Menu* and others, by referring to the distinction of an adopted son's being endued with good qualities or being of an evil disposition; but none of the books above quoted explain wherein this virtuous disposition consists, except the *Vivada-bhungarnabu*, in which it is declared to be *constituted by liberality*, reading the *Vedas*, and a strict observance of religious duties. Following the doctrine of the *Vivada-rutnacara*, *should Ramkrishna* be *endued with the qualities above described*, he *is entitled to succeed to the estates of Ramtonoo and also of Ramkury*. This opinion is supported by the doctrines of *Menu* and *Baudhayana* laid down in the *Vivada-rutnacara* and other works.

"Of the twelve sons of men, whom *Menu* sprung from the self-existent, has named, six are kinsmen and heirs, six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals. Participation of wealth belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, a son given, a son made by adoption, a son of concealed birth, and a son rejected by his natural parents. Consanguinity, denoted by a common family appellation, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of *a priest by a Sudra*."

The doctrine of some sages, that a given son, is an heir to kinsmen, must be considered with reference to the distinction of his qualities, good and bad, since the excellence which is constituted by charitable gifts, or fondness for reading the *Vedas* and the observance of religious duties, is the cause of liberation from the bonds of sin.

Where the discrepancy exists between the *Dayabhaga* on the one side, and the *Vivada-rutnacara*, &c. on the other, it is proper to admit the doctrine of the *Dayabhaga* throughout the *Province of Bengal*, but not of the *Vivada-rutnacara* and of the other treatises.

No. XXVI. ZILLAH BHAUGULPORE.

ANSWER.

A person named *Ramtonoo* dies, having expressed his consent to his wife to adopt a son. This widow, *Huripriya*, with the sanction of her father-in-law *Ramhury*, adopts a son *(Ramcrishna,)* who is endued with good qualities and of her own class. As the filiation of the son so adopted is established by the consent of *Ramtonoo*, so by the sanction of *Ramhury* he becomes his grandson and is competent to perform the *Parvana* or double rite. *Ramcrishna will succeed to the property both of Ramtonoo and Ramhury.*

This opinion is conformable to the doctrine contained in the *Vivada-rutnacara, Menu, Dwayeeta-nirnaya Perishishtha, Dattaka-chandrika, Dattaka Mimansa, Mitacshara, Viramitrodaya,* and other books.

AUTHORITIES.

Menu:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals."

On this *Culluca Bhutta* thus comments in his work entitled *Munwartha Mooctavalee: "Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus*, among these twelve sons of men, whom he has named, the first six are pronounced kinsmen and heirs to collaterals, the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*, and as heirs, they succeed to the heritage of their collateral relations, on failure of male issue, as well as to the estate of their own father. The last six may not take the heritage of any except of their own father; but they participate in his wealth and offer the funeral cake and water, &c. In the enumeration of the son of the body and the rest, six are heirs to kinsmen; the son of a young woman unmarried and the rest are not heirs but kinsmen."

Mitacshara:—"Although *Menu* having premised two sets of six sons, declares the first six to be heirs and kinsmen; and the last six to be not heirs but kinsmen, yet the first six may take the heritage of their father's collateral kinsmen *(Sapindas* and *Samanodacas)* if there be no nearer heir; but not so the last six, however, consanguinity and the performance of the duty of offering oblations of water and so forth, on account of relationship near or remote, belong to both alike. The word '*(Dayada)* heir" has reference to the right of heirs on failure of sons. The variation which occurs in the institutes of *Vasishtha* and the rest, respecting the enumeration of the sets, must be understood as founded on the difference of good and bad qualities." *Viramitrodaya.*

The doctrine of *Baudhayana* laid down in the *Vivada-rutnacara, &c.*—"Participation of wealth, belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, a son given, a son

made by adoption, a son of concealed birth, and a son rejected by his natural parents. Consanguinity, denoted by a common family appellation, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a *priest by a Sudra.*"

Vivada-rutnacara:—"The doctrine of one holy saint, that the son given, is an heir, to kinsmen,—and that of another, that he is not such heir, are to be reconciled by referring to the distinction of his being endued with good qualities or otherwise; by some it is held that although he be of the same family yet he can never succeed to his kinsmen; but *Lucshcedhur* declares, them to be heirs of kinsmen."

Viramitrodaya:—"The difference which is observable in the doctrine of *Haritt*, respecting the son given, the son made, and the son rejected by his natural parents as heirs of kinsmen, must be reconciled with reference to the distinction of their being of equal class or otherwise and endued with qualities good and bad."

"In the same manner, the doctrine of one holy saint, that the son given, is an heir to kinsmen,—and that of another, that he is not such heir,—are to be reconciled by referring to the distinction of his being endued with good qualities or otherwise. Some contend that he is heir to kinsmen, as well as, to the father, from the use of the words "*heirs to kinsmen*;" and on account of the particle "*only*" in the phrase, "of the father only" (occurring in the passage subjoined) others contend that he is heir to the father only. "Of these, the first six are heirs to kinsmen: the other six of the father only." But the variation, from the son given, being enumerated higher, and lower in the order of inheritance, by different sages must be obviated by the distinction as to his qualities good and bad. "The adopted son is entitled to present the funeral oblations to the parents of his adopting father and so forth, this is declared in the *Dattaka-chandrika* by *Devandu-bhatta*."

Dattaka Mimansa:—"Now the purpose of the husband's sanction, is that the filiation, as son of the husband, may be complete, even by means of an adoption made by the wife."

There is a particular authority for the performance of obsequies to be made by a given son while a true legitimate son exists. The son of the body, a son of an appointed daughter, the son, begotten on the wife by a kinsman legally appointed and the son given, these are competent to perform a *Parvana* or double rite; this opinion is conformable to law. Among the sons of a different family the filiation and lineage of a given son is established.—In the celebration of offerings due to a given son deceased, the funeral oblations will be made to his three ancestors, his adopting father, grandfather, and great grandfather; if his father be alive, the enumeration of three ancestors will be made from his grandsire.—"Funeral cake follows the family and estate, but of him who has given away his son, the funeral oblation is extinct."—This is laid down in the *Dwaycela parishishta* by *Cashub Misra*.—The son grandson, and great grandson, are entitled to perform the *Parvan* or double rite.—The son of the body, a son of a wife, a son of an appointed daughter, and the son given, are entitled to perform the ceremony already named, but not the son made and the rest. Their filiation is however established to their adopting father and they are not the grandsons of their adopting father's father, who is not their grandfather. They are only nominal sons, according to some authorities. It should not be objected that given sons are incompetent to perform the *Parvana* or double rite by reason of their not being of the same family with the adopting father as the son of the body, the son of the wife and the son of an appointed daughter are. "A given son must never claim the family and estate of his natural father." From this and other similar texts, the family and almost the lineage

of the given son is declared to be changed; he acquires a lineage up to the sixth in ascent from his adopting father. This exposition is declared by *Vachespati misra* in the *Dwayeeta nirnaya Vrihaspati*:—No code is approved, which contradicts the sense of any law promulgated by *Menu*.

Under the circumstances above stated *Ramcrishna*, should *he be of equal class* and *endued with good qualities*, will *doubtless* succeed to the *estates both of his adopting* father *Ramtonoo*, and his adopting father's father *Ramkury*.

No. XXVII. ZILLAH PURNEAH.

ANSWER.

While *Ramcrishna* lives, he is competent to present the funeral cake to the ancestors of his adopting father and when he dies, he partakes of the oblations offered to them and he is also entitled to perform the *Parvana* or double rite. By reason of the consent of *Ramtonoo*, *Ramcrishna* becomes his son, and (through him) grandson of *Ramkury*, and succeeds to the estates of both the deceased persons. The *Dayabhaga*, *Dayatutwa*, &c. are received in the schools of law in *Bengal*. The *Vivada-chintamani*, *Sraddha-chintamani*, *Vivada-rutnacara*, &c. in those of *Mithila*. This opinion is agreeable to that of several commentators.

