

EXAMINATION OF

MR. NELSON'S VIEWS

OF

HINDU LAW,

IN A LETTER TO

THE RIGHT HON. MOUNTSTUART ELPHINSTONE GRANT DUFF,
GOVERNOR OF MADRAS.

BY

MR. JUSTICE INNES,
A JUDGE OF THE HIGH COURT OF MADRAS.

MADRAS:
J. INBOTHAM AND CO.

via to His Royal Highness the Prince of Wales,
in to the Madras University.

1882.

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PREFATORY LETTER.

TO THE RIGHT HONORABLE

MOUNSTUART ELPHINSTONE GRANT DUFF,

GOVERNOR OF MADRAS.

RIGHT HONORABLE SIR,

FOR some years past Mr. Nelson of the Madras Civil Service has been engaged in promulgating peculiar views in regard to Hindu law, and in calling in question the administration of the Hindu law by the High Court of Madras. His works show that he is of opinion that, with the exception perhaps of the Brahmins, there are no Hindus properly so called in any part of the Madras Presidency, and that probably only the Brahmins of the Western Coast are real Brahmins; that Hindu law should be administered to Brahmins alone, and that the various customs of the other castes should be investigated and recorded, and a new law in fact should be gradually framed for them; and this principally on the ground that the High Court of Madras is unwilling to recognize customs which are in discordance with the Hindu law.

In his latest work, "A Prospectus of the Scientific Study of the Hindu Law," Mr. Nelson has reiterated and expanded his views, and demands a Commission to pronounce on enquiry whether the books ordinarily regarded as authorities on Hindu law in the South of India, are or ever have been so regarded by the people; and on its being ascertained as he assumes it will be ascertained that they are not and never have been so regarded, he proposes that the Commission should at once set about enquiring into and recording the customs of the various castes and tribes of South India.

Mr. Nelson's assumptions are in many respects ill founded, and his statements of facts are often reckless and inaccurate, and the conclusions drawn erroneous. His opinions are however asserted with such assurance and are so constantly reiterated that they are almost certain to find acceptance with the half educated portion of the population of Southern India.

They are calculated to create deep and widespread doubt in the minds of the public as to the authority of the decisions of the High Court, and to foster litigation upon questions long deemed finally determined; and thus to unsettle titles and depreciate the value of property.

I would not be supposed to assume that the Government of Madras would be induced to give effect to the proposals of Mr. Nelson, but unless

some exposition of the unsoundness of his views be put forward, there is reason to fear that a continually-increasing agitation of the public mind will ensue, which will foment litigation and raise a serious obstacle to the efficient performance of its duties by the High Court.

The prospect of the release from all law, except that of the individual will, has a great attraction for the multitude, and this is what in his latest work Mr. Nelson holds out. He advocates the enactment of a short relieving and enabling Act. "The desired enactment should recognize and proclaim the general right of the Indian to consult his own inclination in all matters of marriage, adoption, alienation, testation and the like."¹

Fair criticism upon the administration of the law by the Court would of course be allowed to pass unnoticed, and even in regard to unfair criticism it would be unseemly for the Court to enter into a controversy with Mr. Nelson. But having in view the mischief to the public interests which further silence as to Mr. Nelson's published opinions is likely to occasion, I think an answer should be given them.

My long connection with the Court places me in a peculiarly favorable position for explaining its action on many of the points on which the adminis-

¹ Prospectus of the Scientific Study of Hindu Law, p. 182.

tration of the law is impugned by Mr. Nelson, and of examining his opinions. With that object in view I have thrown together the accompanying pages, and hope that in addressing you publicly, I am conveying to the public my examination of Mr. Nelson's views in a mode as little objectionable as the circumstances will admit of.

I propose first to examine a recent Pamphlet by Mr. Nelson, the object of which is to prove that Hindu law never was administered to Hindus by Hindus in the Madras Presidency, and that the authorities on which decisions on Hindu law have hitherto been founded, are no authorities at all for this Presidency.

Then, I propose to examine the work published in 1877, in which Mr. Nelson directly attacks the administration of the law by the High Court of Madras on certain definite points, and asserts that that administration brings in its train beggary and ruin.

The Prospectus of the Scientific Study of Hindu Law, published this year, enters more fully into the matters discussed in the Pamphlet and the work published in 1877, but in substance it is but a repetition of the facts and arguments put forward in them, with the conclusion that a Commission should issue for the double purpose of proving that the Sanscrit law is of no binding authority in South

India, and of recording the various customs of the several castes and tribes with a view to the formation of a new code of laws for them.

My object will be to establish in the course of my examination of these works, that the Hindu law is not shown to be inapplicable to South India, and that facts and probabilities point to its having been applicable.

That Hindu law embraces a recognition of customs.

That Hindu law is administered by the High Court of Madras in so far as by the Civil Court's Act it is required to be administered. That, within the same limitations, customs are recognized when well proved.

That the law of the Madras High Court for the most part did not originate with that Court, but with the predecessors of that Court, and the Judicial Committee of the Privy Council.

That for the most part it is what is followed elsewhere, and that the rules impugned are rules which, with some few exceptions, where they did not originate with, are at least recognized by the other High Courts and the Judicial Committee.

That where the Hindu law of Madras differs from the law of other parts of India, there are substantial grounds for the divergence.

That the assertion that the administration of the law by the Madras High Court in the rules or prin-

ciples specially attacked by Mr. Nelson has been followed by disastrous consequences, is unproved and improbable.

That the Commission demanded by Mr. Nelson is not necessary or desirable.

I have the honor to be,

Right Honorable Sir,

Your most obedient Servant,

L. C. INNES.

EXAMINATION OF

MR. NELSON'S VIEWS OF HINDU LAW.

In three successive publications Mr. Nelson has insisted that the administration of the Law in South India proceeds upon principles altogether erroneous ; that the Hindu law of the Madras High Court is based upon a number of false principles, fifteen of which he discusses ; that Hindu law never was administered in former times to Hindus by Hindus, or at all events was not what is now administered ; that Hindu law should be applied if at all to Brahmins alone of all the populations of the Madras Presidency, and possibly ought to be confined to Brahmins of the Western coast ; that the customs of all the other tribes ought to be ascertained and law administered to them in accordance with their customs.

I propose to consider these views, and in doing so to examine the Work published in Madras in 1877 and the Pamphlet published in London early this year, and to glance at the Prospectus of the Scientific Study of Hindu law also just published in London.

I shall refer to these several works as "The View," "The Pamphlet" and "The Prospectus" respectively.

*Hindu Law at Madras, by J. H. Nelson, M.A.,
Madras Civil Service.*¹

In this Pamphlet, Mr. Nelson undertakes to show that whereas the High Court “professes and doubts less desires to keep up, as required by the Civil Courts’ Act, the laws and customs of the tribes and castes subjected to its jurisdiction, it in fact imposes on them laws of its own making, and which until quite recently have not had force in any part of India.” To this end, he says, he shall endeavour to prove three propositions:—

1st.—That in ancient times Law, in any ordinary acceptance of the term, never was administered to Hindus by Hindus or others.

2nd.—That if Law was administered to Hindus in ancient times, at all events it never was administered in the kingdoms lying south of the Vindhya Mountains.

3rd.—That if it was, it was not the law contained in the Mitákshara, and other books of the kind.

These are the three propositions by proof of which Mr. Nelson proposes to establish that the High Court of Madras, not only fails to administer the law of the Presidency, but imposes laws of its own making upon the peoples subject to its jurisdiction.

¹ Trübner & Co., 57 & 59 Ludgate Hill, London, 1881.

Before approaching the examination of the evidence offered in proof of these three propositions, it will be well to examine the validity of the argument employed.

Although Mr. Nelson proposes to prove three propositions, it is apparent that if the evidence to the first and second fail to establish them, he is content to rest his case upon proof of the third proposition; and it will be sufficient therefore to put aside for the present the two larger propositions, and confine ourselves to a consideration of what the argument amounts to in connection with the third proposition.

The argument is (major Premiss)—The law administered in the kingdoms lying south of the Vindhya Mountains, including the area of the Madras Presidency, in ancient times was not the law contained in the Mitákshara and other books of the kind.

Minor Premiss to be supplied. The High Court administers the law contained in the Mitákshara and other books of the kind.

Conclusion. The High Court imposes on the people laws of its own making.

The conclusion obviously does not follow from the Premises, and the argument is invalid.

It would not prove either that the laws administered were of the High Court’s own making, or that they were imposed by the High Court.

Even if the conclusion intended ran, “therefore the High Court administers as law, that which is not the law,” the argument would still be invalid, because it would not follow from the fact that a cer-

tain law was not the law in ancient times, that it is equally not the law at the present day.

Regarding the evidence however as intended to prove that the High Court, in administering the law of the *Mitákshara and other books of the kind*,¹ and in other ways, is administering as law that which is not and never was the law of the Madras Presidency, I propose to show that each one of the three propositions is contrary to the fact, or not established by proof such as a rational man should act upon.

Mr. Nelson, I must premise, is quite unfounded in the assertion that the Civil Courts' Act requires the High Court to keep up the laws and customs of the tribes and castes subjected to its jurisdiction. That Act simply embodies the law of the Regulations which has been in force since the commencement of the century, as the law of all parts of the Presidency except the contracted jurisdiction of the late Supreme Court, with which the jurisdiction of the Original Side of the High Court is at present nearly identical. The Act does not require the High Court to administer the Hindu law or customary law to Hindus, except on certain specified branches of law, viz., Succession, Inheritance, Marriage, Caste or any Religious usage or institution; and in these only provided the law or custom has not been altered or abolished by legislative enactment. In cases where no specific rule exists the Court is to act in accordance with justice, equity and good conscience.

¹ This expression is as appears from the pamphlet meant to include the *Mánava Dharma Sástrá* and other treatises on Hindu law.

Neither was the late Sudder Court nor is the High Court bound in other branches of law, as the law of Contracts, or the law of Torts for instance, to apply the Hindu law to Hindus.

As to tribes and castes other than Hindus and Mahomedans subjected to its jurisdiction, there is, in the Act referred to, no rule of law of any kind whatever directed to be administered. The reason being that the legislature in a general way regarded all who were not Mahomedans as Hindus. Whatever may have been the origin of the various tribes of South India, with exception of the Jains, Buddhists, and a few other sects who are very inconsiderable in numbers, the bulk of the population has been always divided into Mahomedans and Hindus. For though many of the customs of the non-Mahomedans who are not of any of the three twice-born classes are distinct from those of their Aryan conquerors, such non-Mahomedans have all more or less adopted the Hindu religion¹ and laws, and when bringing their contentions before the Courts have stated their cases for trial on the assumption that they form part of the Hindu community.

As to the *first* proposition:—That in ancient times law, in any ordinary acceptation of the term, never was administered to Hindus by Hindus or others.

¹ "The Maravars," says Doctor Cornish, "are in religion universally Saivites, but practically demon-worshippers." Nelson's Book 1877, p. 145. That is to say though they have adopted Hinduism, they keep up the practices of the religion they profess to have abandoned. This sort of thing is not unknown in Christian countries. Hundreds of pagan customs are still current in England and Scotland.

By 'law,' Mr. Nelson says, he means an aggregate of rules of conduct that Courts of justice of whatever kind habitually recognize and enforce.

The evidence brought forward is all of the negative kind. "Let us now look at the works that are commonly supposed to contain the law of the Hindus. From the time of Megasthenes to that of Sir William Jones few persons, if any, appear to have noticed their existence. The observant Greek Envoy who lived for years at the Court of Chandragupta and wrote the earliest and most valuable description of the Indians that has come down to us from ancient times cannot have seen or heard of the laws of Manu. Not only does he expressly say that the Indians "use unwritten laws," he also describes a state of things wholly inconsistent with the idea that justice was administered to the people by Judges in accordance with the provisions of written laws like those attributed to Manu, or indeed with the idea that the people principally guided themselves by any such laws. He tells us they do not know official writings but manage all their affairs from memory. And in the matter of laws and pecuniary transactions their simplicity is proved by the fact that they have not many forms of action; for they know not actions of pledge and deposit. No Indian is or keeps a slave."¹

Then Megasthenes divides the people into seven

¹ Pamphlet, p. 3.

classes instead of four as Manu does, and Mr. Nelson says, "It becomes very difficult to believe that the Code of Manu gives a picture even approximately correct of the state of Indian society in the 4th century before Christ. Still less can we believe that it contains the law then observed by that society."¹

Nearchus, Mr. Nelson goes on to say, confirms Megasthenes' statement that the Indians had no written laws.

Then Mr. Nelson refers to the Chinese pilgrims of the 5th and 7th centuries of our era respectively. Fah Hian says, that in the happy Madhyadésa, the people knew neither registers of the population, nor Magistrates, nor laws.

The other pilgrim '*appears* to know nothing of the existence among them of written laws.'

European travellers Bernier, Tavernier, &c., say nothing of written laws, Anquetil Duperron could not discover evidence of the fact that law was known to and observed by Hindus.²

With regard to the accuracy of the observation of the Greeks an eminent author has observed :

"We must still be cautious how we form any further opinions regarding that people on Greek authority alone. The ancients themselves have set us an example of this caution. Arrian says, that he shall place implicit confidence in the account of Ptolemy and Aristobulus alone, and in them only

¹ Pamphlet, p. 4.

² Pamphlet, p. 5.

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“when they agree; and Strabo, in a very judicious
“dissertation on the value of the information exist-
“ing in his time observes, that the accounts of the
“Macedonians are contradictory and inaccurate, and
“that those of later travellers are of still less value
“from the character of the authors, who were ignor-
“ant merchants careless of everything except gain.

“They are well aware of the division into classes
“and of the functions of most of them; but by con-
“founding some distinctions occasioned by civil
“employment with those arising from that division,
“they have increased the number from five (includ-
“ing the handicrafts-men or mixed class) to seven.
“This number is produced by their supposing the
“King's Councillors and assessors to form a distinct
“class from the Brahmins; by splitting the class of
“Vaisyas into two, consisting of shepherds and hus-
“bandmen; by introducing a caste of spies; and by
“omitting the servile class altogether. With these
“exceptions the castes are in the state described by
“Manu which is the groundwork of that still sub-
“sisting.”¹

There can be little doubt from the opinion of Sir William Jones and other eminent Sanscrit scholars that the *Mánava Dharma Sástrá*, whatever its origin and whatever its authority, and whether that which we at present have or an earlier redaction of the original work, was in existence in the days of the Greek invasion of India.

¹ Elphinstone's Hist. of India, 2nd Edn., vol. I, p. 456.

We learn from this work that slavery was a recognized part of the social economy. There was even a servile class. Writing also was known since some of the Greeks praised the beauty of the writing.¹ Writing was spoken of by both Megasthenes² and Nearchus,³ and there exist inscriptions of the third century B. C.³ If writing was known it is difficult to believe that there were no official writings. And the fact that the existence of slavery was overlooked seems to argue want of observation.

But what shall we say to Strabo's account that the Indians were so reasonable as never to have recourse to a law-suit; so honest as neither to require locks to their doors nor writings to bind their agreements; and to Arrian's that no Indian was ever known to tell an untruth? Here was a populous kingdom in a high state of civilization, keeping up large armies, and indulging in magnificent festivals, and we are told there was no crime, no litigation and no lying. Surely after this the reports of Greek writers must be regarded with much caution. Whatever may have been the extent to which Manu's Code was accepted as an authority, it cannot be doubted from the internal evidence, that the crimes for which it provides punishment were of more or less constant occurrence, and that the civil actions recognized were instituted for matters which were ordinary

¹ Elphinstone's Hist. of India, 2nd Edn., vol. I, p. 470.

² Prospectus, pp. 25, 27, notes.

³ Weber's History of Indian Literature, p. 15, note.

subjects of litigation. Megasthenes implies that there was litigation notwithstanding the simplicity for which he gives the Indians credit, since he says that they have not many forms of action. From the expression 'forms of action' may be inferred the existence of Courts with a regular practice, and consequently a regular administration of justice however imperfect. The *Mánava Dharma Sástrá* gives evidently no fictitious picture of society and of social ordinances; and from the tone in which its precepts are recorded, it is clear that what it records as the law was law that had been for long ages in a course of development, and for the most part was recognized as binding at the time of the compilation, in the country in which it had its origin. If it can be shown that a few centuries after the time of Megasthenes, Manu was recognized north of the Vindhya Mountains as a legal authority of high value, the conclusion seems inevitable that the law as set forth in this work could not have ceased to be authoritative in the time of Megasthenes and afterwards recovered its lost position, but must have been authoritative from a period prior to the time of Megasthenes, during the period of the Greek occupation, and continuously down to the time at which the evidence I propose to adduce purports to speak.

As to the value of the negative evidence of non-discovery of such a treatise as the *Mánava Dharma Sástrá*, the attention of a foreign enquirer would be directed rather to the law as actually adminis-

tered, than to the treatises in which that law is set forth.

The difficulty that Sir William Jones experienced in the discovery of the ancient dramatic works of the Hindus, notwithstanding that those works enjoyed all over India a very general popularity at the time of his enquiry,—(see Monier Williams' introduction to the *Sakuntalá*,) affords an instance of the way in which the most careful enquirer, if a foreigner, may be foiled in his search for the literature of the country. The *Mánava Dharma Sástrá* was not merely a legal treatise, and the jealousy of the religious orders as to the publication of their sacred works must further be taken into account. The Greek enquirers had no knowledge of the existence of any law treatises and nothing to lead them to a suspicion of their existence. Their enquiries would be likely to be less effective than those of a literary man like Sir William Jones, who had good reason for his belief in the existence of a Drama, and was very persistent in the pursuit of his investigations.

If then Sir William Jones was only able, after great efforts, to discover the existence of the *Sakuntalá* and the other invaluable dramatic works which he has introduced to the western world, the fact that the Greeks remained ignorant of the existence of legal works which professed to have a divine origin, and had a divine origin assigned to them in the belief of the limited number of educated men who were aware of their existence, is not difficult to apprehend.

The Indians have always been to a great extent

an isolated people. Among the mercantile classes, individuals, no doubt, travelled out of the boundaries of India; but there is no record of any of the literary classes doing so, and their works of imagination pourtray the manners and customs of the natives of India alone. Internal evidence enables us to distinguish what is pure fiction, from what is an undoubted picture of existing social institutions. The trial scene in the *Mrichakkati*, (or 'Toy-cart' as Sir William Jones called it, or as it has lately become the fashion to style it, the 'Clay-cart,') is at once accepted by the mind as a true picture of the administration of Justice in the mode then prevailing in the part of India, Ujayini, of which the writer had experience, or of the former prevalence of which the history or tradition still survived.

The Toy-cart was written¹ in about the second century after Christ, and in it we have a picture of a judicial tribunal appointed by the king; the Judges holding office as do the Judges of the High Court during the Sovereign's pleasure; "an aggregate of rules of conduct that Courts of Justice habitually recognize and enforce," (Mr. Nelson's definition of law)—being administered by that tribunal, and that aggregate of rules of conduct being contained presumably in the *Mánava Dharma Sástrá* referred to by the Chief Judge, as his guide, in communicating to the king the sentence which according to Manu it was *unlawful* to pass, and that which the king might lawfully pronounce. See Manu, Ch. viii, §

¹ See Weber's *History of Indian Literature*, p. 205.

380. Toy-Cart, Act IX. The fact that the tribunal was not quite regularly constituted and that the king is represented as acting contrary to the advice of the Judge, does not affect the conclusion that law as contained in Manu was then the law of the tribunal and was administered by Hindus to Hindus.

It is true that this is the one solitary picture, so far as is known, contained in ancient Sanscrit literature of the administration of justice in a Hindu kingdom; but it is quite enough for my purpose.

The language used precludes the supposition that what is pourtrayed exhibits any thing which was unusual, or different from the ordinary mode of administering justice in Northern India.