AUTHORITIES.

The doctrine of *Menu* cited in the *Dayabhaga*, *Dayatutwa*, *Vivada-rutnacara*, &c. "To three must libations of water be made, to three must oblations of food be presented; the fourth in descent is the giver of those offerings; but the fifth has no concern with them." And "to the nearest kinsman *(Sapinda)* the inheritance next belongs." The meaning of the first verse is stated in the *Munwartha mooctavalee*; "To three, that is the father, grandfather, and great grandfather, water must be offered and to the same three must oblations of food be made; the fourth in descent is the offerer of the oblations and libations, but the fifth is not included, therefore subsidiary grandsons acquire the right of inheritance to the estate of their grandfathers, who die leaving no male issue." The fifth in descent, not being connected even by a single oblation, is not the heir, so long as a person connected by a single oblation, whether sprung from the father's or mother's family, exists; this explanation is given in the *Dayabhaga*. It is laid down in the *Vivada-rutnacara* that, "if there be no true or subsidiary son of a deceased person, his nearest kinsman inherits, &c." The texts of *Baudhayana* quoted in the *Dayabhaga*, *Dayatutwa*, &c. "The paternal great grandfather and grandfather, the father, the man himself, his brothers of the whole blood, his sons by a woman of the same tribe, his son's son and his great grandson: all these partaking of undivided oblations, are pronounced *Sapindas*. Those who share divided oblations are called *Saculyas*. Male issue of the body being left, the property must go to them. On failure of *Sapindas* or nearer kindred *Saculyas* or remote kinsmen are heirs." The following passage is cited by *Rughoonundana Bhuttacharjya* in the *Dayatutwa* and also in the *Dayabhaga*: "Since the father and certain other ancestors partake of three funeral oblations as participating in the offerings at obsequies; and since the son and other descendants, to the number of three, present oblations to the deceased (or to be shared by his manes); and he, who, while living presents an oblation to an ancestor, partakes when deceased." The following is the doctrine of the sages laid down in the *Sraddha-chintamani* and other books of law; "A son of any description must be anxiously a-

dopted by one who has none: for the sake of the funeral cake, water, and solemn rites; and for the celebrity of his name." The following text of *Yajnyawalcya* laid down in the *Vivada-chintamani*, &c. "That son, whom his father or his mother, with her husband's assent, gives to another, shall be considered as a son given." The doctrines of *Menu* declared in the *Vivada-ratnacara*, &c. "He is called a given son, whom his father or mother affectionately gives as a son, being alike, and in a time of distress, confirming the gift with water. A son given 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 funeral oblation is extinct." "A person at the time of distress may give a son to a man destitute of male issue." This passage is illustrated in the *Vivada-ratnacara*; "The offering of the funeral oblations ceases." This passage is illustrated in the *Viramitrodaya*. It is declared in the *Oodwahatatwa*; "A given son is incompetent to inherit from his natural father and to perform his obsequies, but he follows the family, &c. of his adopting father." The relation of a given son does not continue with the family of his natural father and he never partakes of a share of his estate. A given son is neither entitled to perform the obsequies of his natural father nor to present the funeral oblation of food to him, but he is competent to offer the funeral oblation to his adopting father and to obtain the heritage and lineage of that person. This is the exposition of *Shaunaka*. It should not be objected that the given sons are incompetent to perform the *Parvana* or double rite by reason of their not being of the same family with the adopting fathers as the son of the body, the son of the wife, and the son of an appointed daughter are. "A given son must never claim the family and estate of his natural father." From this and other similar texts the family and almost the lineage of the given son are declared to be changed. He acquires a lineage up to the sixth in ascent from his adopting father. This exposition is declared by *Vachespati misra* in the *Dwaiteta-nirnaya*. The commentators say, The son of the body, the son of an appointed daughter, the son begotten on the wife by a kinsman legally appointed, and the son given, these four are competent to perform a *Parvana* or double rite. Among the sons of a different family the filiation and lineage of a given son is established. In the celebration of offerings due to a given son deceased, the funeral oblations will be made to his three ancestors, his adopting father, grandfather, and great grandfather. If his father be alive the enumeration of these three ancestors will be made from his grandsire. "The funeral cake follows the family and estate, but of him who has given away his son, the funeral oblation is extinct." This is laid down in the *Dwaiteta-purishishta* by *Cashub misra*. *Yajnyawalcya* having enumerated the twelve sons of men, declares; "On failure of those first mentioned, the next in order give the funeral cake and claim the heritage." The doctrine of *Vasishtha* declared in the *Vivada-ratnacara*; 'A son, formed of seminal fluids and of blood, proceeded from his father and mother as an effect from its cause: both parents have power for just reasons to give, to sell, or to desert him; but let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord." A mother is competent to give her son in the life-time of her husband and with his consent, &c. this is the explanation of the *Vivada ratnacara*. Both the father and mother are jointly entitled to give a son, but there is a special ordinance declaring that a mother is competent to give a son in the life time of her husband and with his consent; so also even if he be dead. "He who means to adopt a son, must assemble his kinsmen." This is the exposition of *Vachespati misra* quoted in the *Sraddha-chintamani*. It is declared in the *Dattaka mimansa*; "Now the purpose of the husband's sanction is, that the filiation, as son of the husband may be complete, even by means of an adoption, made by the wife."

No. XXVIII. PATNA PROVINCIAL COURT OF APPEAL.

ANSWER.

Ramtonoo, two or three days before his death, desires his wife *Huripriya* to adopt a son, and then dies. Afterwards his *(Ramtonoo's)* father *(Ramhury)* who has neither widow nor child, dies, leaving directions with his daughter-in-law *Huripriya* to select a boy from among his brother's sons and to adopt him. *Huripriya* adopts a son, *Ramcrishna*, (fit for adoption,) in due form; that son becomes the son of *Ramtonoo* and grandson of *Ramhury*, and inherits the estates left by *both the deceased persons.*

AUTHORITIES.

Menu:—"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 funeral oblation is extinct." "To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grandfather,) is the funeral cake ordained: the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake."

To the nearest *Sapinda*, male or female, after him in the third degree, the inheritance next belongs.

Devala:—"A father, a grandfather, and a great grandfather, assiduously cherish a new born son, as birds the holy fig tree.

No. XXIX. ZILLAH BEHAR.

ANSWER.

A person named *Ramtonoo*, two or three days before his death, gives permission to his wife to adopt a son and then dies. Afterwards *Ramhury* (the father of *Ramtonoo*,) desires his daughter-in-law to adopt a son among his brother's offspring and also dies. The daughter-in-law, according to the forms established in law for adoption, adopts a son: that son so adopted *is entitled to inherit the estate both of Ramtonoo and Ramhury.*

AUTHORITIES.

Menu:—"Of the man, to whom a son has been given, according to a subsequent law, adorned with every virtue that son shall take the heritage, though brought from a different family."

Catyayana and *Luy eacshee*:—"They who present the funeral oblations will take the estate of those to whom such oblations are offered."

Menu:—"To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal grandfather,) is the funeral cake ordained; the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake. To the nearest *Sapinda*, male or female, after him in the third degree, the inheritance next belongs." This opinion is supported by the *Mitacshara*, *Viramitrodaya*, and other authorities.

No. XXX. PATNA CITY.

ANSWER.

Huripriya, the widow of *Ramtonoo*, having by permission from her husband and father-in-law according to the rules ordained for adoption, adopted a son named *Ramcrishna*, for the offspring of her husband, that son becomes by virtue of such adoption the grandson of *Ramtonoo's* father *(Ramhury)* and succeeds without doubt to the estate of *Ramhury* on failure of legal heirs. This is established by a passage of *Catyayana* quoted in the compilation entitled *Sungraha-rutnacara;* "A son, grandson, and great grandson, have equal claims to the estate of their progenitor:" and further by the doctrine of *Menu;* "To three ancestors must water be given at their obsequies; for three (the father, his father, and the paternal great grandfather,) is the funeral cake ordained: the fourth in descent is the giver of oblations to them, and their heir, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake." This doctrine is not only ordained for the right of succession of the true legitimate son begotten by a man himself, grandson, and so forth, but also of the (*Gowna*) succedaneous son, grandson, &c. In this case a succedaneous grandson shall be entitled to succeed to the estate of his grandfather, should he die leaving no legitimate son. "By a son, a man conquers worlds; by a son's son, he enjoys immortality; and afterwards by the son of a grandson, he reaches the solar abode;" consequently *Ramcrishna* will succeed to the estate, both of his adopting father and of his adopting father's father.

No. XXXI. ZILLAH RAMGHUR.

ANSWER.

If a son be adopted perfectly eligible for adoption, that son is to present the funeral cake and to take the heritage of *his adopting father and also of his adopting father's father.*

AUTHORITY.

The doctrine of *Yajnyawalcya* as laid down in the *Mitacshara, Viramitrodaya,* &c.—"Among these the next in order is heir, and presents funeral oblations on failure of the preceding."

No. XXXII. ZILLAH SARUN.

ANSWER.

A person named *Ramtonoo,* desires his wife *Huripriya* to adopt a son previously to his death, and then departs for heaven childless leaving his father, *Ramhury,* him surviving. *Ramhury* afterwards gives permission to his daughter-in-law to adopt a son and dies. His daughter-in-law finds a boy perfectly eligible for adoption and adopts him. In this case the son *(Ramcrishna)* so adopted, *is entitled to the property, real and personal, both of Ramhury and Ramtonoo.*

AUTHORITIES.

Menu:—"Not brothers, nor parents, but sons, if living, or their male issue, are heirs to the deceased."

Yajnyawaleya:—"That on failure of the best, the next best shall offer the funeral cake and possess the heritage."

Vishnu:—"The three, the son, grandson, and great grandson, will perform the *Parvana* or double rite, and will take the heritage."

Ramcrishna being adopted by *Huripriya*, with the consent of her father-in-law *Ramhury*, and husband *Ramtonoo*, *will succeed to the wealth, whether real or personal, of both his adopting father and adopting father's father.*

No. XXXIII. ZILLAH SHAHABAD.

ANSWER.

A person named *Ramtonoo*, inhabitant of *Bengal* two or three days before his death directs his wife to adopt a son and then dies. Afterwards his *(Ramtonoo's)* father gives permission to his daughter-in-law to adopt a boy among his *(Ramhury's)* brother's sons and also dies. *Ramhury's* daughter-in-law subsequently adopts a son in due form; that son *will take the wealth of both Ramtonoo* and *Ramhury.*

AUTHORITIES.

Menu:—"Of the man to whom a son has been given, adorned with every virtue, that son shall take the heritage, though brought from a different family."

"To the nearest *Sapindas*, male or female, after him in the third degree, the inheritance next belongs."

Harita:—"By a son, a man conquers worlds; by a son's son, he enjoys immortality; and, afterwards, by the son of a grandson, he reaches the solar abode."

This opinion is delivered according to the doctrine of the *Mitacshara*, *Viramitrodaya*, and other authorities.

No. XXXIV. ZILLAH TIRHOOT.

ANSWER.

A person named *Ramtonoo*, two or three days before his death, desires his wife to adopt a son and then dies. His father, who has neither wife nor children, was satisfied on hearing that his son had left directions with his widow to adopt a son and afterwards dies. The widow adopts a son with the permission of her husband and the approbation of her father-in-law, such son *is entitled to inherit the wealth of his adopting father and that of his adopting father's father.*

AUTHORITIES.

"Let not a woman either give or receive a son in adoption: unless with the assent of her husband. Let her husband guard a married woman: let her son guard her in age; or on failure of these, let their kinsmen protect her. In no instance is the independence of a woman allowed."

"By a son, a man conquers worlds; by a son's son, he enjoys immortality; and afterwards, by the son of a grandson, he reaches the solar abode."

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

"The real legitimate son, the son of an appointed daughter, the wife's son, the sons given and made, the son of concealed origin, and the deserted son also, are participators in the estate."

This opinion is supported by the doctrines of *Menu*, *Vasishtha*, *Harita*, and *Yajnyawalcya*, laid down in the code of *Menu*, *Mitacshara*, *Vivada-chundra*, *Vivada-chintamani*, and *Dattaka Mimansa*.

No. XXXV. DACCA PROVINCIAL COURT OF APPEAL.

ANSWER.

Ramtonoo, with a view to preserve his family from extinction, and to continue the observances due to him after his decease, having authorized his wife *Huripriya* to adopt a son, and she having acted conformably to his instruction, the acts of both parties are legal and valid, and the assent of *Ramhury, father of Ramtonoo, may be inferred* from the intention he expressed of making the adoption. These points being established, the question is whether *Ramcriskna*, the son adopted under these circumstances, be entitled to succeed to the estate both of his adopting father and adopting father's father, or to that of his adopting father only. By the *universal consent* of the legal authorities, inclusive of the *Dayabhaga*, the given son *is entitled to succeed* the estate of his *adopting father*, but *it is doubtful* whether according to the latter he can succeed to the estate of his *adopting father's father* also, who is therein termed his *Bundhoo* or cognate. This difference may however be *reconciled* in favour of the *given son* by supposing that in the passage quoted from *Devala* in the *Dayabhaga*, declaring the given son *not entitled* to the property of his *Bundhoo* or cognate) the term *Bundhoo* does not include the grandfather and lineal ancestors but has reference to other collateral relations. Sons have been determined to be of twelve descriptions. These are divided into two sets, each containing six. *Menu*, *Baudhayana*, and the author of the *Kalika Purana* have included the *given son* in the first set, and have pronounced him entitled to succeed to the estate of *his father and kinsmen*. It is still more explicitly affirmed by *Culluca Bhutta* in his commentary on the laws of *Menu*, that the son of the body, *the adopted son, &c. are entitled to the estates of their fathers and grandfathers*; again, at the 279th verse of the ninth section *he declares the adopted son to be entitled to succeed to the entire estate of his adopting father, and that besides the son of the body and the son given; no other of the twelve sons can succeed.* This is confirmed by the *Puranas*, termed the *Prayuschettututwa*, *Oodvahatuttwa*, and others, moreover in *every contested* point the authority of *Menu* is to be preferred, and from his ordinances, from the commentary of *Culluca Bhutta*, the *Kalika Puran*, the treatise of *Baudhayana*, and *numerous* other works, the title of the *adopted son* to the estate of his *adopting father's father* is fully established, although the author of the *Dayabhaga*, following the opinion of *Devala*, has classed the given son among the inferior order of sons, and does *not* admit

his title to the property of his *adopting father's father*, yet it should be remembered that the authority of the *Smritee Shasters* has been revered in all ages contrary to that of *Devala* whose opinions did *not* obtain credit until a *recent period*. He himself however at the conclusion of the paragraph above referred to, writes that each of *these sons* in the order they are enumerated *become entitled* to succeed to the estates of their *Bundhoos* or relatives. In deliberating on any point of law a due consideration must be paid to the *time*, the *place*, and the *interests* of the parties concerned. The whole *end and aim* of laws is the well *being of mankind*; he therefore who *interprets* them to the *injury of others* is guilty of a *gross breach of moral duty*. *Ramkuny* possessing no surviving son to preserve his name and family, and to present the customary offerings after his decease, consented to the adoption. The son adopted by his son *therefore becomes in all respects the grandson, succeeds to his estate and must, of necessity perform his Sraddha*, or funeral obsequies; for by the license given to the wife by the husband the son becomes *engendered* as it were at that instant *in the womb* of its *adopting mother*. Nothing more need be urged to *prove that the adopted son is the rightful successor to the estate of his adopting father and of his adopting father's father*. This *Byobustha* is drawn from *Menu*, the *Dayabhaga* and other books of law. In further confirmation of what has been advanced, two collateral proofs may be adduced.