But in the Prospectus of the "Scientific Study of Hindu Law" Mr. Nelson puts forward with Dr. Burnell's authority the theory that our present version of Manu, which was believed to have been compiled about 900 years before Christ, dates no further back than to the year 400 A. D.,² and that its genesis is to be referred to the Court of a Chalukya sovereign of the Deccan. I venture to hazard an opinion that nothing can be more certain upon the internal evidence of the work than that it was compiled in the Madhya Desa which is not the Deccan; see Ch. ii, §§ 22 to 24 in which it is intimated that the tract lying between Himavat and the Vindhya is the only

¹ Prospectus, p. 37.

² Johāngten, pp. 86 to 95 of his work, 'Das Gesetzbuch des Manu' gives his reasons for placing it between 500 and 350 B.C. Weber and Max Muller, however, consider that the proper date to be assigned to it is probably much later than 350 B.C. The question is at present involved in uncertainty.

country fit for respectable men to live in, a doctrine which would not have been propounded in a work written or recast at the instance of a Deccan sovereign. The Hindus who emigrated to Java, about the year 500 A. D.,¹ took with them a tradition that Manu was the most ancient of the Dharma Sástrás. It must therefore have been ancient at the period of their emigration. And the date of the Manu that has come down to us is of comparatively small importance in relation to the argument I have endeavoured to combat.

The law of Manu, as I have shewn, was undoubtedly recognized and administered in Ujayini in about the 2nd century of our era. Whether this 'Manu' was the work bearing that name discovered by Sir Wm. Jones, or an older Manu, is immaterial. What it is sought to controvert is the position that law was not in ancient times administered to Hindus by Hindus.

I will only add the opinion of Colebrooke given in the note below.

NOTE.—"The early practice of the Hindus recorded in other books" (i.e. other than Manu's Code) "leaves this question" (*viz.*, the question as to how the king's place was supplied in the local Courts) "in some uncertainty; for in these books it appears there were local Judges appointed by the king in different parts of the country; and also a provision for arbitrations to be authorized by the Judges in three gradations, first, of kinsmen; secondly, of men of the same trade; and, thirdly, of townsmen: an appeal from the first lying to the second and from the second to the third. Appeals lay from all three to the local Court; from that to the chief Court at the capital and from that to the king in his own Court, composed of a certain number of Judges, to whom were joined his ministers, and his domestic Chaplain (who was to direct his conscience); but though

¹ Weber, pp. 208 and 280, note.

"these might advise, the Decision rested with the king. The precise date when this system was in perfection is not stated."—Colebrooke on the Hindu Courts of Judicature: transactions of the Royal Asiatic Society, Vol. II, p. 166.

Having thus disposed of the first proposition of Mr. Nelson, I will now pass on to the second: "That if law was administered in ancient times, at all events it never was administered in the kingdoms lying south of the Vindhya Mountains."

Mr. Nelson in his work, "View of the Hindu Law as administered by the High Court of Judicature of Madras," questions the authority of the Sarasvati Vilása because Dr. Burnell was only able ("as yet" as he says, p. 113,) to procure two copies of it "notwithstanding that he is the most indefatigable and successful collector of manuscripts." No doubt this is good ground for questioning the popularity and currency of the work; and assuming that Dr. Burnell's want of success in this instance is owing to a scarcity of manuscripts, Mr. Nelson, very justly, as I think, concludes that it could not have been of any great authority. But it has never been suggested that the work is a forgery, or was intended to represent a picture of things drawn from the author's imagination and which did not actually exist at the time. Now this work, Mr. Nelson says, sets forth the constitution of several kinds of judicial tribunals in South India,¹ and the most perverse judgment could scarcely main-

¹ Nelson's Pamphlet, p. 22, I am inclined to think however that Mr. Nelson intended to speak of the Smritichandriká as containing this account of judicial tribunals. See Preface to Strange's Hindu Law, pp. x & xii. Mayne's Edition.

tain that an exposition made in such circumstances could be a mere figment of the writer's imagination.

We learn from the passage quoted by Mr. Nelson from Orme¹ that "The ancient practice, corrected on particular occasions by the good sense of the Judge decides absolutely in criminal cases," that "in civil cases for want of a written Code, the justice or injustice of the decision depends on the integrity or venality of the Judge. Hence the parties prefer to submit their cause to the decision of arbitrators chosen by themselves, rather than to that of the officers appointed by the Government."

From this it is inferrible that there were officers for the administration of justice, appointed by the Native Governments of whom Orme is speaking. That in criminal cases at least there was a recognized ancient practice. But that for want of a written Code the practice in Civil cases was uncertain, and the justice of the decision dependent on the honesty of the Judge. The want of a written Code was in Orme's view the cause of the uncertainty of the administration of Civil Justice. We have never enjoyed the advantage of a written Code in England, yet except when the Judges were dishonest, there has been no difficulty in determining the law, which the Reports, the traditions of the Bar and legal treatises have always rendered accessible to the Judges. It is not difficult to understand that in the troubled era of which Orme is writing, when society could scarcely be held together, venality and corruption of

¹ Nelson's Pamphlet, p. 22.

all kinds would taint the administration of justice. Parties would be as little desirous of appearing before the constituted tribunals, as, in England, people would have been inclined to frequent a tribunal presided over by Judge Jefferies or other corrupt or biassed Judges of the period of the Stuarts.

Yet it is evident from what Orme says that there were constituted tribunals appointed by the Governments, and an ancient and recognized practice in (at least) criminal law.

Father Bouchet was a Missionary in the Tamil country, and wrote in the year 1714. "Such," says Father Bouchet, "are the general maxims which serve the Indians for laws, and which are followed in the administration of justice. There are other particular laws which regard each caste."¹

Thus we have according to this witness a general body of laws, and a particular body of laws, both administered as he goes on to explain by a Court of First instance, an Appellate Court, and a Court of final Appeal—which consisted as stated by Father Bouchet "of the immediate Officers of the king who judge in the last resort."

Now Mr. Nelson doubts, whether Father Bouchet was accurate in his statement that there were three tribunals, one of first instance, and the others affording successive appeals. These, however, were matters which must have been within the Father's personal observation. Mr. Nelson is not aware of any Tamil word for 'appeal.' But this circumstance

¹ Pamphlet, p. 18.

has very little weight beside the Father's positive evidence that there were appellate tribunals. I agree with Mr. Nelson that the Mányakkáran if he held the same office as at the present day would not be likely to constitute the appellate tribunal. But the error is probably in the designation of the officer. Náttán-meikkaran was possibly intended. It is the less improbable that some such mistake was made, as the good Father, whatever his other merits, appears to have been somewhat inaccurate in recording names and designations; as will be shown further on.

With regard to Mr. Nelson's observation that "the immediate Officers of the king included at the time when Father Bouchet wrote, Ministers, Generals, and Executive officers of various kinds, but no Judges; as I have shown in the Madura Manual," it is sufficient to say that although there may not have been any distinct office of Judge it would be quite consistent with what we learn of Hindu practice that this office should be filled by the chief Minister or Mantri.

In an article lately published by Mr. Nelson¹ is given Father Bouchet's description of the qualifications held necessary to the office of Judge: the knowledge of the maxims that serve for law, opulence and a limit of age between 20 and 60. His principal duty, he says, was held to be the patient examination of witnesses. Careful Judges would write down the evidence and dismiss the witnesses, and recall and re-examine them and cross-examine them after an interval of two or three days. Mr. Nelson, however, rejects this evi-

¹ Madras Journal of Literature and Science, 1880, p. 6.

dence, but I think upon no reasonable ground. The sole cause for his rejection of it would appear to be that he cannot persuade himself that there were Judges.

The force of such negative evidence as is "unable to discover or "has never heard of" such and such things, depends very much upon the extent and accuracy of enquiry and observation, which at a long distance of time it may be impossible to test; but when we come to positive statements by a witness of the existence, under his immediate observation, of such and such institutions the evidence of the witness must be believed; or if it be doubted, it must be upon the ground that he is capable of drawing upon his imagination for facts; in which case his testimony will have to be, upon all points, adopted with extreme caution or altogether rejected.

I do not see how Father Bouchet can be disbelieved either as to the existence of the classes of Courts which he mentions, or as to that of the Judges who presided over them.

The fact that in the anarchical and corrupt period of which Mr. Nelson's witnesses speak,¹ the castes, in place of resorting to the Courts had taken the administration of their peculiar laws into their own hands, if it were established would not be matter for astonishment, and would not tend to negative the existence of constituted Courts. But from Chapter I, Part IV of the Mitákshara,² it appears that the sets of Courts recognized by the Hindu Sovereigns

¹ P. 22, Pamphlet, citing Buchanan.

² P. 83, version of Girischandra Tarkalankára.

were "Persons specially appointed by the Ruler : assemblies of townsmen : companies of traders and families." Families formed the Court of first instance : companies of traders, the guild or caste, the next superior class of Court : assemblies of townsmen the next : and persons specially appointed by the Ruler the highest. In the commentary the word 'families' is said to mean assemblages of cognate relatives, connections and kinsmen. "Companies of traders" assemblages of persons of similar or various tribes receiving the same livelihood : as horse-dealers, pawn-sellers, weavers and shoemakers : "assemblies of townsmen," assemblies of people of various tribes and various professions sitting at one place, as of villagers or citizens. The second of these tribunals, companies of traders would be a tribunal of the guild or caste, though differently constituted to that to which Buchanan refers. The authority exercised by the caste therefore as noticed in Buchanan would not necessarily be exercised in displacement of the recognized Courts.

The observations I have made upon the remarks of two of Mr. Nelson's principal witnesses, sufficiently dispose I think of his second proposition, that law never was administered in the kingdoms lying south of the Vindhya Mountains.

I will now proceed to consider the third proposition. I shall amend the charge, so that it may embrace the whole matter in respect to which it was intended to put the High Court on its defence. It will run, That the law administered south of the Vindhya

Mountains whatever it might be, was not the law contained in the Mitákshara and other books of the kind, and in other respects is not the law administered by the High Court of Madras. I shall rely principally upon the evidence of Father Bouchet.

For more easy reference I shall place his observations, as quoted by Mr. Nelson, parallel with certain quotations and observations, by which I propose to show that Father Bouchet supports the view that Mr. Nelson's third proposition cannot be sustained.

Where the law administered formerly is found to be different to the law of the Mitákshara, or other authoritative treatises it will generally prove to be an ancient customary law which prevails still at the present day, and is recognized by the High Court.

Now what is meant by the law of the Mitákshara and books of the kind? According to the meaning which Mr. Nelson attaches to the word 'law', it would be the aggregate of rules of conduct contained in such books. Whether the Mitákshara, and similar works are as Dr. Burnell supposes, mere *speculative* treatises, or embody the views entertained by the authors of what was the law as recognized and practised in their time, there can be no doubt at least that they are *treatises*, and not divinely or humanly imposed ready-made bodies of laws upon the points of which they treat. It is quite consistent however with the position of a treatise on a branch or some branches of law, that it should correctly represent the law on the points which it discusses, and be a guide to Judges and practitioners of the period of the writer as well as

to those of succeeding periods. Some archæologist might, two centuries hence, be bold enough to assert that the commercial law of England in the middle of the nineteenth century was not the commercial law attributed to England in works, on that subject. It might be shown that Chinese travellers in England of that period had recorded in the story of their travels, that they were unable to discover that there were any written laws at all; they might, at the same time, set forth certain maxims of commercial law which they had ascertained to be recognized.

If an enquirer who disputed the proposition, were able to show that the law as set forth in these maxims was identical, allowing for inaccuracy and looseness of observation, with the statements of the law, appearing in treatises of the period, it might at once be concluded that the views up to that time entertained as regards the accuracy of such treatises were in no way shaken by the notes of the Chinese traveller; and that the sceptical archæologist had no solid foundation for an assertion in direct conflict with the opinions of eminent jurists and literary men.

Father Bouchet says, the natives of the South have no written laws but are guided by certain maxims.

Mr. Nelson observes in the article just referred to¹: "But seven are given; and since it is impossible to believe that any people however rude and backward could have determined all its disputes by seven maxims; we must suppose that those set out in this epistle are specimens. Again, since the form

¹ Madras Journal of Literature and Science, 1880, p. 12.

"of the maxims is purely European, we must suppose
"that they were composed by Father Bouchet himself
"to represent conveniently what he rightly or wrongly
"conceived to be the main jural or ethic concept—
"held in solution, as it were, in the common talk of
"the people among whom he sojourned." In other words they cannot be expected to pretend to accuracy.

The first maxim is, where there are several children in a family the males alone inherit; the girls have no claim to the inheritance.¹

"Let the sons divide equally
"the effects and the debts after
"the demise of their two parents;" ch. i, sec. 3, Mitākshara on Inheritance. "That sons principal and secondary take the heritage has been shown. The order of succession among all tribes and classes on failure of them is next declared. 'The wife, the daughter also,' &c., &c.

Mitākshara on Inheritance, ch. ii, sec. 1.

Manu, ch. ix, sec. 104.

Upon Father Bouchet objecting to this as most unjust, he was told "the nation had agreed to it" and it was not unjust, because fathers, mothers, and brothers were obliged to marry girls into families as good as their own, and so provide for them.²

"The daughters share the residue of their mothers' property after payment of debts."

Mitākshara, ch. i, sec. 3.

"Sisters should be disposed of in marriage giving them as an allotment, the fourth part of a brother's own share."

Mit., ch. i, sec. 7.

"Although Vishnu declares that daughters too are entitled to allotments according to the shares of sons, still it must be understood that this is not in right of inheritance as in the case of brothers, but simply for the purpose of defraying the

¹ Pamphlet, p. 16.

² Pamphlet, p. 16.

"marriage expenses. The reasons are: 1st, because they possess no right of inheritance in respect of property, which, though they have acquired an interest in it by birth, has not become their independent property (notwithstanding the demise of the father), from its being partible not among them but among the sons only."

Smṛiti Chandrika, ch. iv, § 18.

The second maxim relates to the succession to petty kingdoms, as to which there is no provision in the Mitākshara. It does not therefore admit of comparison.

The third maxim is that: If the property is not divided upon the death of the father, whatever wealth has been gained by one of the sons, must be thrown into the common stock, and equally divided.¹

"Whatever else is acquired by the co-parcener himself, *without detriment to the father's estate*, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs."

Mitākshara on Inheritance, ch. i, sec. 4.

This third maxim is consistent with the Mitākshara, if it be read as referring to property acquired by any of the sons *with the aid of family funds*.

Father Bouchet does not state that any distinction was made depending upon the particular funds with which the property was acquired, but Mr. Nelson admits that he was "misled to some extent by loose and inadequate information;" it is not improbable therefore that the maxim should be read as referring to such property only as was not acquired independently of family funds.

¹ Pamphlet, p. 16.

These two maxims (1st and 3rd) manifest the existence of the Hindu joint family with rules as to inheritance and partition similar to, if not identical with those of the Mitākshara.

Fourth maxim: adopted children take their shares of wealth upon its partition equally with the natural children of the fathers and mothers who adopted them.¹

Adopted children have a right to take their shares of the wealth, but in general *not* equally with the natural children. In the case of children born after an adoption, and that is the only case in which the question can arise, the adopted son has a right to a share, but, except in the case of Sudras, *not* equally with the after-born children. It does not appear whether Father Bouchet is speaking of Sudras. The question of the exception in the case of Sudras has never been raised before the Madras High Court.

Adoptions are made by childless men apparently for the sake of preserving the family property.¹

There is no doubt that this is one of the objects with which adoptions are made in the present day. The object is to serve a religious purpose in continuing the lineage, and to continue the property in the line.

The act is performed in the presence of assembled relatives who assent to it and sign a deed, but without religious ceremonies.¹

The Mitākshara, no doubt, requires a religious ceremony in the case of a Dattaka adoption, but the Madras High Court upholds, with the approval of the Privy Council, what Father Bouchet shews to have been the custom of the country, and in 4 Madras H. Ct. R., p. 165, it will be found that the law does not require any ceremony beyond the act of giving and receiving. In other

¹ Pamphlet, p. 17.

words the law as set forth in the Mitákshara, being in conflict with the law of the country as established by custom, ceases to be an authority in such a case. Established custom is recognized and administered by the High Court of Madras in place of the Law.

In Bengal it is otherwise. Also see 1 Morley's Digest, 25.

Norton's L. C. 62, part I.

The fifth maxim is that orphans must be treated like the children of those to whom they are entrusted. Thus uncles and aunts are considered, at law, to be the fathers and mothers of their brothers', and sisters' children.¹

This maxim, or rather rule, is the simple corollary of the joint family system. The uncles and aunts are not only in law, but also in designation fathers and mothers; being styled if older than the real father and mother, big fathers and big mothers, if younger, little fathers and little mothers; these designations having apparently had their origin in a period of joint family polyandry, still surviving in some parts of the world. There is nothing in this maxim or rule inconsistent with the law of the Mitákshara; though that law contains, I believe, no rule or precept on a subject which is rather a matter of ethics than law.

The sixth maxim is that whatever crime a son may have committed against his father, he cannot be disinherited.²

This results from the law as recorded in the Mitákshara that a son has by birth a property in the estate of the grandfather and father, from which he cannot be excluded.

And in like manner the son can in no case disinherit his father; who, in default of sons, is his natural heir.

The father is heir, after the mother, to the son who has no male issue; but has not an interest in the divided son's estate

¹ Pamphlet, p. 17.

² Pamphlet, p. 18.

unless he survives the son. Whether the son could will away the property to the prejudice of his surviving father has never yet been decided.

The seventh maxim is that the father is obliged to pay all the debts that the children have contracted, 'a'. And the children are equally obliged to pay all the debts of their father. (b.)

'a.' This, practically speaking, is the rule of our Courts at the present day.

On a son contracting a debt how is it to be paid? If it is not discharged by the son or the family, a suit will be brought. On a decree being passed, and execution issued, the joint family property will be attached and finally sold, to the extent of the share of the debtor. The father is the manager of the property, and thus is forced by process of law to defray the debt out of the estate

(b.) That the sons are liable for the debts of their father and grandfather is the well known law of the Mitákshara, and is followed by all the Courts in India including the High Court of Madras.

The Madras High Court has followed hitherto the rule of the Sudr Court that the son is only liable to the extent of the assets of the deceased. The Privy Council's decision in *Girdári Lál v. Kántu Lal* in effect holds, contrary to the Mitákshara, that the son has no absolute property in the family estate. It is all assets of the father and grandfather. Under this ruling it becomes necessary to recognize that the sons must discharge all the debts of their father which were not

contracted for immoral or illegal purposes.

And so where there is a family of undivided brothers, the eldest brother must pay the debts of the spendthrift younger brother and afterwards permit him to take an equal share of the inheritance with the others: for the elder brother becomes the father of the family, and in fact the other brothers come and throw themselves at his feet, and as for him he regards them as his children. ¹

Now we have seen before that there were village tribunals, and two Appellate Courts to administer the law.

If the law required the elder brother to pay the debts of the spendthrift brother, why this appeal to the feelings of the elder brother? It seems obvious that Father Bouchet is here stating not what the law was, but what was the practical result of the joint family system? What could not rightfully be demanded was nevertheless accorded of grace, favour or affection.

The writer then goes on to explain that obstinate debtors were arrested by their creditors in the name of the Prince under pain of being declared rebels, and compelled to remain within-doors until they gave satisfaction for their debts. ²

In the mean time passers by would intercede, and the creditor

"By whatever lawful means a creditor may have gotten possession of his own property, let the king ratify such payment by the debtor, though obtained, even by compulsory means." Manu, ch. viii, § 48.

"By the mediation of friends, by suit in Court, by artful

¹ Pamphlet, p. 18.

² Pamphlet, p. 19.

would give some months more time. The default being continued, a second arrest would be made, and the debtor taken before the Prince, who would give still further time. At last the debtor's goods, his oxen and furniture, would be sold, and the debt satisfied. It was rarely, however, the case that part of the debt was not struck off in favour of the creditor.

"management, or by distress, a creditor may recover the property lent; and fifthly, by legal force." Manu, ch. viii, § 49.

"That creditor who recovers his right from the debtor must not be rebuked for recovering his own property." Manu, ch. viii, § 50.

"The debtor who complains before the king that his creditor has recovered the debt by his own legal act as before mentioned, shall be compelled by the king to pay a quarter of the sum as a fine, and the creditor shall be left in possession of his own." Manu, ch. viii, 176.