AUTHORITIES.

The doctrine of *Menu* laid down in the *Dwayeeta nirnaya*; "A son of *any description* must be anxiously adopted, by a man destitute of male issue, for the sake of the funeral cake, water, and solemn rights; and for the celebrity of his name."

It is laid down in the *Dayabhaga*; "*A father, a grandfather, a great grandfather, assiduously cherish a new-born son, as birds the holy fig tree*;" and as in the word *offspring* are *included sons* and *grandsons* and *great grandsons*, so likewise under *father* are included *fathers* and *grandfathers* and *great grandfathers*.

No. XXXVI. ZILLAH BACKERGUNGE.

ANSWER.

If a person die during the life-time of his father, leaving directions with his wife to adopt a son, and the widow adopt a son in obedience to the sanction, *that son is competent to succeed to the wealth of his (adopting) father and to that of his grandfather*. As the right and share of the son not existent and of the son existing in the womb of his mother is established by their birth to his father's property, so *likewise the same rule holds* with respect to the *adopted* son; the license of adoption in this case being in fact the cause of the *production of the son*. A son, formed of seminal fluids and of blood, proceeds from his father and mother as an effect from its cause; both parents have power for just reasons, to give, to sell, or to desert him; under these circumstances the consent of both parents is indispensable to the validity of the adoption, *nor can the son be adopted by the wife alone, without licence from her husband that being in truth the cause of the production of the son*. With reference to the claim of the given son to the estate of his adopting father's father, the law declares, "Among these, the next in order is heir and presents funeral oblations in failure of the preceding." It is a well known fact that the right of a person is established to the estate of another in virtue of his offering the funeral cake. The right of the adopted son is established by offering the *funeral cake to the grandfather, therefore his title to the wealth of the grandfather is indefeasible*; as there is no specific rule for the

succession of a grandchild to his grandfather's estate. "Should a son die before partition, his share shall be allotted to his son, provided he had received no portion from his grandfather's estate. That son's son shall receive his father's share from his uncle, or from his uncle's son." "In the estate inherited from the grandfather, the ownership of father and son is equal" *On this point no difference of opinion exists.* The term grandson, being unrestricted, comprehends every description of grandson and *consequently the given son is entitled to succeed, to his adopting father's and his adopting father's father's estate.*

A person dies (during the life-time of his father) leaving directions with his wife to adopt a son, and the widow adopts a boy, *that son possesses a right to the estate of his adopting father and of his adopting father's father also on the death of the latter.*

No. XXXVII. ZILLAH CHITTAGONG.

ANSWER.

A person dying, and leaving no son of his body, is succeeded by his adopted son. The *adopted son* by presenting the offering of the (*Pind*) funeral cake to his adopting *father's father becomes virtually his grandson and as such succeeds to his estate.*

AUTHORITIES.

Devala:—"They take the whole estate of a father who has no legitimate issue by himself begotten."

Menu:—"The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted; a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and *heirs.*"

Yajnyawa'cya:—"Among these the next in order is heir, and presents funeral oblations on failure of the preceding."

Vrihaspati:—"A decision must not be made solely by having recourse to the *letter of written codes,* since, if no decision were made according to the *reason of the law,* or according to immemorial usage (for the word *yucti** admits both senses,) there *might be a failure of justice.*"

No. XXXVIII. DACCA CITY.

ANSWER.

Ramerishna, adopted by *Huripriya* in obedience to the instructions of her *husband Ramtonoo,* and with the *consent* of *Ramhury,* the father of *Ramtonoo, becomes* by *virtue of such adoption,* the son of *Ramtonoo* and *grandson* of *Ramhury* and *consequently* the *estate* of *each descends to him.* This exposition is supported by *many authorities.*

AUTHORITIES.

Catyayana:—"Should a son die before partition, his share shall be allotted to his son, provided he had received no fortune from his grandfather. That son's son shall receive his father's share from his uncle, or from his uncle's son."

* *Yucti*; ratiocination.

Devala :—" When the father is deceased, let the sons divide the father's wealth."
Vrihaspati :—" All the sons shall succeed to their father's estate."

No. XXXIX. ZILLAH MYMENSINGH.

ANSWER.

Ramtonoo (a *Hindu*) in his last illness and two or three days previously to his death, desires his wife *Huripriya* to adopt a son and dies, leaving his father *Ramkury* him surviving. After the death of *Ramtonoo, Ramkury* lives about three years. In this case the property left by *Ramkury* goes *to his heir, not to the son so adopted ;* the authority for this opinion is *clearly expressed* in the *Dayabhaga,* that an adopted son has *no right* to the wealth of *(Sapindas) collateral relations.*

AUTHORITIES.

Devala:—"The son of an appointed daughter, the son of the (soil) wife, a son of an unmarried damsel, a son secretly produced, a son rejected (by his natural parents a son received with a bride, a son born of a twice-married woman, a son given, a son self-given, a son made, and a son bought." These twelve sons have been propounded for the purpose of offspring, being sons begotten by a man himself, or procreated by another man, or received for adoption, or voluntarily given. Among these, the first six are heirs of *kinsmen*, and the other six inherit *only from the father.*

According to the doctrine contained in the above passage, *Ramcrishna* is *not entitled* to succeed to the estate of *Ramkury*, neither is there *any authority* recognizing his right of succession to the property of *Ramkury*, although he gave permission to *Huripriya* to adopt a son. Under these circumstances *Ramcrishna* is competent to succeed to the whole estate of his *(adopting) father Ramtonoo, but not* to that of *Ramkury. This opinion is delivered according to the authority of the Dayabhaga which is in force in Bengal.*

No. XL. ZILLAH SYLHET.

ANSWER.

If a childless person die leaving directions with his wife to adopt a son, and his father *should not approve* of those directions or should *not declare* that the *intended adopted son* should take his heritage, and the widow adopt a son equal in point of class and perfectly eligible for adoption without receiving the consent of her father-in-law as above stated, that son shall *only take* his *(adopting) father's* wealth, but *not* the estate of the *grandfather ;* if the widow adopted him with the assent of her *father-in-law,* the son *so adopted shall inherit* from his *grandfather* also as is declared in the doctrines laid down in the *Dayabhaga, Vivada-chintamani*, and other works.

AUTHORITIES.