So far Manu. I will now quote from the Mitákshara, Title 'Repayment of loans' at p. 100, version of Girish Chandra Tarkalankara.

"The king shall not prevent any one from enforcing a recognized debt. If the debtor being pressed for repayment, complains to the king he shall be punished and compelled to pay the debt."

(Text of Yágyavalkya.)

Commentary thereon by the author of the Mitákshara "Recognized" acknowledged by the debtor or established by the testimony of witnesses. "Enforces," to compel payment, "that is by such modes as mild truth, &c. "The king should not prevent," that is should not hinder the creditor."

"The modes of mild truth, &c.,
 "are thus enumerated by Manu.
 "By mild truth, by litigation by
 "artifice, by fasting, and fifthly,
 "by force, a creditor may re-
 "cover the property lent. "Mild
 "truth," kind language. "Liti-
 "gation," by process of law, &c.
 "Artifice," taking ornaments,
 "&c., on the pretext of festival
 "or the like."

"Fasting;" that is creditors
 "fasting at the house of the
 "debtor. "Force;" *confinement*
 "*and the like.* By these methods
 "a creditor may realise the pro-
 "perty lent for the sake of in-
 "crease."

There is much more to the same effect which I need not refer to.

Mr. Nelson admits that the usage of the creditor arresting the debtor, and exercising some degree of coercion in procuring satisfaction of his debt, is in accordance with Manu. I think it apparent that it was also strictly in accordance with the Mitákshara.

So much for the administration of civil, we now come to that of criminal justice. In cases of theft and other crimes, *where evidence was not forthcoming*, the ordeal of plunging the arm into boiling oil was undergone by the suspected person.¹

Other ordeals are also mentioned by Father Bouchet.

Text.

"The balance water, fire, poison, and sacred libation are the
 "divine texts for purgation."

"These are for heavy charges."

Commentary.—"The restrictive
 "meaning is that these are for
 "heavy charges and not other-
 "wise. It is not meant that they
 "are the only ordeals."

Mitákshara, p. 179.

"This has been declared by
 "Katyáyana: *where human evi-*

¹ Pamphlet, p. 19.

*dence is applicable to even only
 "one part of the case that is to be
 "received in preference."*

Mitákshara, p. 59.

See also p. 60.

The special ordeals mentioned by Father Bouchet are not therefore inconsistent with the Mitákshara; and the exceptional circumstances under which alone according to the Father the ordeal was to be resorted to, were precisely those set forth in that work.

The Mitákshara, except under the titles of evidence and ordeals, does not deal with criminal law. This branch of law was in the time of the compilers of the Mánava Dharma Sástrá in a very barbarous condition, though probably not more barbarous than the old Anglo-saxon law.

Elphinstone says, "The criminal law also which
 "still subsists in all its original deformity, has (pro-
 "bably for that very reason) fallen into desuetude,
 "and has been replaced by a sort of customary law,
 "or by arbitrary will."

As Mr. Nelson's strictures upon the High Court do not, I apprehend, extend to asserting that that Court has imposed, or improperly assumes to administer to Indians of the South of India, a criminal law alien from their old customary criminal law, I need not undertake to vindicate the Court in this particular. However unsuited that most admirable piece of legislation the Penal Code may be, in Mr. Nelson's estimation, to the people of South India, Mr. Nelson is well aware that the Legislature alone is responsible for the application of that law to India.

And as the Mitákshara is not concerned with criminal law, the peculiar customs of South India in regard to that law will not tend to show that in matters with which the Mitákshara does deal, the law followed in South India was not the law of the Mitákshara.

It may be observed, however,¹ that Brahmins, in the South were never put to death for their crimes, which may be adduced as an instance of the conformity of the law in the South with the precepts of Manu,² showing that in this particular at least the law of South India, if it was not the law contained in the Mitákshara, which does not treat generally of criminal law, was at all events the law contained in "other books of the kind."

I will now say a few words in regard to the Abbé Dubois. The circumstance of society being at the time at which he wrote everywhere in a state of disruption, and bribery and corruption rife, would naturally occasion a confusion in the law.

"The relatives assembled decide
"any disputes according to the
"rules of the country or the
"caste, and more frequently still
"according to the wealth and
"generosity of him who best
"rewards them for a favourable
"decision."—Evidence of Abbé
"Dubois.³

When we recall, however, the passages quoted in p. 25 it will be seen that the assemblage of the members of the family, for the primary decision of disputes

among those members, is in accordance with the law as propounded in the Mitákshara, and assists to the conclusion already pressed that the law of the land was the law as set forth in the Mitákshara. The Abbé says :—

"Industrious men are obliged
"to pay the debts of their pro-
"digal brothers, and poor rela-
"tions are always troubling the
"managers of thriving families."

The obligation referred to was one induced by the circumstances of the joint family system, as already suggested upon the evidence of Father Bouchet. The same pressure is in full swing in the present day; but is not the law, any more than there is ground for supposing it was in the time of Dubois.

He affirms¹ that (a) where the second of three divided brothers dies, leaving widows but no male issue, the younger brother has the right to take his assets and support the widows.

(b.1) The mother gets no share of property, (b.2) nor does the widow of a divided brother get any, (b.3) nor does a daughter.

'a' appears to be a partial survival of an ancient practice treated of in Chap. IX of Manu, §§ 59, and 120, of a brother raising up seed to his deceased elder brother.

The practice was reprobated in other texts of the same treatise and had apparently become obsolete. It is condemned in the Mitákshara as contrary to the Sástras, but is spoken of as a possibly prevailing

¹ Pamphlet, p. 24.

¹ Pamphlet, p. 20. ² Manu, chap. viii, § 380. ³ Pamphlet, p. 24.

practice, (page 114, Girishchandra Tarkalankara's edition.) It is noticed in the comment on the text, "He who receives (heritage) shall pay the debts of the proprietor who has died without leaving a capable son: so he who takes the widow, &c." Brahaspati, (see page 106, Mr. Nelson's work, 1877) speaks of this as a common practice in the north. There is reason to believe it was at one time very general in different parts of the world. In Ladak, on the death of the eldest brother, his property, authority and widow devolve upon the next brother. He has a customary right of succession to his brother's property and to his widow; and cannot take the one without the other.¹

The practice noticed by the Abbé is not in accordance with the law now followed, which enables the childless widow of a divided brother to hold the estate of her husband for life. It may, however, merely imply a loose observance of the general law such as is often seen in the present day, or the obstinate survival of the old custom referred to in spite of the general acceptance of a body of law in which the practice is reprobated. It does not of itself touch the question of the general acceptance of the law as recorded in the Mitákshara.

(b.1) I conclude that this statement of the practice in the time of the Abbé has reference to the result of a partition by the sons after the death of their father.

The mother, he says, gets in this case no share.

¹ McLennan's Primitive Marriage, 199, 1st ed.

The Mitákshara distinctly provides that the mother shall have a share. But the law on this subject followed in Madras is that of the Smriti Chandrika under which the mother has no right to a share but only to maintenance. Mayne, § 402. Smriti Chandrika, Ch. IV, §§ 12 to 17. The law upon this important point therefore was in the Abbé's time in accordance with the Smriti Chandrika one of the "other books of the kind."

(b.2) Nor does the widow of a divided brother get any [share]. The Abbé is referring to a case in which the brothers have separated, and one dies leaving his widow and an elder and a younger brother. The younger brother, he says, is the heir. If this was a correct statement of the law in the Abbé's time, it is consistent with the custom referred to in 'a' already noticed in the preceding page; or possibly it may have been due to another cause to be now referred to.

Mr. Nelson in his work published in 1877, "A view of the Hindu law as administered by the High Court of Madras," writes as follows:

"That note refers to the following admirable remarks of Mr. Ellis upon the answer of a Pandit to the effect that a widow was entitled to food and raiment, &c., at the hands of her husband's brothers, and no more:—'This is not the law of the Smritis. 'It is the convenient law of more modern Commentators, endeavoured to be supported by proposing alterations in the original texts, for which there is no foundation. In recent times, however, when the operation of the Hindu law had been

“ ‘interrupted and none other established in its stead,
 “ ‘the nefarious practice of the males of the family
 “ ‘seizing all the property of it, and reducing the
 “ ‘females to a state little short of slavery came
 “ ‘gradually to prevail; which practice, as appears
 “ ‘throughout these papers, the present race of
 “ ‘Pandits are sufficiently inclined to support.’ ”¹

Hindu law as we see from Manu, and as we know from the differences observable in the law, as it at present prevails, ‘from what it is recorded to have been in past times, and from the variations of the law in different parts of the country, has never been absolutely inflexible; and, as Mr. Ellis shows, the law as to the rights of women had in the course of time materially changed from what it was originally. The practice stated by the Abbé may therefore indicate the state of things described by Ellis pushed to its farthest extreme, without in any degree affecting the general authority of the Mitákshara, and other books of the kind.

(b.3) Nor does a daughter [get any share.] This is quite correct according to the law as laid down by the MádHAVÍYA and Smriti Chandrika.² In practice no share is given to an unmarried daughter; she lives with the brothers or with one of them till she is married and then a marriage provision is made which is contracted to the smallest possible dimensions. This subject has been noticed at p. 29 under the examination of Father Bouchet’s first maxim. In this respect also, therefore, the law in the Abbé’s

¹ ‘View,’ pages 74, 75.

² Mayne, § 406.

time was in accordance with those “ ‘other books of the kind’ ” followed at the present day.

I have not yet noticed Abraham Rogers¹ who mentions that the Brahmins married girls of all the four classes. This practice will be found to be sanctioned in Manu, Chap. III, §§ 12 and 13.

Rogers says also, “ ‘One of them might marry two
 “ ‘or three sisters or his father’s sister’s daughter or
 “ ‘his own sister’s daughter.’ ”

The second of these practices is not unusual at the present day, and the third is usual among Reddies and Naikars. It is generally admitted that the law relating to marriages has been greatly relaxed in the south by custom.

It is noticed, in a text of Brihaspati quoted in the Smriti Chandrika as a lawful custom in the south to marry a mother’s brother’s daughter. The Smriti Chandrika also quotes Baudhayana who speaks of the custom in the south to marry one’s mother’s brother’s daughter or father’s sister’s daughter, as a lawful custom.² This, therefore, was the law recognized in the Smriti Chandrika, one of the “ ‘other books of the kind.’ ”

What has been noticed of the evidence of the witnesses adduced by Mr. Nelson, in place of supporting Mr. Nelson’s 3rd Proposition appears strongly in favour of the belief that the law contained in the Mitákshara and other books of the kind, was the law of the South of India. But there is a still further indication of this in what Father Bouchet has

¹ Pamphlet, p. 14.

² ‘View,’ pp. 115 and 116.

recorded. He enquired¹ "Why the natives had not collected their customs in books that could be referred to at need, and the answer had been that if they had done so, it would be only the learned that would be able to read the books, whereas all the world was perfectly well acquainted with their customs." Now this appears to me to be almost conclusive to show that Father Bouchet's communications were with the unlearned. A Sanscrit Pundit would never have disparaged written records of the law. The unlearned would, of course, scarcely ever hear the Sanscrit books mentioned by name; he would, for the most part, have the law administered to him when required, according to the knowledge of the law possessed by the tribunals as handed down by custom and tradition in the popular gremium, which, in the lower tribunals, would supersede the necessity of referring to books. Yet if the law so administered were accurately represented in the treatises of Vijnāneswara, Manu, &c., the law administered would be the law "contained in the Mitákshara and other books of the kind." Now Father Bouchet was told that they had a book called "Vicnachuram, by which however they were not guided, but solely by custom." Mr. Nelson says, "That is, I suppose, 'Vijnāneswara.'" Now I do not think "Vijnāneswara" was meant. My impression is that it is a word produced partly by the ignorance of the informant, and partly by the apparent incapacity of Father Bouchet accurately to record long names. I

¹ Pamphlet, p. 15.

believe it to be what the expounder of the Jabberwocky¹ would call a 'portmanteau' word compounded of Vijnāneswara and Mitákshara. 'Vijnāneswara' is pronounced Vignyāneswara. The informant and Father Bouchet together have decided upon taking the first syllable of this word up to the "n," and tacking it on to the second, third and fourth syllables of Mitákshara, and adding an euphonic 'm,' thus:—Vicnácharam.

It cannot be doubted that the work intended to be referred to was the Mitákshara of Vijnāneswara.

The mention of it shows that this work was known in South India. And when we come to consider the wide distribution of manuscript copies of it all over India, and the degree of authority therefore which it probably enjoyed, strong confirmation is afforded of the almost necessary inference from what the witnesses say, that the law administered was generally speaking the law as contained in the Mitákshara. Notwithstanding the evidence afforded by his own witnesses, Mr. Nelson asks the question "If the Mitákshara really is not an authority upon law, and, *as I have abundantly shown, there appears to be no reason for supposing it to be such, what shall we think of the other treatises approved of by Ellis?*"

Sir William Jones, Colebrooke, Ellis and Sir Thomas Strange—no mean enquirers—were all persuaded that "the Mitákshara and certain other books of the kind" were authorities in South India.

Mr. Nelson thinks that Mr. Ellis was swayed in

¹ Conf. Alice in Wonderland, p. 126-7.

his conclusion as to the general authority of the Mitákshara by the polite concession of the Pundit to what he perceived to be the inclination of Mr. Ellis' mind, but admits that the Pundit while he overstepped the bounds of truth in conceding that the Mitákshara was the most generally prevailing authority, in his assertion that in the Drávida and other countries of the South, the Smriti Chandrika and other books were chiefly esteemed, was maintaining no more than what he actually believed to be the truth.¹

If the Pundit verily believed this, what reason is there for the suggestion which follows that the belief of this learned man was in this respect unfounded? It is fair then to assume that in the belief of a learned man for which he had some foundation, the Smriti Chandrika and some books other than the Mitákshara were the chief authorities in Southern India, in the time of Mr. Ellis.

Mr. Nelson's 3rd proposition, however, excludes the Smriti Chandrika and other like books as well as the Mitákshara, and is therefore as to them clearly unsustainable, if the belief of the Pundit were well founded, and it can hardly be maintained that he could be deceived upon a matter which must have constantly fallen under his observation.

I have shown that what Mr. Nelson's witnesses say in no way excludes the supposition that the Mitákshara was generally an authority on questions of Hindu law, (which is all that is claimed for it at the present day), but on the contrary tends to

¹ Pamphlet, p. 26.

establish that in many points their account of the law represents it as in accordance with what is laid down in the Mitákshara, and when considered with the researches of such men as Sir William Jones, Colebrooke, Ellis and Sir Thomas Strange appears to afford convincing proof that the law administered in South India in some former times, and up to a very recent date was the law contained in 'the Mitákshara, and other books of the kind.'

I think the tone of disparagement in which Mr. Nelson speaks of the labours of the great men who have preceded him is to be regretted. He speaks of Sir William Jones's translation of the laws of Manu as having been allowed by all to be a work of "*some merit*!" and he intimates that the value of this work was very much exaggerated. He touches upon portions of the book which display the tyranny of the Brahmins, but he neglects altogether to notice the very valuable record of the Municipal law of twenty-seven centuries ago, which though in the portion of it relating to crimes superseded by the law of the Mahomedans, was for the most part still surviving when the English took upon themselves the Government of the country; which in native states is still to a great extent in force; and the most important portion of which—that relating to succession—is, with such modifications as time has introduced, the law of British territory at the present day. The Criminal law was no doubt very barbarous, but up to sixty years ago it can hardly be said that the English law was less so.

The work contains rules as to several very important titles of law, among which are to be found a law of Evidence, including estoppel by conduct, and a law of Procedure, including *res judicata*. It directs the investigation and recognition of special customs. It denounces perjury in the strongest terms, though admitting excuse for it in certain cases.

Its law of sale in market overt, though not quite the same as that of England, is evolved from the same process of thought, and is more consonant with justice. The work contains rules moreover for the adjudication of suits as to pledge and deposit,—matters as to which according to Megasthenes the Indians had no action whatever.

Mr. Nelson further says, “It cannot be doubted, “therefore, that as the Aryans pushed their way eastward, and extended their establishments north and south, they permitted the conquered tribes to retain each its own usages and system and did not attempt to thrust upon them the Brahmanic institutions which indeed were intended for, and suited to, the Aryan twice-born classes alone.” This seems to import that the non-Aryans were not within the contemplation of the law. I do not think, however, that Mr. Nelson intended to be so understood. What was probably intended was that the non-Aryans were allowed to have their peculiar laws administered to them, and this unquestionably was so. See *Manu*, Chap. VIII, §§ 24, 40, 41, 123-124, also Chap. IX, § 59 and other passages. The first referred to shows that the three twice-born classes

were not the only classes to whom the law was applied originally; § 59, Chap. IX, shows the application of the law to the servile class in the time of the commentator, and § 41, Chap. VIII, shows that the *customary law* of all classes was in addition to be ascertained and administered. The non-Aryan classes were not to be left to shift for themselves. The law was to be administered to them; they were to be treated as part of the nation.

This is perhaps the proper place for the consideration of the subject of the second of the 15 so-called false principles which Mr. Nelson in his ‘View’ published in 1877 and in his recently published Prospectus of the “Study of the Science of Hindu law,” both of which I shall presently consider, charges the High Court with introducing into the administration of Hindu law.

False principle No. 2. *That the High Court of Madras has made the false rule that the so-called Hindu law is applicable to all persons vulgarly styled Hindus and to their descendants however remote and whether pure or impure.*

The real objection of Mr. Nelson is to the application of the Hindu law in the Madras Presidency to persons who are not by origin Brahmins or Sudras.

He adduces as an instance of the improper application of the Hindu law to persons not really Hindus, the Maravers, and refers to the powers of the High Court under the Civil Courts Act to decide in accordance with custom, in place of applying an inflexible law.

I must advert here to what I have said at p. 10.

The old regulations and the Civil Courts Act treat the entire native population who are non-Mahomedans as Hindus, and it is so that they have always hitherto been regarded.

Certain classes which repudiate the religious ministrations of the Brahmins, profess the Hindu religion, calling themselves *Ácháryárs*, a Tamil form of a Sanscrit word which signifies 'religious teachers.' They comprise the artisan classes.¹ In the standing quarrel which may have arisen out of the dissensions between the artisan classes and the Brahmins, the cultivating classes, the Merchants and Accountants as well as the Pariahs, take the side of the Brahmins; so that the whole of the population of South India, or nearly the whole, is engaged in a religious quarrel of a nature which connotes the profession of the same Hindu religion by both sides.

There can be no question that even the great majority of those who practise devil-worship also profess the Hindu religion, and frequent its temples. Mr. Nelson deduces from the fact that the marriage customs of some of the castes and tribes of South India are such as the Hindu religion abominates, that they cannot be Hindus in religion. There is such a practice as bundling not unknown in Wales which is certainly not in accordance with the Christian religion. Yet the people who practise it would be astonished to learn that they were not Christians; and it does not follow that tribes still maintaining

¹ See 'View,' p. 140.

ancient customs, which though not now or for many centuries observed by the pure Aryan race, were at one time regarded by that race as legal and proper, have not adopted the Hindu religion, because in some points they act in conflict with its present precepts.

Now where there is a profession, and to some extent a practice of the Hindu religion, there is nothing violent in the supposition that the law of Succession, which is intimately bound up with the religion, has been adopted also. At all events if such classes resort to our Courts as Hindus, and do not set up any special custom, it is difficult to see how the Courts could treat them as if they were not Hindus, and demand that they should state by what peculiar law they are governed. What Mr. Justice Holloway meant by saying that he felt the grotesque absurdity of applying the doctrines of Hindu law to the Maravers, was that he believed them to be non-Aryans and that non-Aryans are not Hindus, but he added, "At this late day it is however impossible to act upon one's consciousness of the absurdity." Why? Simply because the Hindu law has been administered to these persons for generations, and this because they have always resorted to the Courts as Hindus. To the eye of an archæologist or ethnologist there may be something absurd in administering a particular law to a nation which many centuries previous may not have been governed by it; but the practical administrator will prefer to see one law administered as far as possible throughout the territory about which he is concerned; and if he find

several tribes originally distinct, and severally recognizing originally distinct customs or bodies of law, yet willing to group themselves under the most civilized of these sets of laws, it seems to me that he is not likely to complain of the absurdity of treating them as though they had in past ages formed a portion of the people with whom this set of laws originated; surely to accept the situation and administer laws of which all approve, is far more rational than to attempt the impracticable task of administering seventeen¹ or more different sets of laws to the several distinct tribes inhabiting the country.

Dr. Burnell, in his introduction to the *Daya-vibhāga*, p. 15, says, "By custom only can the *Dharma Śāstrā* here be the rule of others than Brahmins." This is quoted by Mr. Nelson in pp. 118, 119 of his view of the Hindu law, yet in p. 118 he does not allow even for the customary adoption of the law of the treatises by the people generally, but lays it down as a rule that Sanscrit law should be applied, if at all, to the Brahmins alone of all the population of the Madras Provinces.

The following considerations seem to point to the conclusion that the Hindu law became applicable to all the Indian tribes and castes with whom the Aryan invaders came in contact.

It would be a necessity of the position of the conquerors to assume the ultimate adjudication of disputes civil and criminal. And there is no evidence that they learnt, and it is not conceivable they *would*

¹ See 'View,' p. 149.

learn and put in force the laws of the conquered people, or permit that people, in invoking the aid of the sovereign power, to appeal to any laws but those which the conquerors were willing to recognize.

In the course of time the law of the conquerors, on the most frequent and prominent matters of controversy, as on questions of succession and inheritance, would come to be recognized as the law by which the people generally were to abide; and in matters of family and social relations we might expect that the conquered people now settled down side by side with the conquerors would affect an imitation of the usages of the superior civilization in their midst. When we come to consider further that the civilized conquerors brought with them an elaborate religion and ritual of a far more splendid and attractive character than the primitive worship of the conquered, and that these latter have adopted this religion to the extent at all events of professing it and partially following it, it becomes all the more probable that they would adopt in their entirety the laws of succession and inheritance that are intimately bound up with the religion.

The exclusive possession of learning in the higher castes, and the assumption by the priests of an unapproachable superiority, would add strength to the influences working in the direction of conformity.

That there must have been a great common law over the greater part of India seems proved by the acknowledged common resemblance to the laws of

the conquerors in the laws of those castes and tribes that are most differentiated from that standard.

Tamil has long been a highly cultivated language, with a literature of its own, and if the laws of the conquered races had been referred to a different standard to that of Hindu law, we might confidently expect to find treatises upon the laws and customs of the aborigines. But none such are to be found; whereas we find treatises upon the Hindu system of inheritance and succession and upon other subjects, that were written in every part of India.

Their silence as to the prevalence of any other law existing side by side with the Hindu law, seems to imply that the Hindu law had been for the most part adopted by the conquered people.

The probability of the existence of a great common law is enhanced by the consideration of the works upon Hindu law from a period of about 400 years before Christ extending to within two centuries of the present time.

The works of this succession of writers show that the prominent features of the Hindu law survived and prevailed in every part of India.

Over so vast a territory, presenting such varying circumstances of climate, conditions of life and grades of civilization, and teeming with races whose more or less rooted and ineradicable customs had in varying degrees resisted the tendency to conformity, it is probable that the conquering races would themselves here and there be found to diverge from the strictness of the original standard of law.

To this probably may be attributed the different interpretation placed upon the same texts by writers in different parts of India. They exhibit an unconscious tendency to make the text mean what the irresistible logic of facts proved to be the universal rule of life and governing law.

Thus it was probably that different schools of law sprang up in different parts of the country in which it was found impossible to contend that the existing rules by which men were governed, and which were recognized as legal, were in strict conformity with the standard of the ancient law treatises.

These authorities (as Holloway, J., observed in an important case reported at p. 250, Vol. VII, Madras High Court Reports) themselves are as much the record of customary law as of the written texts of the Shastras.

I will now turn to Mr. Nelson's *View of the Hindu law as administered by the High Court of Judicature at Madras, published in 1877*. In this work Mr. Nelson, after referring to the law which the High Court is directed by the statute to administer, and misrepresenting the terms of the statute in the way already pointed out (p. 10), proceeds as in the pamphlet to give his reasons for supposing that no such thing as Hindu law ever existed: that if it existed, it was the law of Aryans and Sudras only: that the three lowest of the original four castes are not to be found in the Madras Presidency: that it is very doubtful if the Brahmins in the Madras Presidency, save a few on the western coast, are 'very Brahmins.'

that if they are, it is highly improbable that they should have maintained their original laws and customs, since they travelled to the south in small detached bodies, and Dr. Burnell thinks they were at a very early period broken up into *Kulas* and divisions marked by sectarian differences.

He then deduces from the preceding statement of his views, the conclusion that the only possible descendants of our Aryans proper are the Brahmins of this Presidency and that it is highly improbable that they have preserved, in fact, all or most of the laws by which the Aryans of the Punjab guided themselves. He says, the Brahmins of this Presidency guide themselves by customs widely and radically different from Hindu law.

He considers the name Hindu points to an inheritance by birth of a peculiar religious faith and status—though he admits it has other meanings sometimes assigned to it, among which is that of Indian, (*i.e.*, native of India.)

He lays down the proposition that it is impossible for one not born a Hindu to acquire the status; that there is no such thing as a Hindu nation, but only a larger or smaller *community*, that might be called Hindus strictly and properly. That the aggregate of these might be called a Hindu fraternity, and that the residuum of concordant customs might be styled Hindu law, but that it is improbable that any large residuum could be discovered.

Then he goes on to say that the Hindu law of our Courts, as administered, is an aggregate of discre-

pant inconsistent guesses, founded on mutilated Sanskrit texts taken at random from purely speculative treatises. He asserts roundly that substantial justice is not done, and that decrees are for the most part grossly unjust.

He then says further, "Houses are divided against themselves, respectable families brought to beggary, doubt and uncertainty prevail everywhere and the value of property is rapidly falling."

His object, he says, is to make his statements good and with this end—

1st. To show that any of the leading principles upon which the Madras High Court has proceeded in laying down rules of Hindu law about inheritance, succession and certain kindred subjects are false principles.

2nd. To set forth a few rules of Hindu law about inheritance, succession and certain kindred subjects that really are contained in Sanskrit works of authority.

3rd. To show that Hindu or Sanskrit law is not applicable, certainly not universally applicable to the tribes and castes constituting the so-called Hindu population of the Madras Provinces: but these tribes and castes have usages, manners and customs of their own antagonistic to and exclusive of the Hindu or Sanskrit law.

Before proceeding I will adduce a further instance of the inaccuracy which characterises Mr. Nelson's statements.

He says, at page 137, "It was discovered some

"years back that the usages of the people on the western coast were so greatly and palpably inconsistent with Hinduism that the administration to them of what is known as Hindu law was wholly impracticable, and accordingly the Madras High Court brought itself to "*recognize*" the peculiar customs that obtained in that part of the Madras Provinces, and to grant to the western coast the rare privilege of managing their private affairs after their own fashion."

Now this would make it appear that the High Court, after a period of contumacious refusal to recognize the customs of the western coast, was at last compelled by force of facts to accord recognition to them; and from the authoritative manner in which it is stated few of those unacquainted with legal matters in the Madras Presidency would suppose that the statement is altogether beside the truth. It is so, however.

The Polyandry of the western coast is one of the most ancient institutions of the Indian peoples. It is found to survive at the present day in many of the Hill tracts and in portions of the country, like the western coast, little accessible to the inroads of other Hindu civilizations. Kinship through females, another part of the institutions of the western coast, is the almost necessary result of polyandry, in which the certainty of parentage is with the mother alone. A female *can*, but a male *cannot*, with any certainty as to parentage; continue the line.

The customs of the western coast could not escape

notice at the earliest period of our occupation of that portion of our territory, and ever since the East India Company had possession of it have the customs prevailing there been recognized and allowed.

The law administered at the present day has been administered from the very first—more than sixty years prior to the erection of the High Court, which has continued to administer the law exactly as it received it from the late Sudder Court, recognizing these customs just as it does well established customs of the kind elsewhere, as customs having the force of law, to which, by the early Regulations, and still later by the Civil Courts Act, it is required to give effect.

It may be suggested that by 'the High Court' is meant the High Court and its predecessors. But this could not have been intended, and if it were, it would be incorrect for Mr. Nelson could not with propriety have used the words, "It was discovered some years back," to account for the action taken by the Courts of Adawlut in the Madras Presidency since their earliest foundation in recognizing these customs. "Some years back" points to a much more recent period than that at which the High Courts were erected (1862); and the words "brought itself to recognize" imply an interval during which the Court resisted the conclusion ultimately arrived at as to the difference of the customs on the western coast from those elsewhere; such interval having no existence whatever, but in the imagination of the writer.

Incautious assertions of this kind so calculated to

mislead must detract much from the weight which might otherwise attach to Mr. Nelson's work.

Mr. Nelson first lays down for discussion fifteen False principles, upon which the High Court has proceeded.

I purpose to follow his order of discussion except as to the third of these which I propose to treat of further on. The second I have already dealt with.

The 1st charge against the High Court is that it has laid down the false principle *that there exist, or formerly existed, in India, certain schools of Hindu law.*

What is here asserted that the Madras High Court has laid down any such rule or principle is altogether inaccurate. The Madras High Court has no doubt, *adopted the expression 'schools of law'* which was used long before the Court came into existence. It was used by Colebrooke in his preface to the *Mitákshara*. It was used by Sir Thomas Strange following Colebrooke. Colebrooke was taken to task by an anonymous writer for the use of the term. He noticed this¹ and observed, "I am yet to learn, why "schools are to be restricted to matters of taste and "the fine arts; or why jurisprudence is not to be "taught and studied in schools. Nor am I aware "that any more appropriate term can be chosen when "speaking of diversity of doctrine deduced by a "varied train of reasoning and interpretation, from "the same premises."

Mr. Mayne says: "The sub-division has been

¹ See p. 255, Mr. Mayne's ed. of Sir Thomas Strange's work on Hindu law.

"carried to an extent for which it is impossible "to suggest any reason or foundation. For instance, "Mr. Morley speaks of a Bengal, a Mithila, a "Benares, a Maharashtra and a Dravida school and "sub-divides the last into a Dravida, a Karnataka "and an Andhra division. So the Madras High "Court and the Judicial Committee distinguish "between the Benares and the Dravida schools of "law, and a distinction between an Andhra and a "Dravida school has received a sort of quasi recog- "nition."¹ If however the term be used to express the existence of considerable differentiation in doctrines of law it is quite properly applied. The question is whether the divergence is sufficiently great to render the term appropriate. But Mr. Nelson having first unfoundedly attributed to the High Court the imposition of a rule *that there are schools of law*, and having gone on to state, which is also a mistaken assertion, that it was invented in very early times by English lawyers, whereas if invented at all, it was invented by Colebrooke, closes with endeavouring to question the propriety of the expression as applied even to the divergences between the doctrines of the *Dayabhága* of Jimuta Váhuna and the *Mitákshara*.

He quotes Dr. Burnell's opinion that "the expression is unnecessary, because the real differences "between even the *Mitákshara* and *Dayabhága* are "very few in number, certainly not more than the "constructions one often finds put upon some

¹ Mayne, § 33.

"English law, and it is quite beyond doubt that the authors of the Texts and Digests had no notion of 'the kind,' that is of 'schools of law.' The learned writer appears to take the expression 'schools of law' in a literal sense. Colebrooke, however, thought the expression very appropriate to distinguish what he conceived to be a vital divergence of opinion in the doctrines held by those two writers, and this is the opinion uniformly entertained ever since by legal writers from Colebrooke to Mayne, and by all the Courts throughout the country from early times to the present day. Mr. Mayne says, § 35, "Any one who compares the Dayabhāga with the Mitākshara will observe that the two writers differ in the most vital points, and that they do so from the conscious application of completely different principles." He then goes on to show what they are. As to this first charge of Mr. Nelson, therefore, it may fairly be said that it is untrue that the Madras High Court has laid down any such rule or principle. The Madras High Court has no doubt recognized the existence of differentiations of doctrine, but for the expression used to convey the existence of such differentiations the Court is not primarily responsible, nor as it is implied by Mr. Nelson in his charge the exclusive inventor and sole delinquent. It is used by Colebrooke who speaks of a "School of Hindu Law" in the extreme South of India¹ and of a Maharashtra school;² by Monier Williams who says there are 5 schools of law, see his Indian wisdom

¹ 'View,' p. 96.

² 'View,' p. 134.

and by Dr. Goldstücker in his pamphlet, who distinguishes between the Dayabhāga school and the Mitākshara school; and by all the High Courts and the Judicial Committee; and when confined in its application to marking a divergence of doctrine is not at all an inappropriate expression. The charge is quite immaterial to the issue, and it is only necessary to notice it in order to show the recklessness of assertion that characterises the work.

False Principle 4. That the High Court has laid down the false principle that a state of union is the normal and proper state of Hindu family; and therefore non-division shall in all cases be presumed until the contrary is proved.

The Madras High Court alone cannot be held especially responsible for this doctrine. It is a rule adopted by the Privy Council and by all the High Courts throughout India and has never before been questioned. Mr. Nelson says,¹ "Since the Sanskrit law books both approve and practically encourage division of brethren upon the death of their parents, it is perfectly clear that the presumption of non-division is not justifiable in all cases in which the state of a Hindu family is called in question. But is it justifiable in any such case?"

And at p. 34, "Dr. Burnell has pointed out that the Sanskrit law expressly advocates division." As to this it may be observed that the Sanskrit law cannot be any guide as to what is a question of evidence.²

¹ 'View,' p. 35.

² See the numerous cases collected, p. 356 Field's Law of Evidence in the note to Section 102.

At p. 36, Mr. Nelson is candid enough to admit that Dr. Burnell remarks ; " Practically there can be no "doubt division takes place comparatively seldom " although the Sanskrit law expressly advocates it." If this is so, (and it is a matter of every-day observation and does not require an archæologist or Sanskrit Expert to discover it,) the High Courts are clearly right in presuming that every family is undivided until some evidence is adduced of a division.¹

False Principle 5. *That the High Court of Madras has made the false rule that as to ancestral property a son and therefore a grandson may compel a division against the will of his father or grandfather.*

Mr. Nelson gives what he conceives to be the true rule at p. 44.

He says " the correct doctrine possibly may be " that sons can force the father to separate them from " him in two cases and two cases only that is to say : " and then he gives the two cases. His view is founded as are those of Sir Colley Scotland and Sir Adam Bittleston in the particular case referred to upon passages of the law books then and still accessible to Judges and Practitioners.

I do not understand how Mr. Nelson can venture to rely upon his opinion upon such a question as conclusive against that of the Judges who decided the case. The rule is recognized in all countries in which the Mitákshara is received as an authority.

¹ See the Nára guntý Pollium Case, IX Moore's I. A., p. 66, in which it was held by the Privy Council that sons become co-parceners by birth and that it is for those who allege partition to prove it.

Mayne says,¹ " The right of both a son and a " grandson under Mitákshara law to a partition " of moveable and immoveable property in the possession of a father against his consent, has now however been settled by express decisions in Madras, Bengal and the N. W. Provinces and is assumed " to exist equally in Bombay."

False principle 6. *That the High Court of Madras has made the false rule " that a member of an undivided family can aliene joint ancestral property " to the extent of his own share."* This rule Mr. Nelson considers to flow from the mischief of false rule 5.

There was and is a difference upon this point between the High Courts of Calcutta, Madras and Bombay.

The Calcutta High Court held that a co-parcener could not alienate his interest voluntarily ; nor if he borrowed money on his own account could a decree be executed by attaching his interest in the joint-family property, unless the co-parcener had expressly hypothecated his interest, and the lender got a decree upon the interest so hypothecated ; in which case he might compel the family to effect a partition and hand over to him the share hypothecated. The Bombay High Court also held that there could not be a voluntary alienation, but that Court differed from the High Court of Calcutta in holding that if a decree had been obtained against a co-parcener for money borrowed, whether on pledge or not, execution might issue against the interest of the co-parcener,

¹ Mayne, § 295.

i.e., that the judgment-creditor might attach or compel a partition.

In each of these two High Courts, (it is to be observed), it was held that a decree might be made against a co-parcener who had hypothecated his interest in the joint-family property, and that partition might thereupon be enforced.

The Madras High Court said broadly that a co-parcener might lawfully alienate his interest.

If he could not do so, as insisted by the High Courts of Calcutta and Bombay, it is difficult to understand upon what principle these High Courts allowed attachment to issue so as to affect the share which they maintained could not be alienated. Their views proceeded upon the ground that it was impossible in a joint-family in which the number of members is continually fluctuating by fresh births and deaths, to predicate at any moment what share a co-parcener will be entitled to when partition takes place; and that the principle of Mitákshara law seems to be that no-sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share. But to carry out this view consistently it would be necessary to deny to the mortgage or sale of a share made by one co-parcener without the assent of the rest, any validity whatever. But neither the Bengal nor the Bombay High Court was prepared to go this length, and they allowed the transaction to be valid to the extent of permitting it to be enforced under a decree of the Court, by

attachment and sale in execution of a decree for the debt.

A reason was wanted to cover the apparent inconsistency. The reason assigned was that the vendee had acquired *an equity to a partition* because, forsooth, he had paid his money on what he knew or must be supposed to have known was by law an invalid security.

The reason appears scarcely tenable. An equity to a partition means a claim which the possessor may enforce by an application to a Court of Equity. But as all Courts in this country are Courts of Equity, the expression means a claim which the possessor may enforce by an application to a Court.

But what is the ground upon which he is thus able to enforce it? Clearly it must be that he has a right of action to enforce a partition, and the foundation of this right of action must be the right itself to a partition, arising from the fact that the co-parcener's property has been transferred to him. It is perfectly true that the strict rule of the Mitákshara law is that no sharer before partition can, without the assent of all the co-sharers, determine the joint character of the property by conveying his share. But, according to the law of the Mitákshara, every member of the joint-family has by birth an unascertained interest, no doubt a fluctuating interest, in the joint-family property. This by the Mitákshara is expressly said to be *his property* from the date of his birth.

Now what the Madras High Court says to the

vendee is: "If you come to the Court, we shall recognize the alienation as valid, and enforce it by decreeing that the interest sold you, which is as yet unascertained, shall be ascertained and made over to you." If it be allowed that the Court may unobjectionably sanction the attachment and sale in execution of a co-parcener's share on a decree for the debt, as is the practice of the Calcutta and Bombay High Courts, it is not apparent why the Court should not be able to recognize the validity of the *transaction* itself.

To be able to enforce the contract or transaction in execution as the Calcutta and Bombay High Courts enforce it implies a recognition by the decree itself of the validity of the contract or transaction so enforced. The truth is that the prohibition of the conveyance contained in the Mitákshara is a prohibition which the Courts are not bound to observe. When once the proprietary right of sons in their shares and their right to demand a partition at any time are conceded, such a prohibition can no longer be viewed as part of the law of "succession, or inheritance," which the Courts are bound to administer in accordance with Hindu law. The arrangement between the co-parcener and the alienee is of the nature of a contract and the Courts are not and never were bound to administer the law of contracts in accordance with Hindu law. It was not necessary therefore to be guided by the Mitákshara in determining the validity of the transaction. The Madras High Court gave the Mitákshara the go-bye.

The Calcutta and Bombay Courts while professing to be guided by the Mitákshara, in reality if I may respectfully so suggest, seem to me to have evaded it.

The Privy Council, in the appeal of Baboo Dheendiyal Lal *v.* Baboo Jugdip Narain Singh from the High Court of Calcutta, has lately declared that as to the right of the execution-creditor in the interest of a co-parcener in the joint-family property, there ought not to be any distinction between the case of a decree-holder who has had that interest pledged to him, and a mere money decree-holder who has attached it. Either should be allowed to enforce his decree against the interest of the co-parcener.