Devala:—" The son of the body, the son of an appointed daughter, the son of a wife, the son of an unmarried girl, a son of concealed birth, a son rejected, the son of a pregnant bride, a son by a twice-married woman, a son given by his natural parents, a son self-given, a son

made by adoption, and a son bought. These sons have been propounded for the purpose of offspring; being sons begotten by a man himself, or procreated by another man, or received (for adoption,) or voluntarily given. Among these, the first six are heirs of kinsmen, and the other six inherit only from the father: the rank of sons is distinguished in order as enumerated. *All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten.*"

Yama:—"Twelve sons are named by sages, who know the principles of things; among these sons, six are *kinsmen* and *heirs*; six, *not heirs but kinsmen*. The first is declared to be the son begotten by a man himself in lawful wedlock; the second, a son begotten on his wife by a kinsman; the third is the son of an appointed daughter; thus have the learned declared the law; the fourth is a son by a twice-married woman; the fifth, a son by an unmarried girl; the sixth, a son of concealed birth in the husband's mansion; these six give the funeral cake and *take the heritage*. A son rejected by his father or mother, the son of a pregnant bride, a son given by his natural parents, a son made through adoption, and fifthly, a son bought, and lastly he, who offers himself of his own accord. These six, being of mixed origin, are *kinsmen*, but not *heirs*, except to their *own father*."

Nareda:—"A son begotten by a man himself in lawful wedlock, a son begotten on his wife by a kinsman, the son of an appointed daughter, the son of an unmarried girl, the son of a pregnant bride, and a son of a concealed woman, a son rejected, a son given by his natural parents, a son bought, a son made by adoption, and a son self-given, are declared to be twelve sons. Among these, six are heirs to kinsmen, six *not heirs* but *kinsmen*."

Vishnu:—"In the enumeration of twelve sons a given son is the eighth. *Ojajnyawalcya* counted a given son to be the seventh." According to the authorities of *Devala* and other holy saints laid down in the *Dayabhaga* of *Jimutavahana*, and cited by *Vachespati Misree* and others, it appears that the adopted son has the right to the property of his *(adopting) father only*, but his succession to the *grandfather's estate is declared by the authorities of Baudhayana and others.*

Baudhayana:—"He pronounces the real legitimate son; the son of an appointed daughter, the wife's son, the son given and made, the son of concealed origin, and the deserted son also, *participators in the estate;* the son of an unmarried daughter, the son received with a pregnant bride, the son bought, the son of a twice-married woman, and also the son self-given, and the *Nishada* or son of a *Sudra*, he pronounces partakers of the family."

Menu:—"Of the twelve sons of men, whom *Menu, sprung from the self-existent*, has named, six are *kinsmen* and *heirs*, six *not heirs, except to their own father, but kinsmen*. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents are the six *kinsmen and heirs*. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six *kinsmen but not heirs to collaterals*."

Vyasa, cited in *Vrihuddhurma purana*:—"The son of the body, the son of a wife, a son given by his natural parents, a son bought, a son of concealed birth, a son rejected, the son of an unmarried girl, the son of a pregnant bride, a son made by adoption, a son by a twice-married woman, a son self-given, and the son of a *Sudra*. Of these, the first six are *heirs* to *kinsmen;* and the other six *not heirs* to *kinsmen*, each according to priority in order, is considered as superior, and the last successively, as inferior."

The *Cáliká purana* :—"The son begotten by a man himself in lawful wedlock, the son begotten on his wife by a kinsman, a son given by his natural parents, a son made by adoption, a son of concealed birth, and a son rejected, *take shares of the heritage.*"

The adopted son should be the *giver* of the *funeral cake*, and *taker* of the *heritage* of his *grandfather* and also of *Sapindas*. *Bhrigu* declares; "A *virtuous* man must not make a partition of the heritage contrary to the laws or usages of districts and the rules of his tribe, and must not deviate from the established usages of his native country, the rules of his tribe and the law of his class, but he must follow the usages of the country and rules of the family of which he is a member; by so doing he performs his duty, otherwise not." According to the doctrines of *Catyayana* and others, declared in the *Dayabhaga*, it appears that there is a variation in the numeration of the sons *(respecting a given son)* by different authorities, according to one class he may take the *heritage* of the *grandfather* and *present* the *funeral cake* to him, but *not* according to the *other*, therefore the question of his succession should be *referred* to the *consideration of the most competent Judges* who will *decide the matter* paying attention to the usages and laws of the particular place and the rules of his family and also with reference to the *qualities of the claimant, good and bad.*

No. XLI. ZILLAH DACCA JELALPORE.

ANSWER.

A Hindoo named *Ramtonoo*, in his last illness and a few days before his death, desires his wife *Haripriya* to adopt a son and dies, leaving his father *Ramhury* him surviving. *Ramhury* hears and approves of those directions. After the death of *Ramhury*, the widow of his son *(Haripriya)* adopted a son *Ramcrishna*. In this case *agreeably to law the adopted son is entitled to succeed to the property left by both the grandfather Ramhury and the father Ramtonoo.*

Authorities of *Devala* cited by *Jimutavahana* :—"*Atumaja*, the son begotten by a man himself, *Puraja*, procreated by another man, *Lubdha*, received (for adoption) and *Yadrich'heeca* or voluntarily given. Among these, the first six are heirs of *kinsmen.*" The word *Atumaja* indicates the sons begotten by a man himself in lawful wedlock, the son of an appointed daughter, and the son by a twice-married woman, *Puraja* means the son of a wife, *Lubdha* signifies a son given by his natural parents, a son made by adoption, the son of a pregnant bride, the son of an unmarried girl, and a son bought, and *Yadrich'heeca* signifies a son rejected, a son self-given, and a son of concealed birth. Among these, the first six are *kinsmen and heirs*, the other six inherit *only from their own father;* the rank of sons is distinguished by the order in which they are enumerated.

Yajnyawalcya declares; "The ownership of father and of son is the same in land which was acquired by his father, or in corody, or in chattles.

No. XLII. ZILLAH TIPPERAH.

ANSWER.

According to the doctrine of the *Dayabhaga* and other books of law, a given son, who is adopted agreeably to the prescribed modes for adoption, has *no right* to succeed to his (adopt-

ing) father's father's estate, but to that of his adopting father only. On the death of *Ramkury* his legal representatives are entitled to inherit his property. *Ramcrishna*, the son adopted by *Huripriya*, though perfectly eligible for adoption, is *not entitled* to claim the property left by *Ramkury;* to which his representatives were entitled previous to the adoption of *Ramcrishna;* but he has a right to his adopting father's property. Although according to the doctrine of *Menu*, &c. a given son has a right to the property of his adopting father and *also* to that of his *adopting father's* father, yet this passage has reference to the case of a son actually adopted at the period of the adopting father's father's death. Although *Ramkury* did give his consent to the adoption, yet, as that consent was *not coupled with the condition* that the son so adopted should be his heir, *Ramcrishna* can have no title to the inheritance. This opinion is conformable to law.

No. XLIII. CALCUTTA PROVINCIAL COURT OF APPEAL.

ANSWER.

Ramtonoo (a *Hindoo*) in his last illness, and a few days before his death, desires his wife to adopt a son. *Ramtonoo* dies, leaving his father (*Ramkury*) him surviving. *Ramkury* (*Ramtonoo's* father) lives about three years after his son (*Ramtonoo*) and then dies, leaving neither widow nor child. A short time after the death of *Ramtonoo*, *Ramkury* hears of his (*Ramtonoo's*) having left directions with his (*Ramtonoo's*) wife to adopt a son and he approves of those directions. Children of the brother of *Ramkury* were brought to *Ramkury*, in order that he might chuse one for adoption. He selected one of the children to be adopted by *Huripriya*, (*Ramtonoo's* widow,) but its adoption was prevented by the death of its father (*Ramkury's* brother.) *Ramkury* spoke of his intention of getting *Huripriya*, (the widow of *Ramtonoo*,) to adopt this child and he (*Ramkury*) after that disappointment spoke of his having trusted to *Huripriya* (*Ramtonoo's* widow) to select a proper person for adoption. *Huripriya*, after the death of *Ramkury*, does select a proper person. In this case that son is *not entitled*, according to the authority of the *Dayabhaga* of *Jimutavahana*, to succeed to the estate of his *adopting father*. Agreeably however to the code promulgated by *Menu*, to the *Vivada-bhungarnuba*, and other works which are universally respected throughout *Bengal*, &c. *Ramcrishna will* succeed to the estates both of the *grandfather* (*Ramkury*) and of his *father* (*Ramtonoo*).