It then comes to this that equally in Calcutta, Bombay and Madras a co-parcener can by owing money subject the joint property to partition; which in practice, that is, in its effects upon joint-family property, differs in no respect from the Madras doctrine that a co-parcener can alienate his interest in the joint-property; and for this doctrine very sound reasons are assigned in the judgment in Vol. VIII, Madras H. C. Rep., pp. 10 and 11.

False principle 7. *That the High Court of Madras has made the false rule that self-acquired property ordinarily is indivisible.*

By indivisible I presume is meant not subject to be thrown into the common stock for purposes of partition.

Mr. Nelson¹ quotes Dr. Burnell who says, "The principle that decides this question is very simple

¹ 'View,' p. 65.

"and may be broadly stated. Whatever an undivided member of a family gains by use of family means directly or indirectly is divisible; all else and this is necessarily in only a few cases is his indivisible self-acquired property," &c.

I am not aware of any case decided by the Madras High Court, in which a different view has been taken of what constitutes impartible self-acquired property. Sir Colley Scotland almost invariably used the expression 'self and separately acquired property' as applied to self-acquired property of an impartible description.

Mr. Nelson goes on to say, "Dr. Burnell has not thought it necessary to cite any cases in which the Madras High Court has improperly used the term 'self-acquired, being no doubt of opinion that the misuse was notorious." Mr. Nelson then quotes certain cases to demonstrate the constant misuse of the term. In the 1st case quoted (I Madras H. C. Reports, p. 412), the Court in the judgment uses the word 'self-acquired immoveable property,' without adding conditions as to the mode of acquisition. But if the report be even carelessly looked into, it cannot escape observation that it was conceded that the acquisition was an acquisition which, if a partition had been in question between the brothers including the deceased, would have rendered it impartible and the acquirer would have taken it. The real question was whether self-acquired property of any kind, *i.e.*, whether acquired by the acquirer's own skill, exertions, or funds or from the joint-

family property, would go to the widow, so long as the acquirer had remained undivided up to his death. It was not necessary therefore to be particular in defining what constituted self-acquired property that would be impartible. But in fact the term is never used without reference to the traditions of the Court and the Bar as handed down from the beginning of the century. I may refer to Vol. I, S. Decrees, p. 148 of the year 1817. The argument used in the case quoted by Mr. Nelson in which the Hindu authorities are set out, precludes any notion that there could have been any misunderstanding as to what is self-acquired property—properly so called.

The second case quoted from II Madras H. C. 369, turned upon the construction of a document and not upon whether the property had been self-acquired or not. It was not disputed that it had been self-acquired, and the exact conditions which would render property indivisible on the ground that self-acquisition was alleged, did not require to be discussed.

The same observation is applicable to the third case quoted.

The fact is that 'self-acquired property' or 'self-acquisition,' is a perfectly correct and sufficient expression. It is used in the legal sense attached to it throughout the Reports as property that has been acquired without the use of joint family funds.

Now there is nothing to make it apparent that in any of these cases the Judges misunderstood or misused the term 'self-acquired property.' Mr.

Nelson's objection appears to be that it should never be used without a long explanation of its meaning. It was used, however, by Sir Wm. Jones and Colebrooke; and Dr. Burnell pronounces the equivalents chosen by the latter (Colebrooke) to be "singularly apt."¹

All that he notices is that there is a general misapprehension of the term in the Courts.

No cases in the High Court are pointed out which afford proof of this position, and I can confidently assert that none such have any existence whatever in the High Court Reports. The High Court certainly did not make any rule to this effect, but followed what was handed down from the beginning of the century and to the effect of the rule which Mr. Nelson's authority, Dr. Burnell, considers the correct rule.

False principle 8. *The High Court of Madras has made the false rule that debts incurred by the managing member of a Hindu family, should be presumed in favour of a minor not to have been incurred for the benefit of the family.*

"He who sets up a charge on a minor's estate, created in his favour by the guardian, is bound to show at least that when the charge was so created, there were reasonable grounds for believing that the transaction was for the benefit of the estate.

"The Court being of opinion that there was no proof of necessity; that the appellant had wholly failed to relieve himself of the burden which the

¹ P. ix of the preface to the Vyavahāra Nirṇaya.

"law cast upon him of showing that he had good grounds for supposing that the transaction was for the benefit of the estate, and that the Courts below were warranted in imputing the character of fraudulent contrivance to the transaction; sustained the decree of the Lower Court, deciding that possession of the property should be restored to the respondent who had been deprived thereof by a judicial sale under a decree obtained upon a deed of agreement executed by his step-mother as his guardian during his minority, charging his estate."

This is a decision of the Privy Council in 1866 long prior in date to that referred to by Mr. Nelson in the 6th volume of the Madras High Court Reports adduced in proof of the charge. In this decision the Judicial Committee refer to, and approve of, the principles laid down in 1856 in Hanooman Pershad Panday, VI M. I. A., 423, in which there is the following well known passage, "The lender is bound to enquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the family." It will be seen that the Judicial Committee of the Privy Council made the rule Mr. Nelson impugns, which was followed by the High Court in the case in the 6th volume.² The rule is perhaps there too

¹ Ruling in *Lalla Bunseedhur v. Koonwar Bindesereee Dutt Singh*, M. I. A., Vol. X, p. 454.

² Mad. H. C. Rep., Vol. VI, p. 371.

narrowly stated, but the rule of the Court is the rule laid down by the Privy Council.

Mr. Nelson says, Presumptions are quite foreign to the idea of Hindu law. But presumptions are part of the law of Evidence, and the law of Evidence administered is the English not the Hindu law, which is very imperfect, and which the Courts are not required to follow. Of course the weight of the presumption depends on the circumstances of the case, as Mr. Nelson, in page 69, unnecessarily insists. He goes on to say, '*Natives who should know*' assure me that the value of land is everywhere rapidly falling in consequence of the presumption in favour of minors being indiscriminately acted upon by all the Courts.

There are two species of witnesses adduced by Mr. Nelson whose evidence it is very difficult to test. These two are "thoughtful men,"¹ and Natives who "should know,"² 'Thoughtful men' may be men of no observation. Those who regard themselves as thoughtful men, assume to determine who else are thoughtful men, carefully excluding all who differ from them in opinion. As to Natives "who should know," Mr. Nelson says in page 26, of the pamphlet already considered, "Now no one who understands "natives can doubt, it seems to me, that Ellis' adviser "politely and deferentially admitted the general prevalence of the Mitákshara because he perceived "that Ellis' mind had been unduly influenced by "what Colebrooke had said about it." No doubt

¹ 'View,' p. 27.

² 'View,' p. 70.

this sort of concession to one's opinion is very frequently experienced by Europeans in earnest search of the truth, and it may be permitted to question whether Mr. Nelson in common with others has not had to submit to the same process of deception at the hands of those whom he has consulted. At all events it is unaccountable that the care which the law in all countries extends to the interests of minors, to protect them from fraud, should have the effect of lowering the value of land, especially as by thus taking a large proportion of the land of the country out of the market, it would presumably rather have the effect of raising the price of land generally. No doubt it would tend to depreciate property of minors which a guardian might desire to make the subject of a dishonest bargain between himself and a purchaser; the reason being that owing to the fetters of the law the guardian could not confer an unimpeachable title.

Those who lay undue stress upon the importance of the commercial convertibility of land without considering the rights of infants interested in it, may regard this as an evil. To me it appears an unmixed good, and a proof that the law is so administered as to protect infants.

I would remark then that the High Court of Madras did not make the rule which is denounced as false: that it is a general rule observed by all the High Courts and was enunciated by the Judicial Committee of the Privy Council in 1856 and became the law which the High Courts were bound to observe

long before the judgment to which Mr. Nelson's observations are directed. The principles laid down in Hanooman Pershad Panday have been affirmed in many recent Judgments of the Committee, the latest being Kameshwar Parshad v. Run Bahádur Singh.¹

False principle 9. *That the Madras High Court has made the false rule in Mad. H. C. R., Vol. I, p. 412 that the widow of an undivided co-parcener whether childless or not has no title to anything but maintenance.*

The correct doctrine in respect of a childless widow is clearly that which is stated with unmistakeable perspicuity by the author of the Mitákshara in the last paragraph of Section 1 of Chapter II of the portion of the work relating to Inheritance.

"Therefore it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue." This is a recapitulation of what was stated in para. 30. He does not, throughout the argument upon Dhareswara's opinion, question the statement of Dhareswara that the passage commented on regards the widow of a *separated* brother, but only confutes the opinion that the childless widow, to take the estate of her husband who was already separated from his brother before his death, must be solicitous of authority for raising up issue. Mr. Nelson's interpretation is incorrect. There is no

¹ I. L. R., Calc., Vol. VI, p. 843.

authority accepted in the Madras Provinces for his position, that the widow of an undivided co-parcener has a right to enjoy the estate in common with the other co-parceners until partition, and is then entitled to take a share.

Mr. Ellis' authority is cited. His evidence no doubt shows that he thought the view now entertained by Mr. Nelson, in accordance with the law of the Smritis, but it will be seen from what he writes that the law had altered. The quotation is as follows:—"The view that a widow is entitled only to food and raiment is the more convenient law of modern commentators, yet in recent times when the operation of the Hindu law had been interrupted, and none other established in its stead, the nefarious practice of the males of the family seizing all the property of it, and reducing the females to a state little short of slavery, came gradually to prevail: which practice as appears throughout these papers, the present race of Pundits are sufficiently inclined to support." In other words the condemned practice had come to be recognized as the modern law.

Mr. Nelson cites the decision of the Privy Council in the Sivagunga Case as conclusive to show that a widow, though her husband were unseparated from his co-heirs, takes the estate of her husband. But this is because according to the view taken by the Judicial Committee in that case, the co-parcener died *separated* from the joint-family in respect of his *self-acquisition*, which comprised his estate. Dr. Gold-

stücker condemns the decision on this very account. He says that the law is that until partition the question of self-acquisition is not pertinent, because up to that time all property self-acquired or ancestral is *vested* in the *managing member*. He also points out that under the law of the Dayabhāga the widow would be clearly entitled to the share whether her husband was divided or undivided, but that the Mitākshara, in rejecting the principle of the power of conferring spiritual benefits as the ground of the right to inherit, that being the only principle on which she could inherit, virtually excludes the widow of an undivided co-parcener from the right she would have under the Dayabhāga of taking the share of her deceased husband. Unless therefore we are going to introduce the law of the Dayabhāga, I cannot see how the Madras rule under notice can be taken to be over-ruled by the Sivagunga or any other case, except upon the distinction taken by the Privy Council in affirming the rights of the childless widow of an undivided co-parcener to the self-acquired property of her husband. In this respect the Judgment of the Privy Council, though upon the grounds mentioned by Dr. Goldstücker it may be wrong, will have to be followed in preference to the broad rule enunciated in the case reported in Vol. I, Madras High Court Reports, p. 412 which Mr. Nelson quotes in support of this charge against the High Court. This particular case, though it is thus affected to some extent in what it laid down, by the Privy Council decision in

the Sivagunga Case, is, notwithstanding, possibly right for the reasons given by Dr. Goldstücker for considering the judgment in the Sivagunga Case wrong, and the principle it enunciates is undoubtedly true as a general principle.

At page 78 Mr. Nelson says, "An attempt to make 'the Dayabhāga and Mitākshara agree as to widows' would I imagine be not very difficult."

Considering the very material divergence of opinion between the Mitākshara and the Dayabhāga,¹ already noted in p. 62 and that the principle upon which the widow succeeds in the Dayabhāga to the estate of her husband in an undivided family is the very principle which the Mitākshara rejects, I do not enter into the grounds of Mr. Nelson's confidence.

False principle 10. *That the Madras High Court has made the false rule that ancient Zemindaries are not divisible because they are of the nature of principalities.*

He quotes V Madras H. C. Reports, p. 31. The High Court in that judgment quotes and follows the opinion of Sir T. Strange and the Judicial Committee.

The Judicial Committee had, early in 1863, in the Sivagunga Case, expressed the opinion that the Sivagunga Zemindary, being in the nature of a principality or raj, was impartible. In the later Sivagunga Case it has affirmed that opinion.

Mr. Nelson says, there are no ancient Zemindaries

¹ Mayne, § 35.

and insists the rule is therefore false. But estates of 300 years standing, (see the reports of the Sudder for 1851, p. 9): the Vijayanagaram, and Bobbili Estates, and many even more ancient in the Vizagapatam District; and those of Kalastri and Vencatagiri, Chundi, Muttiyálpádu, &c., in Nellore may well be regarded as ancient.

The High Court at all events did not enunciate this rule.

False principle 11. *That the High Court of Madras has made the false rule that one with whose mother the adopter could not legally have married must not be adopted.*

Upon the basis of a letter from Mr. Ellis and what has been told him by natives of their practices in contravention of this rule, Mr. Nelson pronounces this a fanciful doctrine, though he says, in p. 90, that it was received without question by Sir Thomas Strange. It is not exclusively the doctrine of the Madras High Court, but is accepted by the High Courts throughout India, nor did it originate with the Madras High Court. If it was accepted without hesitation by Sir Thomas Strange and has been acted upon by the Sudder, and High Courts and the Judicial Committee ever since, I think the Madras High Court cannot be far wrong in continuing to act upon it, until it is displaced by clear evidence of a customary law to the contrary. Fuller enquiry may justify a departure from the rule but it has been accepted by other High Courts and did not originate with the Madras High Court.

False principle 12. *That the High Court of Madras has made the false rule that the Aliya Santána Kattu Kattale is a work of authority on the law of South Canara.*

The book now it is translated is palpably not worthy to be relied on as an authority and probably is a forgery.

In the period when Mr. Findlay Anderson was Civil Judge of Canara, twenty years prior to the existence of the High Court, the book was generally regarded as authoritative, and the late Sudder Court and its successor the High Court merely followed the opinions of that most experienced and able Judge Mr. Findlay Anderson, and of other experienced Judges in receiving it as a reliable record of the law current in that part of the country.

False principle 13. *That the Madras High Court has made the false rule, that survivorship is a principle upon which the rule of succession in part depends.*

If this rule be false it is not the Madras High Court, but the Judicial Committee which is responsible for it.

The High Court took no part in the disposal of the Sivagunga Case quoted by Mr. Nelson in support of his arguments. Nor is the High Court identified with Mr. Norton, whose own language in his Leading cases, is quoted in support of Mr. Nelson's view that the rule was laid down by the High Court.

Mr. Nelson says that Professor Goldstücker in his comments upon the judgment of the Privy Council

in the Sivagunga Case, IX Moore, shews that the principle of survivorship has no existence at all.

The Professor, it is true, makes an assertion to this effect, but I cannot see that he establishes his proposition. His argument is based upon the comment of the author of the Smriti Chandrika upon the text of Vrihaspati, a comment which it is seen at a glance, strains the text and endeavours to wring from it a meaning it was never intended to convey. The text of Vrihaspati runs thus: "In scripture, in the traditional code and in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of virtue and vice. Of him whose wife is not deceased half the body lives; how then should another take his property while half the body of the owner lives?"

The Smriti Chandrika puts upon this passage the construction that a wife has a nearer claim, from the circumstance that she has the property of conferring visible and spiritual benefits (on the deceased). How the author of the Smriti Chandrika deduced this meaning from the passage, it is impossible to understand. The words upon which the spiritual theory appear to be built are "equally sharing the fruit of his pure and impure acts," (*i.e.* virtue and vice). But these words may be much more naturally viewed as intended to illustrate the completeness of the union of the wife with her husband and her consequent survival as half of her husband. The principle enunciated by Vrihaspati as pointed out by Mayne, § 452, may be one that does not fully account

for the succession of the widow, but the language of Vrihaspati does not warrant the meaning attached to it by the Smriti Chandrika.

It is by no means certain that the spiritual theory as to inheritance was not invented long subsequent to the institution of property, and the law of succession; and that the reference of a right of descent to principles of religion was not contrived for the purpose of introducing a more powerful sanction or motive for the continued observance of the rules of succession. It was the opinion of the Abbé Dubois that:¹ "One of the most artful contrivances made use of by the early Hindus for preserving their customs, has been that of clothing them with ceremonies which make a strong impression on the senses and communicate something holy to the practice."

The doctrines of the Dayabhāga may have been the result of a re-action from a period when the religious sanction, possibly in the time of the author of the Mitākshara, had in practice ceased to be regarded.

False principle 14. *That the High Court has made the false rule that a widow can adopt without the consent of her husband.*

This also is a rule which has the sanction of the Judicial Committee.

The law in regard to adoption, it is generally agreed, requires legislative interference, but this doctrine should not have been put forward as one for which the Madras High Court is responsible,

¹ Abbé Dubois Pope's Ed., p. 25.

when, as Mr. Nelson himself shows,¹ it follows the opinion of Colebrooke as deduced from the Mitákshara. It is also in accordance with the opinion entertained by Sutherland.² Ellis, however, took a view rather stronger than that which Mr. Nelson adopts.

Mr. Nelson's opinion is that a woman cannot adopt without the consent of her husband; or if he has intended and made preparations to adopt, but has not formally completed the adoption, then although he has given no authority to his wife to adopt, she may adopt with the consent of the assembled Sapindas.

This view is based upon no writings which were not accessible to Colebrooke, Sutherland, Ellis and the Judges of the Supreme and Sudder and High Courts, and the Judicial Committee, and has not the solid basis upon which in the opinion of the Judicial Committee the decision of the High Court in the Rámnád Case was capable of being put, the custom of the country. Nevertheless I am free to admit that the law of Adoption is in a very unsatisfactory condition; and this has often been insisted upon by the High Court.

False principle 15. *That the Madras High Court has made the false rule that a Hindu family may be at once divided and undivided.*

Dr. Burnell considers this rule erroneous and bases his opinion upon reasons derived from Grammar and Logic.

He says that the word 'wealth' in the precept

¹ 'View,' pp. 104-5.

² 'View,' p. 105.

"divide the wealth" means the *whole* wealth, and would not grammatically admit of only a portion being divided. Also that Dharma charges are chargeable on the property as a whole, and that if the family be partly divided, the charges also must be divided [partly], which is an impossibility.¹ The logical difficulty I do not understand.

I am not inclined to attach much importance to the grammatical difficulty. In the course of ages divergences will necessarily take place between precept and practice. This may be painful to philologists, but facts must be accepted. As long as customs, which are at the root of the law of property, are referred to a religious origin in a positive revealed law, difficulties of this kind will always suggest themselves.

The Judicial Committee at p. 612, IX M. I. A. in the Sivagunga Case say: That two courses of descent may obtain on a part division of joint property, is apparent from a passage in W. H. Macnaghten's Hindu law, Partition, Vol. I, p. 53, where it is said as follows: "According to the more correct opinion, "when there is *an undivided residue*, it is not subject to the ordinary rules for the partition of joint property; in other words if *at a general partition any part of the property was left joint*, the widow of a deceased brother will not participate notwithstanding the separation, but such undivided residue "will go exclusively to the brother." Here, therefore, a partial division is recognized. No such rule as that stated was made by the High Court of

¹ Book, p. 100.

Madras. It was recognized as the law by the Judicial Committee and by the Courts of India in Calcutta and Bombay long before the Madras High Court decided the case upon which the charge is based.

The cases will be found quoted under para. 417 of Mr. Mayne's valuable work.

The law on this point as declared by the Madras High Court, is recognized, therefore, by the High Courts of Calcutta and Bombay and by the Judicial Committee of the Privy Council.

It is thus seen how unfounded are Mr. Nelson's charges against the High Court of having laid down certain false principles of Hindu law.

It will be well, however, to consider whether any of the "principles" (as Mr. Nelson calls them), or rules call for the severe denunciation of them in which Mr. Nelson indulges, or have been productive of untoward results.

"Houses," he says, "are divided against themselves: respectable families are brought to beggary" "doubt and uncertainty prevail everywhere, and the value of property, is rapidly falling."

"The laws made by that Court, I believe, to be essentially bad laws; wholly unsuited to the social system of the so-called Hindus, and productive of disastrous results—one of which is the growing unwillingness on the part of capitalists to advance money on what ought to be excellent security and the consequent steady fall in the value of rights over land."

As to the use of the expression "Schools of Law;"

the rule as to the indivisibility of ancient Zemindaries; the recognition in one case of the authority of the Aliya Santána Kattu Kattali; the rule as to the disqualification for adoption of boys with whose mother the adopter might have intermarried; the presumption of union of a Hindu family; the opinion of the Privy Council that succession may depend on two principles—one the right to make the funeral offering, the other an assumed right of survivorship, (IX M. I. A., 610); the recognition of the present contraction of the former rights of widows to a right to be maintained in place of a right to take a share; the recognition of the right of widows in the south, (more extended than that of the same class in the north), to adopt without the consent or authority of the husband; the rule that self and separately acquired property is ordinarily indivisible; and the rule that a joint-family may, in making a partition, reserve some property for future partition;—it would be idle, I think, to ask if any such rules as these could possibly have brought about the disastrous consequences alleged to have followed from the administration of the law by the High Court in cases of "Inheritance, Succession, Caste, Marriage or any Religious Usage or Institution."

There remain five of the impugned rules to be considered. First, I will take the rule (called 'false principle') that a lender seeking to enforce a charge against the estate of a minor, must have at least been at the pains to make reasonable enquiry and satisfy himself that the amount was borrowed or the

debt incurred by the guardians of the minor for his benefit, or for some family need.

Will any one be bold enough to contend that this is not a righteous rule, or that the course advocated by Mr. Nelson should be substituted, that the lender or creditor should not be required to enter into any proof that he did make such reasonable enquiry and that it is for the infant to show that the charge was not incurred for his benefit, or for family need? Is it possible that the rule referred to, which is a rule of the Privy Council, followed by all the High Courts, and is based upon the sound moral principle, recognized by every system of jurisprudence, of protecting the interests of infants, can have been productive of evil consequences?

Of the remaining four rules, two, the fifth and sixth are that a son and grandson may enforce partition and that a co-parcener may alienate to the extent of his share. Of these the first is recognized as the correct rule, as I have already shown, in all countries following the law of the Mitákshara. It has never been before suggested that the power which sons thus possess by law in the various parts of India in which it is recognized, tends to lower the value of property or is productive of disastrous results; nor is it shown by Mr. Nelson that it has had or can have any such effect.

It may be suggested that the rule which enables a son to alienate his interest in the joint-family property may create inconvenience in facilitating the dissipation of the wealth of the family by the sons and

in thus tending to put an end to the family union. In practice, however, there is no reason to suppose that greater ill effects follow than from the rules on the subject recognized in Calcutta and Bombay, as already explained. Short of prohibiting the seizure of joint-family property under a decree against a single co-parcener it is difficult to say what measure would be effective to prevent the diminution of the family wealth brought about by the indebtedness of the members of the joint-family. The members having each a property in their several interests, no reason appears why they should not be made liable for their debts by seizure of their property. The existence of spendthrift relatives is a misfortune no doubt to the other members of the family, but the ill consequences flow not from the law as laid down by the High Court of Madras, but from the joint-family system. The modes of mild truth (p. 36) are of little avail in the Kaliyuga age, and to make a man answerable in his property is less barbarous than to immure him in the public prison, or to shut him up in one's own house or to sit dhurna at his door; and if he should be made answerable in his property, there seems no reasonable objection to the seizure and sale by legal process of that which is his property from his very birth, viz., his interest in the joint-family wealth. If this is once acknowledged it is not illogical to allow to a co-parcener who can thus by legal process subject the joint-family property to be severed, a right to dispose by private contract of that which the law can seize to pay his creditors.

The evil apprehended is the ruin of the family by the action of one member in effecting secret alienations of the joint-family estate to the extent of his own share.¹ One would suppose from this that joint-family property was never intended to be, and was not under Native Governments, held liable to the debts of members of it; that the joint-family was so beautiful a system and so much venerated that the property held by the family corporation possessed a special immunity from the demands of creditors. This however was by no means the case as is shown by Mr. Nelson himself² in his consideration of Father Bouchet's 7th maxim, (see ante pp. 18, 19, 20) from which it appears that under the joint-family system at the end of the 17th century the necessity was recognized of defraying the debts of individual members from the joint-family wealth. The only alteration made under the English administration is to enforce the payment of such debts from the family wealth with greater speed and certainty, and to confine the liability of the family wealth for the debts of any single member within more exact limits.

These changes in the mode of enforcing such debts have arisen naturally in the progress of civilization and are, I cannot help thinking, productive of advantage instead of disaster.

False principle 2 I have already discussed. I have shown that at all events the High Court follows as its predecessors followed the intention of the

¹ Nelson's Book, p. 54.

² Pamphlet, p. 18.

law in applying the Hindu law to all vulgarly styled Hindus. This would be sufficient to vindicate the High Court, but it may be well to consider whether disastrous consequences can have followed from the administration of the law according to its intention in this respect, and also from the mode in which the Madras High Court deals with customs. (False principle 3.)

The gist of the grievance supposed to follow in the train of false principle 2, is that whereas the tribes and castes of South India not being Hindus ought to have their peculiar customs, and not Hindu law, administered to them, the administration to them of Hindu law is continually conflicting with the law in which they have been born and by which their Personal, Family and property rights and their law of succession are believed by them to be regulated.

No evidence of this is forthcoming, and there have been so far as I am aware no cases before the High Court in which people of the lower castes or tribes vulgarly classed as Hindus have repudiated that classification, or claimed or pleaded under a different law of succession, inheritance, caste, religious usage or institution from that of the Hindu. The instance of the Maravars, as to whom Mr. Nelson quotes Mr. Justice Holloway, is an instance directly opposed to his view, for they have always claimed as Hindus and pleaded as Hindus.

It is very improbable that whole families, not recognizing or governed by Hindu law, would thus impale themselves as it were upon Hindu law and volun-

tarily incur the disastrous consequences to which Mr. Nelson refers. It may however be that whereas the Hindu law recognizes the existence of peculiar customs in different parts of India, and directs (especially in the case of those not belonging to the four castes) that their customs shall be respected, the High Court has laid down rules in regard to customs which practically prevent their recognition to the extent to which they ought to be recognized, and has in this respect, unintentionally perhaps, failed to carry out the Hindu law in its true spirit, and imposed much inconvenience on families who have governed themselves by customs recognized in their community as legal.

This brings me to the consideration of the remaining false principle No. 3.

I shall postpone it however for the present as it will be more convenient to consider it in connection with the cursory examination I propose to make of Mr. Nelson's Prospectus of the study of the Science of Hindu law.

I will now therefore proceed to examine Mr. Nelson's 'True rules.'

The following is an abstract sketch of the true rules:—

1. Custom is to be maintained notwithstanding that the law is opposed to it.
2. Hindu law is to be administered to Brahmins alone.
3. English words of art are to be avoided in the rendering of Sanscrit law terms.

4. All earnings are to be handed over by members of the family to the father.

5. Sons are not independent, but by birth they have a right over the wealth.

6. They cannot aliene or use the family wealth.

7. If a father become vicious or extravagant, his independence ceases, and in some circumstances the sons may enforce a partition.

8. Sons may prohibit the father from squandering the property or making an unequal partition of it.

9. The father may separate his sons from him making an equal partition.

10. What he has acquired for himself by his own exertions he may divide unequally.

11. Widows of the father must have an equal share with the sons, not mere maintenance. So with the widow of any son who may have died.

12. Questions may arise on a partition as to what is, what is not liable to partition, and as to whether wealth that has been self-acquired by one of the sons, should or should not be parted amongst all.

13. After separation all religious ceremonies are separate with certain exceptions. Each one manages his own wealth.

14. If one dies without issue, his widow, if chaste, succeeds to his estate, and may aliene immoveables for religious purposes. After her death, the estate reverts to her husband's relations in a certain mode of succession.

15. If the wife dies before her husband, her children, daughters first, take her wealth.

16. A sonless separated son may adopt a son. In doing so he must follow the custom of the country.

17. If on the death of the father, the sons prefer to live in union, they may do so, the eldest managing.

18. The widows of the father and of any of the sons who may have died will be entitled to claim the share in the family income, their husbands would have enjoyed if alive. Though, practically, as the sons would spend the income of the family as they pleased, and the widow would have no power of interdiction, this right would be of little value.

19. When the male members resolve to make partition, the widows will take shares equal to that of the sons.

20. The fact of partition when questioned is to be determined, like other questions of fact, upon the whole of the evidence adduced.

21. After separation, reunion may take place :

"Such are, briefly and roughly," Mr. Nelson says, "the general principles that I apprehend may be gathered from those parts of Sanskrit works which deal with the important subject of succession.

"As will be seen at a glance they are for the most part diametrically antagonistic to the principles that have been established by the High Court of Judicature at Madras."

Except in three points, viz., the authority of the sons to enforce partition, the power of alienation of the sons and the rights of widows, (rules 6, 7, 11, 18 and 19), this elementary sketch of the rights of the members of a Hindu joint-family, is precisely

what the merest tyro in the study of the Hindu law as current in the Madras Presidency, at once identifies, as a representation of rights that are recognized by the High Court of Madras, and by all the High Courts in so far as they are guided by the law of the Mitākshara.

Of the exceptions referred to, the qualification which Mr. Nelson would introduce to the rule that sons may enforce a partition against the will of the father, is not stated. The power of alienation possessed by the sons, as I have already explained, is a point upon which the High Courts have differed and on which the Privy Council, though it has not committed itself to an opinion as to the power of any one co-parcener to alienate without the consent of the others, has preferred the broad rule by which the Madras High Court gives effect to alienations to those of Calcutta and Bombay. The reasons that may be urged in support of the Madras rule I have already stated, pages 65 to 69.

The rights of widows which Mr. Nelson advocates cannot be claimed by them except under the law as set forth in the Dayabhāga, which is not the law of Madras and so far as can be gathered from the "Thesawalamai" which professes to represent the law of the Tamils of Ceylon who from time to time have emigrated from India, was not formerly the law in Southern India.¹

If the law on this subject as presented in the Dayabhāga ever were the law in Southern India in

¹ See Appendix, I.

former times, it is clear that the existing system displaced it and became thoroughly systematised in Southern India. For a widow never dreams of getting her husband's share except in the case of her husband having been separated from his co-heirs and sonless; and the works which are especially held to be authorities upon the law of South India upon this point clearly and unmistakeably reduce the widow's right to what it is now held to be.

The first of the 'True rules' is conformable to the law as now administered, if by 'custom' is meant a custom proved in accordance with the recognized rules of law. But it is certainly not the law as now administered if, as I suspect, Mr. Nelson intends that every one may set up any new practice he pleases and claim recognition of it as his custom. The effect of the second of the rules I shall notice again further on.

In other respects Mr. Nelson in so far as during his judicial career he has acted up to the view of Hindu law propounded in these "True principles," (though perhaps as unconsciously as M. Jourdain had been talking prose all his life), has been administering the law as laid down, followed and administered by the High Court of Madras.

I will now refer to Mr. Nelson's latest work, "*A Prospectus of the Scientific study of Hindu law.*" It might at first sight seem that this book contemplated little more than the propounding a vast number of insoluble problems. But on further examination it appears to have for its object to establish the

necessity for sweeping away what Mr. Nelson speaks of as the noisome rubbish of High Court Reports, and to slay and bury the monster called Hindu law. To this end he has re-affirmed his condemnation of the fifteen so called false principles enunciated by the High Court, already noticed by me.

Doubt is attempted to be thrown upon the age of the Mitákshara and it is suggested that the Mitákshara is taken from Mádhava's work instead of—as has hitherto been supposed—Mádhava's work from the Mitákshara, and that the Mitákshara therefore, instead of having been an authority for the law of South India for many generations, is a work written about the year 1700, not earlier because it is an enlarged edition, Mr. Nelson supposes, of Mádhava's *Daya Vibhága*, written about 1350, and quotes Dháreswara, who, in Mr. Nelson's opinion, may turn out to be Dára Shukoh brother of Arungzib who died 1659.

This startling theory I leave to be refuted by other and abler pens, but I would remark that Father Bouchet's reference to a work called '*Vicná-charam*' clearly indicates the Mitákshara of Vijnáneswara as acknowledged by Mr. Nelson, (see ante p. 44.) It is difficult to understand how a work posterior to the period at which Dára Shukoh wrote and which quotes his writings could have become sufficiently known in the South by 1714, the year in which Father Bouchet wrote, to be brought to his notice as one of the works upon law which were known and read and revered, though not consulted in the decision of legal questions; and the theory

certainly seems to overlook the received eras of the commentators on the *Mitákshara*, *Visweswara Bhatta* 1400 A.D., and *Mitramisra* 1550 A.D., and the generally accepted view that *Jimuta Váhana* in his treatise is combating the doctrines of the *Mitákshara*, and that the commentator on the *Dayabhága* of *Jimuta Váhana*, *Raghunandana*, is supposed to have lived about the year 1500 A.D., also the fact that *Mádhava* in his work quotes not only *Vijnáneswara* *Yogin* the author of the *Mitákshara* but also *Chandrikákára* or the *Smriti Chandrika* of *Devanda Bhatt*, who is supposed to have lived about 1250 A.D., and who in the *Smriti Chandrika*¹ quotes both *Dháreswara* and *Vijnáneswara*, the author of the *Mitákshara*; whence necessarily results the series—

1. *Dháreswara*,
2. *Vijnáneswara's Mitákshara*,
3. *Smriti Chandrika*,
4. *Mádhava's Daya Vibhága*.

Mr. Nelson recommends the appointment of a mixed commission of Orientalists, Judges and men of business to enquire and report on the Sanskrit books that are generally supposed to contain Hindu law. "Of this commission the principal duty should be to collect all the admissible evidence forthcoming to show that such books all or any of them, have at any time consciously or unconsciously been regarded by any of the population of South India or by any part of it, as books containing law, and therefore as authorities obligatory on men's con-

"science." Mr. Nelson adds, "I have searched in vain for such evidence, I honestly believe that not a particle of it can anywhere be found."

This implies that the question is whether any of the law books recognized as authorities, were ever received as positive law.

But this is not the question. The question is what is the living law among the people, and do the treatises consulted by the Courts and regarded as authorities: do these treatises accurately represent the law? Such a question is best answered in the course of a cycle by observation of what the received law of the people is, as ascertained by judicial decisions. The treatises referred to have never been regarded by the Courts as works which were believed to contain a sacred revealed or other positive law. The most that has been attributed to them is that they accurately represent the law in the part of the country in which they are recognized as authorities.

A foreign enquirer in England might question a very large body of laymen before he would be able to ascertain what legal works were regarded as authorities to be consulted in the ascertainment of their rights. And if the enquiry proposed by Mr. Nelson resulted in showing that the *Mitákshara*, *Smriti Chandrika*, *Mádhaviya*, and other like treatises were little known among the body of the people, this would not destroy the authority of these treatises as representing accurately the law of South India, except in so far as by judicial enquiries that law had

¹ *Kristnasawmy Aiyar's version*, Ch. III, §§ 20 and 23.

been ascertained to differ from what is to be found in the treatises.

Mr. Nelson proposes that when it is found, as he assumes it will be found, that no evidence of the authority of the treatises is forthcoming, the Government should commence the task of collecting and arranging in a simple form the few primitive usages and customs that are common to all or most Indian castes. This was effected in Bombay and the usages were published in 1826. The enquiry however was confined to only two Talooks.

The result of the enquiry so held was this—

"A general conformity is observable with the leading principles of the Hindu system, which so far as they affect civil disputes appear to be as follow :—

1. "The supremacy, generally speaking, of the Brahmin caste. Some castes permit the agency of their own priests, but the ceremonies performed are imitations of the Brahminical rites.

2. "Severe penalties annexed to intermarriage or association with a lower caste.

3. "Adoption, even by widows, in order to secure the continued performance of funeral oblations.

4. "Inheritance generally speaking, in equal shares by males only, in equal degree of relationship; the degree of consanguinity indicated by the customary performance of funeral oblations being the principle on which property is inherited.

5. "Community of property among the members

"of one family; descended or ancestral property being considered as entailed.

"On the other hand the chief points on which the law and custom have been observed to be at variance are—

1. "The great variety of castes and sects ;

2. "The custom of a second and inferior marriage allowed to wives and widows in many castes ;

3. "The small or irregular punishments in some cases enforced by caste assemblies ;

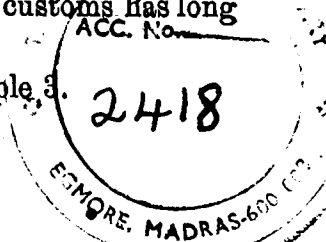
4. "The disregard to legal restrictions as to caste, in trading and taking interest ; besides an infinity of local usages, which have become established, unwarranted by Sastra if not opposed to its rules." Steele's Law and Customs of the Hindu Castes in the Deccan, p. xvii Preface. Edn. of 1868.

It will be seen that the result was very incommensurate with the difficulty and complexity of the task undertaken.

The enquiry resulted in showing what Mr. Nelson believes it would not show in the Madras Presidency a general conformity with the leading principles of the Hindu system.

The divergences from Hindu law so far as they related to matters which would come before the Mofussil Courts as questions to be determined by that law, or by custom, were confined to questions of marriage, in which a variety of customs has long been recognized by the Courts.

I will now examine False principle, 3.



3. That the High Court of Madras has laid down the false rule *that a custom which has not been judicially recognized cannot be permitted to prevail against distinct authority.*

The High Court never laid down this rule in any case. Had it done so it would be tantamount to saying that a custom can never be proved to the satisfaction of a Court of Justice, because it must always have been preceded by a previous judicial decision recognizing it, which, to be a valid judicial decision, must be preceded by some other previous judicial decision, and so on.

It is said by Mr. Nelson that this false rule was first broached in a case reported at p. 51, Vol. I, Madras High Court Reports.

This is not a case in which it was held that a custom which had not been judicially recognized cannot be permitted to prevail against distinct authority. The custom, which was undoubtedly in derogation of the general law, had been condemned by the late Sudder Court only three years before.

The High Court followed that decision.

The defendant had admitted the practice on which plaintiff relied, but the High Court had to consider the legal effect of that practice and could not therefore decide in favour of the plaintiff on the mere admission of the defendant of the existence of it.

There was no other evidence of the custom.

The parties were of the Reddi caste, (Vaisyas).

The second case at I Mad., 420, is one of a Brah-

min in the Andhra country, adopting a sister's son. The custom was held invalid.

The circumstance that the practice had never been recognized by judicial decision was not the basis of the decision, (though the head-note wrongly states it so). This circumstance was only mentioned to enforce the other reasons. The judgment proceeded on the law as expounded by the greatest authorities, the reasons on which the law was based, and the circumstance that there had been no judicial decision to raise a doubt as to the authority of the opinions condemning the custom.

The third case referred to in Vol. IV, p. 204, decides that the illegitimate son of a Sudra by an incestuous intercourse does not inherit.

This seems to be a very wholesome doctrine notwithstanding any amount of practice recognizing such rights as the High Court disallowed. It was also based upon carefully considered reasons.

In the case reported at VII Madras High Court Reports, 250, not only Holloway, J. and myself by whom the final judgment was delivered, but all the Judges of the Court were of opinion that the custom though made out conclusively as a custom was not made out as a valid custom. It was in derogation of the general law governing the parties who were Brahmins, and opposed to the law as expounded in the treatise of Vaidyanáda Dikshadar a treatise of authority written in the Tamil country to which these parties belong.

It was thought, as Mr. Justice Holloway has ex-

pressed it in the judgment, that "In the case of Brahmins it is impossible in any case to believe in the existence of a customary law of which no trace appears in any written authority of the place to which they belong. These authorities themselves are as much the record of customary law as of the written texts of the Shastras."

In another Southern district also, (Tranquebar), another District Judge after an elaborate enquiry had come to the conclusion in a similar case that there was no such rule of customary law.

One of the conditions of a valid custom is that the evidence should show the conviction of those following it that they were acting in accordance with law.

That conviction we did not consider had been made out in the instances given in evidence, but on the contrary we thought that the parties in the several cases had been consciously acting in violation of what they knew to be the rule of law.¹

It may be observed that there are two species of customs, one in derogation of the general law, and the other the customs of people to whom the general law may not have originally applied.