Questions of this nature are decided according to the authorities of *Menu*, and the sages who concur with him; as that of the *Dayabhaga*, when at variance with *Menu*, is not received, because *Sricrishna Tercaluncara* (the commentator on the *Dayabhaga*) concurring with *Vrihaspati*, lays it down as a general rule that in *every* case where a difference exists between *Menu* and other authorities, the former is *invariably* to be preferred. It was thought adviseable to bring forward both opinions leaving the decision to the Court. These expositions are drawn from the *Dayabhaga*, the code of *Menu*, the *Vivada-bhungarnuba*, and the opinion of *Vrihaspati*, quoted by *Sricrishna Tercaluncara*.

AUTHORITIES.

It is laid down in the *Dayabhaga*, "The true legitimate son, and the rest, to the number of six, are not only heirs of their *father, but* also heirs of *kinsmen;* that is, of *sapindas* and other relations. The others are successors of their (adopting) father, but not heirs to collateral relations (*sapindas*, &c.)"

Menu:—" Of the twelve sons of men, whom *Menu, sprung from the self-existent,* has named, six are kinsmen and heirs, six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose parents cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra,* are the six kinsmen, but not heirs to collaterals."

Vrihaspati:—" *Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Veda;* no code is approved, which contradicts the sense of any law promulgated by *Menu.*"

No. XLIV. ZILLAH JUNGLE MEHALS.

ANSWER.

Ramcrishna, adopted by *Huripriya, will succeed* to the *entire estate* of his *father Ramtonoo, and to that of his adopting father's father Ramhury.* The consent of the grandfather to the adoption is *superfluous* and unnecessary. This is according to *Menu* and other legal authorities, but according to the *Dayabhaga* compiled by *Jimutavahana,* the adopted son is entitled to succeed to the estate of his *father only.* As the authority of the *Dayabhaga* is *decisive,* a contrary doctrine cannot be admitted.

No. XLV. ZILLAH NUDDEA.

ANSWER TO THE 1st QUESTION.

The adoption of *Ramcrishna* by *Huripriya,* with permission from her husband and with the consent of the father-in-law *is legal* and *valid.* The law does not make the consent of the *father-in-law* a necessary condition. This is according to the *Vivada-bhungarnuba* and other authorities. The opinion of *Vasishtha* quoted in the *Vivada-bhungarnuba;* " A son, formed of seminal fluids and of blood, proceeds from his father and mother as an effect from its cause: both parents have power for just reasons to give, to sell, or to desert him; but let no man *give or accept* an *only son,* since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord."

ANSWER TO THE 2d QUESTION.

Should *Ramcrishna* be a person of *virtuous habits* and competent to fulfil all the prescribed duties of his tribe, he *is* entitled to succeed to the *whole estate* of his *father Ramtonoo and also* of his *grandfather Ramhury.* This opinion is agreeable to *Menu,* the *Vivada-bhungarnuba* and other treatises. The doctrine of *Menu* as laid down in the *Vivada-bhungarnuba:* " Of the twelve sons of men, whom *Menu, sprung from the self-existent,* has named, six are kinsmen and heirs; six not heirs, except to their *own father,* but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned,

a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals." *Culluca Bhutta* interprets it thus; "*Menu, sprung from the self-existent, Brahma*, and first of the fourteen *Menus*, among those twelve sons of men, whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*, and as heirs, they succeed to the heritage of their *collateral relations*, on failure of *male issue, as well* as to the *estate* of their *own father*. The last six may not take the heritage of any, except of their *own father*, but they participate in his wealth, for it is declared generally without any exception, that sons inherit the estate of their fathers." *Menu*:—"Not brothers, nor parents, but sons, if living, or their *male issue*, are heirs to the deceased." When learned priests are mentioned as heirs to all persons on failure of kin, then, indeed, consanguinity is not the ground of their succession; for there is no other ground but their claim as learned priests: these on the contrary are kinsmen, and therefore perform the duties imposed by that relation, offering water and celebrating other rites.

In truth, it is *now admitted*, that the son by a twice-married woman, the son given, and the others *should they be endued with good qualities*, will inherit the property of their (adopting) parents and kinsmen, should they *be void of those qualities*, they are *not* entitled to succeed to the kinsmen but it appears from the doctrine contained in the *Brahma* purana, that some of them will be entitled to share the father's property and some of them must ever be maintained with supplies of food and apparel. It appears by the *modern* usage that a given son, *if he is accustomed to perform the* (নিত্য *Nitya*) indispensable and fixed observances (নৈমিত্তিক *Nimittika*) casual rites, (কাম্য *Camya*) supererogatory works (which are performed at pleasure or through the desire of some advantage) (ইষ্ট *Eesta*) essential ceremonies, as ablution, investiture, &c. (পূর্ত্ত *Poorta*) acts of pious liberality, as digging a well, planting a grove, building a temple, &c. and so forth, allowed to his own tribe, will succeed to the wealth of his *(adopting) father's brother*.

The third question has been already answered in the reply to the first

No. XLVI. ZILLAH BURDWAN.

ANSWER.

Huripriya, having obtained permission from both her husband *Ramtonoo*, and father-in-law *Ramhury*, adopts a son named *Ramcrishna*, that son *has a right* to the estate of his (adopting) father *Ramtonoo* only; but *not* to that of the *grandfather Ramhury*.

AUTHORITIES.

The doctrine of *Yama* is laid down in the *Vivada-chintamani*; "Twelve sons are named by sages who know the principles of things; among those sons, six are kinsmen and heirs; six not heirs but kinsmen. The first is declared to be the son begotten by a man himself in lawful wedlock; the second, a son begotten on his wife by a kinsman, the third is the son of an appointed daughter; thus have the learned declared the law. The fourth is a son by a twice-married woman; the fifth, a son by an unmarried girl; the sixth, a son of concealed birth in the hus-

band's mansion ; these six give the funeral cake and take the heritage. A son rejected by his father or mother, the son of a pregnant bride, a son given by his natural parents, a son made through adoption, and fifthly a son bought, and lastly he, who offers himself of his own accord. These six being of mixed origin, are kinsmen, *but not heirs except to their own father.*"

The passage of *Nareda* declared in the *Vivada-chintamani* and the *Vivada-Rutnacara :* " A son begotten by a man himself in lawful wedlock, a son begotten on his wife by a kinsman, the son of an appointed daughter, the son of an unmarried girl, the son of a pregnant bride, and a son of concealed birth, a son by a twice-married woman, a son rejected, a son given by his natural parents, a son bought, a son made by adoption, and a son self-given, are declared to be twelve sons. Among these, six are heirs to kinsmen, six not heirs but kinsmen."

Devala, (after enumerating the son of the body, the son of an appointed daughter, the son of a wife, the son of an unmarried girl, a son of concealed birth, a son rejected, the son of a pregnant bride, a son by a twice-married woman, a son given by his natural parents, a son self-given, a son made by adoption, and a son bought,) adds, " *These twelve sons are considered as offsprings by birth or adoption,* namely, sons begotten by a man himself, sons begotten by another but fathered by him, sons acquired, and sons by their own consent. Among these, the *first six are kinsmen and heirs,* the *other six inherit only from their own father.*"

The Doctrine of *Harita* cited in the *Vivada Rutnacara :* " A son begotten by a man himself on a faithful wife, the son of his wife begotten by a kinsman, a son by a twice-married woman, the son of an unmarried girl, the son of an appointed daughter, and a son of concealed birth *are heirs to kinsmen.* A son given by his parents, a son bought, a son rejected, the son of a pregnant bride, a son self-given, and a son made by adoption *are not heirs to kinsmen.*"

Menu :—Of the twelve sons of men, whom *Menu, sprung from the self-existent,* has named, six *are* kinsmen *and heirs ;* six *not heirs,* except to their *own father,* but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents *are the six kinsmen and heirs.* The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra,* are the six kinsmen, *but not heirs to collaterals.*

The opinions of *some* legislators, that the son given *is an heir to kinsmen,* and that of *others,* that *he is not* such heir, *are to be reconciled* by referring to the distinction of his being *(Sugoona) endued with good qualities,* or *(Nirgoona) not so endued.* A true explanation of this is laid down in the *Rutnacara,* and thus (the objection of) variation, from the son given being enumerated higher and lower in the order of inheritance, and so forth, by different holy saints respectively, *is obviated by the distinction as to his qualities, good and bad.*

No. XLVII. ZILLAH MIDNAPORE.

ANSWER.

A widow named *Huripriya,* adopts a son, *endued with good qualities,* agreeably to the ordinances for adoption, with the consent of her husband *Ramtonoo* and her father-in-law *Ramhury.* That son *has a right to the estate* of his *(adopting) father and grandfather. This opinion is conformable to the Doctrine of Menu, the Mitacshara, Dattaka-chandrika, &c.*

AUTHORITIES.

Mitacshara:—" *Menu* having premised two sets of six sons, declares the first six to be *heirs* and *kinsmen*, and *the last* to be *not heirs*. 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*. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra* woman, are six *not heirs but kinsmen*." The above passage *must be expounded as signifying, that the first six may take the heritage of their father's collateral kinsmen, (Sapindas* and *Samanodacas)* if there be no nearer heir; but not so the last six: *yet the following passage* is laid down in the *Dattaka-chandrika*; " the variation which occurs in the institutes of *Vasishtha* and the rest, respecting the enumeration, *must be understood as founded on the difference of good and bad qualities.*"

Menu:—" Of the twelve sons of men, whom *Menu, sprung from the self-existent*, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth or whose real father cannot be known, and a son rejected by his natural parents, *are the six kinsmen and heirs*. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals."

Baudhoyana:—" He pronounces the real legitimate son, the son of an appointed daughter, the wife's son, the son given and made, the son of concealed origin, and the deserted son also, participators in the estate."

Menu:—" Of the man, to whom a son has been given, *adorned with every virtue, that son shall take the heritage though brought from a different family.*"

The doctrines of *some* sages that the *given son, is an heir to kinsmen*, and that of *others, that he is not such heir, are to be reconciled by referring to the distinction of his being endued with good qualities, or otherwise.*

No. XLVIII. ZILLAH HOOGLY.

ANSWER.

Under the circumstances stated in the question, the *right* of the son so adopted, to *the estates* of his *adopting father and grandfather is established* by law.

AUTHORITIES.

The doctrines of several sages quoted in the code of *Culluca Bhutta, Mitacshara, Vivada-chintamani, Vivada-rutnacara, Dayabhaga, Viramitrodaya, Vivada-nuba-satoo, Vivada-bhangarnuba*, and other works, are to the following effect. According to the authority of the *Dayabhaga*, the son of the body, the son of an appointed daughter, the son of a wife by a kinsman, a son given, a son of a young woman unmarried, a son of a pregnant bride, a son rejected by his natural parents, a son by a twice-married woman, a son of concealed birth or whose parents cannot be known, a son self-given, a son made or adopted, and a son bought; these are thus men-

tioned in the passage of *Devala* : " These twelve sons have been propounded for the purpose of offspring; being sons begotten by a man himself, or procreated by another man, or received for adoption, or voluntarily given. Among these, the first six *are heirs of kinsmen*, and the other six inherit *only from the father*; the rank of sons is distinguished in order as enumerated." That is to say, the true legitimate son and the rest, to the number of six, are not only heirs of their father, but also heirs of kinsmen; that is, of *Sapindas* and other relations. The others are *successors* of their adopting father, *but not heirs of collateral relations (Sapindas)*, &c. The word " first" has a plural termination and includes the son of a man by himself begotten in lawful wedlock, the son of an appointed daughter, a son of the wife, a son given, a son of a young woman unmarried, the son of a pregnant bride, these are heirs *to kinsmen*. The word " others" has also a plural termination and indicates the son rejected by his natural parents, a son of concealed birth or whose father cannot be known, the son self-given, a son made or adopted, and a son bought. This enumeration is not contradictory to the doctrine of *Menu*, &c. According to the passage of *Devala* ; " the sons begotten by a man himself or procreated by another, or so forth." It appears that the given son having been enumerated among the last six, is *excluded from the inheritance of kinsmen*, but by this enumeration the regular order is broken. *Baudhayana* and others thus enumerate ; "Participation of wealth belongs to the son begotten by a man himself in lawful wedlock, the son of his appointed daughter, the son begotten on his wife by a kinsman legally appointed, a son given, a son made by adoption, a son of concealed birth, and a son rejected by his natural parents. Consanguinity, denoted by a common family appellation, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a *priest* by a *Sudra*." " No code is approved, which contradicts the sense of any law promulgated by *Menu*." The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before-mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs; this doctrine of *Menu* is maintained and received by all the more ancient Law Treatises.

No. XLIX. ZILLAH JESSORE.

ANSWER.

A son who has been adopted agreeably to the forms prescribed by law, by a woman duly authorized by *her husband, is entitled to succeed to the estate of his adopting father and also* to that of *his adopting father's father.* This is the doctrine of *Menu, confirmed by numerous other authorities.*

No. L. ZILLAH 24-PERGUNNAHS.

ANSWER.

Ramtonoo having, during his life, authorized his wife *Huripriya* to adopt a son, and both he and his father *Ramhury* dying ; *Ramcrishna*, the son so adopted conformably to the instructions of *Ramtonoo*, succeeds *to his estate and likewise* to that of *Ramhury his adopting father's father.*

The consent of the latter to the adoption is not requisite. ON THIS POINT THE WISE ARE UNANIMOUS. The *proofs* are drawn from two passages in *Menu*.

AUTHORITIES.

Menu:—"Of the twelve sons of men, whom *Menu, sprung from the self-existent*, has named, six are kinsmen and heirs, six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose parents cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs. The son of a young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to collaterals."

It appears from the *Dayabhaga, which is in force in Bengal*, that an *adopted* son is *not* heir to *Sapindas* (collaterals) *but this doctrine is applicable only to the case of a partition between the son of the body and sons by adoption.*

No. LI. ZILLAH CUTTACK.

ANSWER.

Ramtonoo, (a *Hindoo*,) in his last illness, and three days before his death, desires his wife *Huripriya* to adopt a son. *Ramtonoo* dies, leaving his father *(Ramhurry)* surviving him. Afterwards *Ramhurry, (Ramtonoo's father,)* having left directions with his daughter-in-law, *(Huripriya,)* to adopt a son, lives about three years, and then dies. Agreeably to the permission of both her husband and father-in-law she adopts a son *(Ramcrishna.)* In this case, *the son so adopted according to law, is competent to present the funeral cake to Ramtonoo and to his father, and is also entitled to succeed to the property, real and personal, of both. Although Huripriya* did not make the adoption previously to the death of her husband and father-in-law, yet by her adopting a son, with the consent of her husband, *Ramtonoo, the adopted son's right is established to his adopting father's estate, and likewise to that of his adopting father's father.* Therefore the given son will present the funeral cake to his adopting father and adopting father's father, *and will succeed to their estates. This opinion is conformable* to the doctrines of *Menu*, the *Dayabhaga, and other works.*

AUTHORITIES.