With regard to the former the rules laid down in Vol. VII, p. 254, would have to be applied as a test of the validity of the custom, unless it is one recognized in Hindu law treatises of authority as a valid custom though in derogation of the law.

With regard to the latter, the first question

¹ Mayne, § 47.

would be, was the class to which these people belong originally subject to the Hindu (or any other) general law? If not, then the custom pleaded is pleaded not as a custom in derogation of the law, but as the law itself, and assuming that it is not an unlawful practice, all that would be required to be shown would be that the class generally recognized the practice as binding on its members.

The rules laid down in VII Madras High Court Reports, 254, and in III Madras High Court Reports, 75, 77, have been approved and applied by the High Courts of Bengal¹ and Bombay² and were approved of by the Judicial Committee of the Privy Council.³

It will be seen that the Madras High Court has not in the instances mentioned by Mr. Nelson refused to recognize customs properly proved.

The case already referred to at p. 51, Vol. I, Madras High Court Reports, was a case in which the custom of Illata was not legally made out. The parties were persons who were subject to the general law.

This custom was not at that period so well known and recognized as it is at present.

At p. 119 of the Prospectus Mr. Nelson again insists that the High Court refuses to recognize customs and among others that of Illata. But this is a mistake. Many cases have come before this Court in which the custom has been recognized. Unfortunately few have been reported. But I may refer to the cases of B. A., 103 of 1868 and to the case reported at p. 25, Vol. VII, High Court Reports.

¹ 9 Beng. L. R., 294. ² 10 Bomb. H. Ct., 234. ³ 14 Moo. I. A., 585.

In Chapter VII, of the Prospectus Mr. Nelson deals with Mahomedan law. He insists that the High Court does not recognize the custom among certain Mahomedans of the Madras Presidency of the joint-family; and in illustration of what he advances refers to a scene in Court in the course of which the counsel for the appellant was laughed down by the Court for speaking of division and non-division in connection with a case involving the decision of the rights of certain Mahomedans. The story is told as though Mr. Nelson had himself witnessed the scene. But long before Mr. Nelson became Acting Registrar of the High Court in 1867 which I presume is the period referred to, this custom of certain classes of Mahomedans had been recognized. He will find a report of a case bearing out what I say in Vol. II, Madras High Court Reports at p. 414, and I give in the Appendix¹ a case of some interest more recently decided. In the case at Vol. II, p. 414, the family divided in 1865; the partnership existing up to the time of the division was not disputed and was treated by the Court as a custom well known and recognized; the question was only as to what were some of the rights flowing from that partnership.

In the case now given in the Appendix the custom was disputed, and the case was tried and decided upon the evidence in favour of the custom.

The High Court has never to my knowledge ignored the custom or refused to recognize it. I cannot therefore avoid thinking the circumstances

¹ Appendix II.

referred to by Mr. Nelson must have been connected with a case of purely Mahomedan law in which it was quite evident that that law alone could apply; for it is only the Lebbai and Marcayen classes of Mahomedans in this Presidency who have adopted the joint-family system.

The Court though unwilling to disturb what has been received as law for the last 80 years and to accept allegations of custom often put forward to justify violations of well recognized law; unwilling also to introduce the confusion and uncertainty of title that would result from the recognition of so-called customs on absolutely insufficient evidence, has never been and is not unprepared to give effect to any custom properly proved.

A remarkable case¹ has lately come before the Court tending to refute Mr. Nelson's assumption that the Hindu law as administered by the Court, *i.e.*, speaking generally, the law of the Mitákshara, and other works of the kind is not the law according to which the non-Mahomedan Indians, when left to themselves, regulate their rights of succession.

The litigation in the case referred to was in a Reddi family in the Kurnool district, and commenced in the Court of the Nawab of Kurnool in 1835. The parties were dissatisfied with the Mahomedan Judge's decision and entered into a compromise, and in this and in their subsequent conduct and in the subsequent litigation, they conducted themselves in a manner showing a consciousness that they

¹ Appeal 138 of 1880, see Appendix III.

were governed by those principles of Hindu law which the High Court would have applied to the case.¹

I sincerely hope that the Government will not commit itself to any such roving commission as that demanded by Mr. Nelson.

It would be burdensome to the country and I am persuaded would be productive of incommensurate advantage. Meantime the unsettlement of the public mind would be a great evil and would produce mischiefs innumerable of a kind of which Mr. Nelson has furnished an example in page 61 of the Prospectus.

Vasishtha has declared that it is wrong for a man to follow any but his own Sākhā. "He thereby sinks into blind darkness."

Mr. Nelson says, "The practical importance of 'this question, of the right of Brahmins and others 'to follow Sākhās other than their own, would be 'at once understood if a defendant in a suit were 'to object to the claim on the ground that the law 'relied on by the plaintiff was opposed to the law 'laid down in the parties' Sākhā of their Veda. 'Such answer, I believe, has never yet been made in 'a Court of Justice; but before long it may be 'come quite common.'² I should not be surprised if it did. Any mischievous suggestion of this kind is sure to find a ready adoption.

I do not desire to disparage this learned work of Mr. Nelson, I admit that it displays great research

¹ See also Foulkes's *Sarasvati Vilāsa*, Preface, p. xxii.

² Prospectus, p. 61.

and there is manifested throughout it an earnest pursuit of an object which Mr. Nelson believes it would be of public advantage to achieve. But I cannot be indifferent to the impression on my own mind that the accomplishment of the object would be productive of extreme inconvenience, and public mischief, not to say deplorable disaster.

The central idea of the work is the necessity of undoing all that has been done in the last 80 years towards settling the Hindu law of Inheritance and of leaving at large and open for future decision all questions connected with that law.

In some parts of his book as at p. 61, just quoted, Mr. Nelson evinces a desire in the case of Brahmins to ignore the changes in the law which the authors of the *Mitākshara*, *Smṛiti Chandrika*, and *Daya Vibhāga* were forced to recognize and to revert to the ancient law; but in others again he insists that the Courts must be forbidden by law "to assume in any case "that a party to a suit whether a Brahmin or a "non-Brahmin is obliged in any degree or for any "purpose by the *Mitākshara* or any other Sanscrit "Book" and that the law should direct "that where "a party denies the applicability to him individually "of the so-called Hindu law, or of a particular part "thereof, his opponent who affirms the same shall be "bound to establish the averment by good and sufficient evidence.

"The immediate practical effect of making such a "law would be to uproot and sweep away all the "'settled principles' of the so-called Hindu law,

" which disfigure the Reports of the Madras High Court, &c."¹

To adopt Mr. Nelson's suggestions whether as regards the higher or lower castes would commit us to chaos in the matter of the Hindu law we are now called on to administer. What is contemplated would result in our abdicating the vantage ground we have occupied for nearly a century, in which, if we continue to hold it, we may hope gradually to remove the differentiations of customary law and bring about a certain amount of manageable uniformity. It would be to commit us to the investigation and enforcement of an overwhelming variety of discordant customs among the lower castes, many of them of a highly immoral and objectionable character, which if not brought into prominence and sanctioned by judicial recognition will gradually give place to the less objectionable and more civilized customs of the superior castes.

The number of the existing Courts would have to be indefinitely increased to cope with the enormous increase in litigation which Mr. Nelson's system if adopted would infallibly bring with it. I repeat my hope that his proposals may not find acceptance with the Government.

¹ Prospectus, p. 183.

APPENDIX I.

No. 4482

year 1828.

PARPADDIAN, widow of Alwan of Sonale, *Plaintiff*,

vs.

WALLIAR, widow of Camden and sister, *Defendants*.

BROWN RIGG, *Judge*.

Held, that by the 7th clause of first section of Thesawalame, all property acquired by sons while unmarried, and under the care of their parents, shall become part of the common stock, and that after the death of the parents it is to be considered the modisom or hereditary property of the sons, and that the widow of one of the sons has no right to any share, and that his brothers should succeed to the same exclusively share and share alike.

p. 613, Thesawalame.

Edn. of H. F. Muttukistna.

APPENDIX II.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Original Suit No. 5 of 1877.

P. S. MAHOMED ESOF, *Plaintiff*,

vs.

SHAIK NYNAH PILLAY and others, *Defendants*.

JUDGMENT.

Plaintiff seeks to have the Will of Magdoo Mahomed Markayer, his father, dated 11th September 1873 declared invalid as also the kararnama or family arrangement of the 21st June 1876 purported to have been entered into in supercession of the Will, and to have his rights and interests and those of his mother Alima Bi, 5th defendant, and his sister (6th defendant) Mahomed Bibi of the age of eight years and his married sister Fatma Bibi (7th defendant) in the estate and effects of his deceased father ascertained and declared, and the shares of the 5th, 6th, and 7th defendants paid to them, and the residue secured for the benefit of plaintiff.

An account is prayed of the said estate come to the hands of defendants 1 to 7, and there is the usual prayer for an injunction and receiver.

The 8th defendant Mahomed Ammah who was betrothed to Habib the deceased elder brother of plaintiff was made a party defendant subsequently to the institution of the suit.

Plaintiff who is an infant of 7 years of age was represented by his guardian Koyar Mahomed Markayar one of the brothers of his mother (5th defendant). The other infants parties to the suit were also properly represented.

The deceased who resided at Coimbatore had two brothers Sera Mudali Markayar, the father of 1st and 2nd defendants, and Saiyed Mahomed, the father of 3rd and 4th defendants.

Deceased had for many years and up to the date of his death carried on a large business in the export of dressed hides to England. Though at first disputed by 1st and 2nd defendants it was admitted in the course of the trial by the Advocate General who appeared for 1st and 2nd defendants that Syed Mahomed, the father of 3rd and 4th defendants, was from 1840 up to the date of his death in 1860 in partnership with the deceased father of plaintiff in the business.

The evidence shows and it is not disputed that 1st defendant joined the deceased Magdoo in his business in 1859 and 2nd defendant in 1860 and that 3rd and 4th defendants came to live with him in 1860 on the death of their father and were eventually taken into the business on 12th April 1870. Magdoo established a new business in Madras entering into a partnership deed as of that date on the 11th August following. The partners were Magdoo the first defendant, Shaik Naina Haidroos one of the two brothers of 5th defendant, and one Bava Saib Muttumira Ravuttan.

On the 11th September 1873 Magdoo made the Will which plaintiff impeaches. A misunderstanding had arisen between 1st and 2nd defendants and Magdoo, and they had left Coimbatore for Caroor where they set up a separate business in skins. Magdoo induced them to return and took over the business and the property they had purchased to enable them to carry it on. It was soon after this that the Will was executed.

On the 3rd April 1876 Magdoo died, and on the 21st June the kararnama was entered into on the part of 1st, 2nd, 3rd, and 4th defendants and Habib plaintiff's brother. 5th defendant mother of plaintiff and 7th, the married sister, attested.

On the first August a certificate under Act XXVII of 1860 to collect the debts due to deceased was granted to 1st defendant. On the 3rd September Habib died, and on the fifth January following this suit was commenced.

The contention on behalf of plaintiff is that the Will was invalid, as the ascertainment of what the precise intention of the testator was in regard to the distribution of his property, was left to depend upon certain lists which the testator had designed to annex to his Will but which he had not so annexed; and that in other respects it is contrary to Mahomedan Law and can only bind $\frac{1}{4}$ of the estate of the deceased as that estate stood at the date of the Will. That the 5th, 6th, and 7th defendants are the legal sharers and are entitled to their shares out of the entire estate and that plaintiff as the surviving son is entitled to the entire residue. That plaintiff is no party to the kararnama which, besides, secures to 1st, 2nd, 3rd, and 4th defendants who have no titles to it a large share in the estate.

The 3rd and 4th defendants in their written statement claim an interest in the estate of Magdoo as co-partners with him in the business, in which they succeeded their father, the original partner of Magdoo.

1st and 2nd defendants dispute the jurisdiction of the Court: they also refer to their having respectively joined Magdoo in the years 1859 and 1860 as already mentioned, and say that having learnt the business they had entire management, during the last ten years, of all except the new Madras Partnership founded in 1871 in which 1st defendant one of the four partners looked after his own interests and those of his uncle Magdoo; that Magdoo and 1st and 2nd defendants believed themselves to be governed by the Hindu Law as to succession to property, and that they worked and managed their uncle's business without remuneration or share in the profits on the promise repeatedly made by Magdoo that he would treat them as if they were his own sons in the division of the property; that the Will was valid, having been consented to and attested by 1st, 2nd, 3rd and 4th defendants and Habib the eldest son, and consented to by 5th and 7th defendants; that the schedules intended to be annexed to the Will were so annexed about a month before the death of the testator.

They maintain that the Will is valid even by Mahomedan Law.

They further say that in the execution of the kararnama, which was attested by 5th and 7th defendants who obtained greater benefits thereby than by the Will, the plaintiff and 6th defendant were represented by Habib their brother and by 5th and 7th defendants (respectively their mother and sister) and that the kararnama is binding on the entire family. They repudiate the charge of fraud imputed to them by plaintiff.

The issues bring in question the jurisdiction of the Court, the validity of the Will, and the extent to which it is valid if valid at all, the binding effect of the kararnama as regards plaintiff, and the rela-

tions of 1st, 2nd, 3rd, and 4th, defendants with Magdoo in his business.

The question of whether the Court has jurisdiction depends upon the Construction of Section 12 of the Charter.

I agree with and should follow the decision of Mr. Justice Norman reported in 3 Bengal L. R. Original Civil Decisions, page 85, in the appeal of Prasannamayi Dasi (defendant) *vs.* Kadambini Dasi (plaintiff), as to the construction of Section 12 of the Letters Patent. Apart from the view founded on the grammatical structure of the sentence, it seems obvious that the intention of the amendment of the Original Letters Patent was to cure a defect of jurisdiction. Prior to the issue of the Letters Patent of 1865 the High Court had no jurisdiction over cases in which in suits for land, part of the land was situated, or in other suits the cause of action arose, partly within and partly without the jurisdiction. While therefore Courts subordinate to the High Court by a single application to the High Court under the Civil Procedure Code, could in any suit before them, obtain authority to entertain it notwithstanding such defect, there existed the anomaly that the Highest Court in the Presidency, though capable of conferring this power on the Subordinate Courts, could not exercise it for itself.

The intention in amending the Letters Patent must, I think, have extended to the two cases and could not have been confined to cases in which the jurisdiction depended on the locality of the cause of action alone, for the defect in either case was equally anomalous and equally inconvenient.

To apply the decision to which I have just referred: it is necessary to see whether this is a suit for land, as if not the Will and kararnama having been executed, and the testator's domicile and the residence of all the members of the family except 3rd defendant being without the Ordinary Original Civil Jurisdiction of this Court, the suit could not properly be entertained here.

In a strictly accurate and scientific point of view the suit can scarcely be said to be a suit for land, as the object of it is the distribution of an estate and the allotting to plaintiff his share in the distribution; the special object aimed at not being to obtain land but to obtain the proper value of his share. But I think that within the meaning of the old Code of 1859 which the Letters Patent must be taken to follow, and which is more practical than scientific, the suit may be said to be one for land, as in seeking to set aside a Will and kararnama it seeks also to set free from the distribution made under those instruments a large amount of property, a part of which is land within the local jurisdiction of the High Court, and to obtain the orders of the Court dealing with that land, together

with the rest of the property, and distributing it according to Mahomedan Law. In this view I am glad to find myself in accord with the opinions of the learned Judges in the cases reported at pages 95 * & 249 † of the first Volume of the Indian Law Reports, Calcutta Series.

I am therefore of opinion that this Court could give leave to entertain the suit on the ground that some of the property in question is immoveable property situated within the local jurisdiction of the Court.

The main question for consideration in the suit is whether the will and kararnama should be treated as invalid instruments, and a fresh determination should be arrived at by the Court independently of those instruments, as to the rights and interests of all parties concerned.

There can be no question, I think, that if the family be governed in regard to succession by Mahomedan Law, the Will is in many respects invalid. It deals with considerably more than $\frac{1}{2}$ of Magdoo's estate. Some of those interested no doubt attested the Will, but there is no evidence that they gave such an assent to its provisions as would render it valid and binding on them. In fact the evidence makes it perfectly clear that 1st and 2nd defendants and the widow (5th defendant) were dissatisfied with it. No provision was made for the latter, though under Mahomedan Law she would be entitled to $\frac{1}{2}$. A provision to a very small amount and not in accordance with Mahomedan Law was made in favor of the daughters who under Mahomedan Law would be entitled to $\frac{1}{2}$ each of the residue after deducting the widow's $\frac{1}{2}$.

1st and 2nd defendants and 3rd and 4th defendants who were nephews of Magdoo were placed almost on the same footing as Habib and his brother, the two sons.

Though invalid however, as a demise of property according to Mahomedan Law, the question still remains whether a testamentary disposition of this nature might not be valid under some other law, and binding upon the family.

The determination of the validity of the Will under some law other than the Mahomedan Law, depends upon whether the parties are governed by some other law in regard to the devolution of property, and whether the Will is in accordance with such law.

There is also the further question raised in the plaint as to whether the Will was complete at the death of the testator, or was left incomplete and without the lists of property which were to express

* East Indian Railway Co. v. Bengal Coal Co.

† Delhi and London Bank v. Wordie and another.

the testator's intentions in regard to its distribution. Whether, if valid, it is binding on plaintiff depends upon whether the kararnama, which purports to substitute other provisions for those of the Will, has become binding upon him in substitution of the terms of the Will.

The Will if invalid is of course not binding upon plaintiff, and even if valid it will not be binding if plaintiff is bound by the kararnama or family arrangement which took its place. The evidence shows that there was discontent with the provisions of the Will from the very first moment of its being drawn up. 1st and 2nd defendants had considered themselves entitled to a larger share in the estate; and it is clear that 5th defendant, though she now denies it, sent messages to Gnyanabaranam asking him to interfere to obtain an alteration of the proposed Will in her favor, and that he spoke to Magdoom with that view. Government Bonds worth 35,000 rupees, as was discovered after Magdoom's death, had been omitted from the lists of property dealt with by the Will.

The 3rd and 4th defendants also according to 1st defendant, were dissatisfied with the provisions of the Will postponing for an inconvenient length of time their possession of the share allotted to them. The widow demanded her share "according to Mahomedan Law." And it is apparent therefore that one of the same questions was then raised as is now raised as to whether the Will was valid according to the law governing the parties interested.

It is in this place that I shall now consider that question, as to which during the trial I found it necessary to raise an additional issue.

It will be recollected that, according to the evidence of Gnyanabaranam, the Yakil of the District Court of Coimbatore who was called in by Magdoom to draw up the Will, Magdoom, when it was pointed out to him by Gnyanabaranam that he had made no provision for his wife who was entitled to a share according to Mahomedan Law, said he had nothing to do with Mahomedan Law in regard to property, and went on to explain that his wife would remain with the sons, and would be amply provided for if she guided them properly. This evidence I am satisfied may be trusted, and shows Magdoom's belief that his wife's rights were limited under the law followed by his community to the rights which a Hindoo widow in similar circumstances would be entitled to.

Although dissatisfaction at the provisions of the Will prevailed after Magdoom's death, yet between that date and the institution of this suit Alima the widow appears to have been the only member of the family who impeached its validity on the ground that it was not in accordance with Mahomedan Law.

She had been left quite unprovided for although there were ample funds from which a separate provision might be made, and it was very natural that the far more favorable provisions of the Mahomedan Law should be insisted upon by her as provisions to the benefit of which she was entitled. The additional evidence as to the law governing the devolution of property in this family shows, no doubt, that the customs of those calling themselves by the general name of Lebbais differs in different parts of the country, but that in the district of Coimbatore and in the Palghat division of the Malabar district they do not follow in this respect the Mahomedan Law but a practice which in many material respects conforms to the Hindu Law. The evidence certainly does not do more than establish a local custom confined, so far as the evidence shows, to the areas referred to.