Menu:—"To three ancestors must water be given at their obsequies, for three, (the father, his father, and the paternal great grandfather,) is the funeral cake ordained: the fourth in descent is the giver of oblations to them, and their heirs, if they die without nearer descendants; but the fifth has no concern with the gift of the funeral cake."

Therefore a succedaneous grandson succeeds to the wealth of a grandfather, who dies leaving no legitimate issue; this opinion is delivered by *Culluca Bhutta* in the *Munwartha Mooctavulee.*

It is declared in the *Dayabhaga;* "The true legitimate son and the rest, to the number of six, are *not only heirs of their father, but also heirs of kinsmen;* that is, of *Sapindas* and other relations." The doctrine of *Yajnyawalcya* laid down in the *Mitacshara;* "The true legitimate is-

sue, 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.

The fourth person, and the rest, share the remains of the oblation wiped off with *Cusa* grass; the father and the rest share the funeral cakes; the seventh person is the giver of oblations: the relation of *Sapindas*, or persons connected by the funeral cake, extends therefore to the seventh person, or sixth degree of ascent or descent.

No. VI.

The Will of Goculchunder Corformah, declared by the Supreme Court to have been well proved; but except as to a disposition in favor of the Testator's step-mother, wholly inoperative—See p. 74.

Sree Sree Radhacrishnjee Soronong. Sree Goculchunder Corformah, the Mansion of all Happiness!!!

I, of my own free will and pleasure, according to my own understanding, paying no regard whether the same be conformable to the *Hindoo* law or not, make. I have three wives, *Sree Mootee Rasmoney,* the second *Sree Mootee Radhamoney,* and the third *Sree Mootee Narayuny;* and sons, *Sree Govinchunder Corformah,* the second *Sree Dayalchunder Corformah,* the third *Sree Isnoochunder Corformah,* and the fourth *Sree Sorodchunder Corformah;* and four daughters, *Larlemoney, Premmoney, Bodonmoney,* and *Crishnomoney; with the consent and pleasure of all whom,* I, of my own free will, make this will, and all have signed it; this cannot be deviated from; whoever asserts any thing contrary to it will be discarded by the deity, forsaken by me, and removed from the *Surcar,* and forfeit all titles in every thing belonging to the *Surcar.* 1st. First order; I have the image of *Sree Sree Connyelolljee* in my house, to whom I give of my own will and pleasure, the property acquired by me myself; my *ancestorial* property, grounds, houses, gardens, English Company's bonds and certificates; merchandize, gold and silver ornaments, plates, jewels of diamond and pearls, and so forth, and he becomes proprietor of all this property, and no body has any right to divide and take the same. 2d. Second order; *Sree Sree Connyelolll Thakoor* is an image, and will not be able to manage, for which reason, my three wives and four sons will manage; they will act in such manner that benefit may arise to the *Surcar,* and will all receive the means of subsistence and clothing from the *Surcar* of the *Thakoor,* as well as for defraying the expences attending the daily and stated religious acts, and the family and all other expences, and will conduct in the same manner as they are conducted during my life time. 4th. Fourth order; Should you three wives and four sons not agree with each other, and disputes frequently occur, you will each put a key of your own upon the *Surcarry* treasury and house, and when requisite, assemble together and receive and disburse the same. You will perform this with the *Thakoor's* estate, which *you will never have authority to divide and take it; you will never have authority to take it; you will never have authority to take it.* I forbid you thrice from so doing; and whoever does not regard this prohibition, and *utters the subject of division,* will be discarded by the deity and abandoned by me, and forfeit all title in the estate of the *Surcar;* and if the person prefers any claim, it will be null, and although entitled agreeably to *Hindoo* law, still he will *not be competent to share; he will not be competent to share; he will not be competent to share. I have again expressed prohibitions three times over.* 5th. Fifth order; I am the manager of the estate of *Sree Sree Connyelolll Thakoor;* on my demise, my four sons, *Sree Govinchunder Corformah, Sree Dayalchunder Corformah, Sree Isnoochunder Corformah,* and *Sree*

Sorodchunder Corformah, and my three wives will be the managers of the estate of this *Thakoor*. These seven persons will be managers as I am myself, and will conduct the business. They will be managers of the business on my behalf. 6th. Sixth order; Should there arise any dispute amongst yourselves on any account, and should you disagree in any business, you will make it known to *Sreejoot Gourchund Mullick*, or to any respectable person, and he will settle the same, and you will abide by such settlement. *You will never resort to the Court on your own private disputes. The person who attempts to resort to the Court is not fit for to remain in my Surcar*, but will receive from it the sum of current (500) five hundred rupees for subsistence and clothing, and retire, and have no concern whatever with the *Surcarry* property, grounds, &c. 7th. Seventh order; You will consider my reputation, my instruction, and my writings of *more importance* than even the *Vedas:* one *Sotin* will never quarrel with the other, nor will one brother with his brother. Having entered into dispute, *you will not even pronounce the word division.* I am repeatedly writing in prohibitive terms thereon, for your welfare. Should you enter into dispute among yourselves and make a division, prosperity will forsake you, and you will be ruined, on which account I have repeatedly made use of prohibitive injunctions, but should you do so, not attending to them, you will be abandoned by me and have no title in the *Surcarry* property, but become entitled to only current (500) five hundred rupees. Take this into consideration and conduct yourselves accordingly. 8th. Eighth order; I have three wives and four sons, being in all seven *powers* who are managers, and as the body is the seat both of health and sickness, the survivors will be managers, and if there be any offspring, such will be so, the well managers of the business of *Sree Sree Connyeloll Thakoor*. 9th. Ninth order; My step-mother is also in the *Surcar; as long as she lives she will receive subsistence and clothing from it; on her death, you will take four or five hundred rupees from the Surcar for her funeral charges and perform the same.* 10th. Tenth order; On my death, should you wish to disburse sums for my obsequies, you will not on any account exceed the sum of two hundred rupees in performing the same. *The performance of obsequies is all futile.* You will not attend to the censure of the world but disburse only two hundred rupees for the purpose of purification, and perform the funeral ceremonies. 11th. Eleventh order; *Should you wish to make an offering to me, whatever eatable you offer to Sree Sree Connyelolljee Thakoor*, on the day of the full moon of his *Jhoolun Jattra, I shall partake of, and if you wish to see me, you will look near Thakoor during the latter part of the night of the said full moon, and you will see me.* 12th. Twelfth order; *Whenever you are desirous to offer me any thing to eat, you will offer Loochee Cochoree, &c. to Sree Sree Connyelolljee,* and distribute the same among *Brahmins* and *Voishnavas*, and *you may be sure I shall partake of the same.* 13th. Thirteenth order; I have made this will of my own free will and pleasure, and you have likewise signed the same of your own free will and pleasure. *In consequence of which Thakoor Connyeloll becomes proprietor of my own property, ancestorial property, ornaments, the English Company's bonds, certificates, grounds, gardens, wearing apparel, &c. and you seven persons become managers of the business in the same manner as I was on behalf of the Thakoor.* You will lodge all the *Surcarry* articles and property in the iron chest within the treasury room, and take very great care, whereby you will confer great obligations on me. I am your *Mahagunu*, and request this of you, *that you will not make any broils amongst yourselves, that you will not make, that you will not make;* but if you should, the person who does, will be ruined, and never be competent to make a division. I have specified these orders. The year (1205) one thousand two hundred and five, 7th Ugrawn; 1798, 20th November.


सत्यमेव जयते

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N. B.—This Index extends to the six first Chapters only. It was not thought necessary to give an Index to the three last.