It is notorious however that a large proportion of the Mahomedans of the Malabar district observe the rule of nephews while others follow the rule of sons, both being modes of succession proper to Hindus. These customs have always been recognized by the Courts, and there is nothing violent in the supposition that other Mahomedan communities in the Peninsula may also deviate from the strict Mahomedan Law as to the devolution of property, and may have customs which are not in accordance with the Mahomedan Law of property, but are well and clearly differentiated from that law and are so generally recognized and followed by the community adopting them that they claim recognition from the Courts equally with the Mahomedan customs of Malabar. See as to this the great case of the Khojas called the Agakhan case reported at page 323, Vol. XII, Bombay H. Ct. Reports. The oral evidence for 1st and 2nd defendants which I have to consider on this question consists of two witnesses from Coimbatore, one from Periyagram in the Erode taluq; one from Aravakuruchi in the Caroor taluq, 5 from Palavetti in the Caroor taluq and one from Palghat.

The evidence of Goolam Mohideen who is an ordinary Mussulman, not a Lebbai, and fills the office of a Cazi in Coimbatore, is important. He says the Lebbais do not conform to Mahomedan Law. He mentions as an instance of this want of conformity that females among the Lebbais do not take shares in the property. He says also that at marriages Lebbais perform ceremonies usually performed by Hindus. Goolam Mohideen Ravuttan, Ibraim Saib, Hussain Ravuttan and Periappa Lebbai also speak to the observance of practices and ceremonies at marriages which are universally observed by Hindus and not by ordinary Mussulmans, as the Muhurtakal, Nishitambulam, Nalugu, and Manjal Nir. All the witnesses but Goolam Mohideen the Cazi speak of the practice among the Lebbais of appor-

tioning property by partition deeds, a practice in accordance with Hindu customs and alien to Mahomedan Law.

The mode of sharing property also on a demise differs materially from that enjoined by the Mahomedan and conforms in certain material effects to that of the Hindu Law. Thus under Mahomedan Law the sons are not legal sharers and come in only after the claims of the widow and some other members of the family are satisfied. Under the practice of the Lebbais according to these witnesses the partition is made by and mainly for the sons; unmarried sisters take no shares but receive stridhanam on marriage. In other words they are provided with a marriage portion as under the Hindu Law followed in Madras, and no more. Married sisters take nothing on a partition as they have already received their marriage portion. Some provision is made for childless widows until they marry again. Instances are adduced by several of the witnesses in support of these statements of what has occurred within their own immediate knowledge.

The evidence of Goolam Mohideen Ravuttan shows that he and his brothers after the death of their father held the property in common to the exclusion of their married sisters, also that his father had received his share in a partition with his own brothers, and that in that partition account had been taken of a parcel of the family land which had been previously given away to a sister as stridhanam. He puts in the deed of partition document 37 in corroboration of this. The partition spoken to by one of the witnesses and borne out by document 38 is not material except as an instance of what is unusual among ordinary Mahomedans, a partition of property among sons by the father in his lifetime.

Aravakurchi Thangel Ravuttan produces document 39 which bears him out as to a partition effected between the witness and his brother, in the course of which a provision was made for the maintenance of the widow of another brother. This evidence shows a state of coparcenary unusual among Mahomedans, and that the position of widows among the Lebbais is the same as under Hindu Law, and that they have not the rights of widows under Mahomedan Law.

Document 40 and the evidence of 5th witness Kullar Ravuttan show a partition between 5th witness, his younger brother's widow and younger brother, and that though witness had two sisters no provision was made for them in the partition. The younger brother whose widow was a party to the deed had left children, which explains why she was a party. Mahomed Hoossain Ravuttan says he had four sisters who were married in the father's lifetime. After his death a partition took place. The position of the family was this. Deceased had left three married sons and four married daughters.

The eldest son had predeceased him, but the widow of that son was surviving. A partition was made of the family property among the sons. The four daughters claimed nothing and took nothing. The widow who preferred a claim was not allowed to have any portion of the property. She is a childless widow and is simply maintained by the family.

Pariappa Lebbai is a Katib or reader of the Koran enjoying a small endowment of land attached to a mosque and as holding that office his evidence is of some weight. He testifies to the peculiarities attending the marriage ceremonies of Lebbais noticed by the other witnesses, and in regard to succession, he says that when there are sons a daughter takes no share and that a childless widow is, as among Hindus, simply maintained.

Rahamattoolla Saib has been Monigar of Palavetti for upwards of 20 years. His testimony which so far as it depends on experience supports that already noticed, is confined to the neighbourhood of Palavetti. He says that the property in a family goes to the sons and that daughters only receive marriage portions.

Umar Moodelly is a Lebbai Cazi of Palghaut in the Malabar district. He speaks to the rule of succession called Makkattayam or succession of sons, in contradistinction to Marumakkattayam (succession of nephews or sister's sons) being followed in Palghaut by Mahomedans; the rule being that which is followed by the Hindus of that locality. It appears however from his evidence that though sons take in succession to their father to the exclusion of females they are not regarded as coparceners of their father or as entitled to a share in the property until his death. In this respect the law regulating succession is not in accordance with the ordinary Hindu Law prevailing in the Madras Presidency.

Chinnappa Ravuttan is of Palavetti. He speaks of a condition of family union which is unusual in families following the strict Mahomedan Law of succession to property, but usual with Hindus. He, says "My father had three brothers. His brother's descendants and we are all living together in one family. I have one sister; she is married; we have not divided. My father is dead. My mother predeceased my father. His second wife died shortly after his death. It is not usual to give mothers a share. My step-mother did not get any share; we did not divide. My brothers are living. My uncle's wife did not claim any share in the property." Documents 41 and 42 are extracts from the Registry office of deeds executed by persons who are not before the Court. The transactions evidenced by document 42 show a practice among Lebbais in accordance with that testified to by the witnesses whose evidence has been already noticed in regard to the devolution of property. These documents were objected to as

not being evidence, but under Sections 65 F and 76 and 77 of the Evidence Act I consider that I am bound to receive them. However unsatisfactory it might be to give weight to such documents standing alone seeing that the test of cross-examination cannot be brought to bear upon the transactions to which they testify, I consider that taken in connection with the other evidence considerable weight may be given to document 42 in so far as it is corroborative of the other evidence as to the deviation of Lebbais of the Coimbatore district from the strict Mahomedan Law of succession to property.

Document 41 appears to show merely a distribution of property by a father in his lifetime, and is equivocal in its bearing on the question.

The evidence on the other side to rebut this evidence is that of three witnesses of Madras and four from Cayalpatnam, a port in Tinnevely. The witnesses all say that so far as their experience extends the Lebbais follow the Mahomedan Law of Inheritance.

Naina Mahomed Lebbai Alim fenced with all the questions and gave his evidence badly, but not, (in my judgment,) from a desire to withhold the truth, but from indignation at the possibility of its being asserted or supposed that a Mahomedan of any class or sect could venture to depart from the course prescribed by Mahomedan Law; and I am not disposed to doubt the truth of the evidence of the other witnesses. From the evidence of the 1st witness it appeared that a deed of partition had been entered into by his father with him and his brothers and sister in which the property is described as the 'self-acquisition' of the father: document D is the sister's counter-part showing that she was treated as one of the parties to the proceeding and entitled to a share.

The use of the term 'self-acquisition' however seems to imply that it was thought necessary to make it clear that the property was not to be regarded as property common to the family. This imports that the supposition which it was necessary to exclude was one which without such express exclusion it would not be unreasonable to entertain; and therefore indicates that the common enjoyment of family funds in union is not unusual in Lebbai families. The evidence of the other witnesses however is strong to show that in the town of Madras and in Cayalpatnam at least the Mahomedan Law of succession is followed. I think, however, that it is shown by the other side that in the interior, or at all events in the district of Coimbatore and in Palghat, there are peculiar customs in regard to marriage and succession which have been borrowed from the usages of the Hindu community in whose midst the Lebbais have been thrown, and that the most prominent feature of the rule observed as to succession is that on the death of a man, leaving sons and unmarried

daughters and a widow, the sons take to the exclusion of the females, who are simply maintained, and that married daughters are regarded as entitled, as among Hindus, to no provision whatever.

I entertain no doubt from the evidence that these are well established customs.

The other evidence in the suit tends to confirm this view. There is no ground for supposing that Magdoo was not on affectionate terms with his wife and daughters; yet when it was put to him by the Pleader, Gnyanabaranam, that he had made no provision for the widow, and that he ought to do so as he was governed by Mahomedan Law, he said at once that in regard to property he had nothing to do with Mahomedan Law. Fourth defendant examined as 7th witness for plaintiff, says, he never heard of Mahomedan Law, till a Pleader's son at school gave him a copy of it; that is, probably a copy of some text-book on the subject.

4th witness for plaintiff Bayooddin Saib, a Cazi, in answer to the question 'If a father dies leaving sons and daughters, what is done?' says a lump sum is set apart for marriage of the daughters. It is only in one out of a hundred cases that they give a half share to the daughters. After death of the husband, the widow is maintained during life, but gets no share.

Witness Muttumira, 3rd witness for 1st and 2nd defendants, says, "I settled with Magdoo as to share of Saiyed Mahomed. They were undivided. That is the way we Lebbais act: we are following Hindu Law as to property: Mahomedan in religion: as to inter-marriages we act in accordance with Mahomedan Law." He also says "of course according to Mahomedan Law daughters are entitled to a share. But amongst us Lebbais' daughters do not get a share, I have never known of an instance of their doing so."

The 6th witness for defendants (Kadersa Ravuttan) says, "I am told female children inherit according to Mahomedan Law, but I have not seen it practised."

Gnanabaranam, a pleader who deposed as 1st witness for 1st and 2nd defendants, says, 1st defendant remained quiet when Magdoo said he followed Hindu Law—was not surprised at his saying so—was aware of the practice among Lebbais. The practice among Lebbais is for daughters to get no provision, and for unmarried girls to be under the protection of sons.

Looking at what is, I think, the fair result of the evidence noticed, it appears to me that the testator was not bound to follow the Mahomedan Law in the distribution of his estate by the Will, and that in the mode of distribution of what he bequeathed, he followed the customs by which his community is governed, in the preference of males to females.

It will hereafter appear that in regard to a great portion of the property in his hands Magdoo must be regarded as a trustee for 3rd and 4th defendants; as to another portion as a partner of 1st defendant; and that as to such portion as he might call exclusively his own, he was probably under contractual obligations to 1st and 2nd defendants to give them a large share of it.

What the testator had actually to leave therefore was much less than what he purported to bequeath, and if the Will were set aside as invalid, and the property apportioned having regard to the rights of 1st and 2nd and of 3rd and 4th defendants and 5th, 6th, and 7th defendants' shares given to them in the portion which properly appertained to Magdoo's estate, the residue which would have fallen to plaintiff and his brothers, would probably be much less than what was actually bequeathed to them. But, however, this may be, I think the evidence is sufficient to show that the Will is not invalid by reason of its being not in accordance with Mahomedan law.

Then there is the question of whether the Will is an incomplete instrument, the lists according to which Magdoo intended to distribute the property not having been appended to it.

The evidence is very strong to show that the lists were prepared by Magdoo and annexed to, and declared part of, the Will just before his death.

In the early part of the kararnama, to which all the principal members of the family including 4th defendant were parties, it is recited that the division is in accordance with the lists of property left by Mahomed Magdoo and the evidence now given by 4th defendant that the lists referred to in the kararnama as "Nos. 1, 2, 3, to be marked A B C" were three bound books, ledgers of Magdoo, is clearly false. Ledgers would certainly not be called lists; and his evidence in this respect is inconsistent with what he, in another place, says, that A attached to the kararnama was prepared at the time of the kararnama. There never has been any suggestion that the lists have been forged subsequently to the death of the testator. It is certain that they were in existence and filed in Court with the Will soon after his death when application was made for a certificate under Act XXVII of 1860, and I entertain no suspicion of the evidence of 1st defendant and others who speak to the lists having been made over to 1st defendant by Magdoo with the Will a few days prior to his death.

There is no ground, therefore, for regarding the Will as invalid on account of an omission to complete it by the specification of property to be found in these lists.

I now come to the question of whether the Will so far as it affects

plaintiff has been superseded by the kararnama, and whether plaintiff is bound by that instrument.

As before observed the validity of the Will was called in question as soon as it was drawn up and ready for execution. 1st and 2nd defendants were dissatisfied with it, as they considered themselves entitled to a large share in the estate.

5th defendant was dissatisfied with it as it contained no provision in her favor.

3rd and 4th defendants after the death of the testator were dissatisfied with the provisions which postponed their possession of the share allotted to them. It was also discovered that Government Promissory Notes to the amount of rupees 35,000 were omitted from the lists of property annexed to the will. These Habib (eldest son of the testator) claimed for himself and his young brother (plaintiff).

Witness Muttumira Ravuthan says—"In lifetime of Habib several of us met together and spoke. Shaik Naina Kader Saib, Gnyanabaranam, Haidroos, myself, Kader Mira Sahib of Palivetti: he is brother-in-law of Shaik Naina and Kassim. Habib also was there. We met to give advice to be at peace, not to quarrel. Gnyanabaranam took the Will to Madras being executor. We suggested that something should be given to Magdoo's widow. I said 'you children make provision for her that she may not be driven to the necessity of stooping down to your wives.' Haidroos and Kassim joined in this. Haidroos also spoke though not much. All spoke in one tone in behalf of the lady. Haidroos also did so. Gnyanabaranam, Haidroos and I all spoke in the same way."

This is the evidence of one who was both a partner of Magdoo in the Madras business and (as the evidence shows) an intimate friend of his, and who is not personally interested in the estate of Magdoo.

It appears from the evidence of Gnyanabaranam, Muttumira and 1st defendant, that one of the five executors having died, the question arose as to how the certificate under Act XXVII of 1860 should be obtained, whether in the name of some one or of all the survivors. Messrs. Barclay and Morgan were consulted. A petition for a certificate was ultimately put in by 1st defendant which was opposed by Habib and it was on the dismissal of this petition that the idea of a family arrangement came to be entertained.

Gnyanabaranam says, "Afterwards a kararnama was executed. I suggested the mode of drawing it up. It was brought to me after execution by 1st defendant and Habib. This is the kararnama. They said all their disputes were over and 1st defendant was to obtain certificate in his own name. ***** I was consulted by the members of the family. By Haidroos, Muttumira Ravuttan and defendants 1

to 4, before the execution of the karar, with reference to the division of the property. 3rd and 4th defendants claimed that notwithstanding the non-expiry of the time fixed in the Will, they should have the lands and money and jewels at once. Habib asked that a certain amount of money should be given from each share to his mother. Haidroos first claimed 10,000 rupees from each share; afterwards assented to 5,000. He took an active part. Habib went and spoke to his mother, and Habib told me she had consented to receive 5,000 from each share. Disputes had gone on for two or three weeks before karar was prepared. It was all done openly. There was no attempt at concealment of the family affairs."

The evidence of these two witnesses and of 1st defendant sufficiently explains the real origin of the kararnama. It is apparent to me that the most complete confidence was reposed by the entire family in 1st and 2nd defendants the managers in possession of the estate, and that the statement of Haidroos that the object aimed at by the other parties to the kararnama was to secure a complete disclosure of the particulars of the property, over which 1st and 2nd defendants had control, is entirely without foundation.

Habib, plaintiff's elder brother, 1st and 2nd defendants and 3rd and 4th defendants were parties to the kararnama and 5th and 7th defendants attested.

The questions now to be considered are whether there was a reasonable ground for the execution of this document in supersession of the Will, whether plaintiff's interests were properly represented and protected, whether the compromise is a fair and reasonable one, meeting the difficulties which suggested its execution, and whether plaintiff ought to be held bound by it.

I think that the dissatisfaction expressed in regard to the Will by so many members of the family interested in the distribution of the estate; the natural desire of the plaintiff and his brother Habib to provide definitely for 5th defendant their mother which seems to have met with a ready response from 1st and 2nd and 3rd and 4th defendants, the fact that a large sum in Government Promissory Notes had been omitted from the complete distribution of the estate which the testator had intended to make; the circumstance that while 1st and 2nd defendants' services in the management of the estate for many years were acknowledged, there was a question of what they were entitled to on account of those services; all operated as reasonable and sufficient grounds for a settlement which should supersede the Will. The evidence does not show that 1st and 2nd defendants, after the death of Magdoo, put forward a claim to a larger share than the Will gave them on the ground that Magdoo had made them the promise which 1st defendant now says he did make of

leaving them $\frac{1}{2}$ share of the property, and that they had continued their services on that understanding; but I think it is clearly shown that 1st and 2nd defendants left Magdoo and set up business for themselves on learning the proposed provisions of the Will, and the family must have been quite aware that 1st and 2nd defendants had then put forward a claim to a larger share than the Will was to, and did, give them, and this probably formed an important item in those dissensions of the family which all the members of the family and the friends who were in their confidence were anxious to abate.

5th defendant also was not content to rest her demand upon mere propriety or convenience, but raised the question of whether she was not entitled to the share of a widow under Mahomedan Law.

It does not clearly appear whether any doubts actually occurred to the members of the family as to the law of testamentary and intestate succession by which they were governed. The probability, I think is, judging from the evidence, that all must have felt well satisfied that they were not governed by Mahomedan Law, but by the rules which I have already said the evidence on that particular shows were followed by members of the Lebbai community in that part of the country. But confidence in regard to that point would not determine the proper share of the 3rd and 4th defendants, and still less would it determine those of the 1st and 2nd defendants; and in regard to 5th defendant although her claim was made upon a basis which was not recognized, there were still considerations of affection, of propriety and of convenience which dictated a compliance with her claim to a provision such as would render her independent of her sons and the other members of the family. But these considerations were necessarily attended with doubts as to the exact amount of the provision to be made.

The main principle running through the decisions of the Courts in cases of family compromises and arrangements is that if fair, they will be upheld when their object is to prevent or put an end to litigation and to preserve the peace and property of families.

I think there was clearly such an object in the present case, and that there was, therefore, reasonable and sufficient ground for entering into a family arrangement.

Then were plaintiff's interests properly represented and protected? By the kararnama the property was divided into three shares of which Habib and plaintiff as the sons of Magdoo took one share, which was somewhat larger than either of the other two shares; 3rd and 4th defendants as sons of Syed Mahomed, brother of Magdoo, took the second share; and 1st and 2nd defendants, sons of another brother of Magdoo, the third share.

Habib was to take the first share and hold it for himself and plain-

tiff in equal shares. Haidroos, plaintiff's father-in-law, was present and attested the kararnama. Here were two persons, one the elder brother avowedly acting for plaintiff, and the other necessarily interested in seeing that plaintiff obtained his fair share.

It cannot, therefore, I think, be doubted that the plaintiff was properly represented, and as plaintiff and Habib were placed upon an equal footing, the arrangement, if a fair and reasonable one as regards Habib, must have been equally so as regards plaintiff.

Now the estate excluding for the present the later partnership (the Madras business) cannot be fairly regarded as the exclusive property of Magdooom acquired by his own exertions and his own funds.

It is clear from the letters which have been filed and the evidence of Muttumira that the father of 3rd and 4th defendants was the partner of Magdooom in a business which was never wound up, and in the absence of evidence to the contrary the presumption is that they were entitled to equal shares in the profits.

In the absence of evidence also showing that the business subsequently carried on and the accretions to the property therefrom owed anything to funds other than those derived from the original business, the funds in the hands of Magdooom at his death would have to be regarded as appertaining to a family partnership, in which 3rd and 4th defendants, the sons of Syed Mahommed, would be entitled to an equal share with Magdooom.

The plaintiff demands that the estate be apportioned according to Mahomedan Law and the plaint involves the assumption that the other parties to the kararnama have taken advantage of plaintiff; in other words have taken more than they would be fairly entitled to.

On the assumption which it is necessary to make that the business (excluding the Madras business) was a family partnership in which 3rd and 4th defendants were entitled to $\frac{1}{2}$ and plaintiff and Habib as representing Magdooom to the other half and for the present excluding 1st and 2nd defendants from all share in the property, let us compare the share of plaintiff by the kararnama with what he would have had under Mahomedan Law.

The entire estate is said to be worth rupees 3,50,000 in which Magdooom's share would be 1,75,000 rupees. In this the widow would be entitled to $\frac{1}{2}$ and the two daughters each to $\frac{1}{4}$ of the remainder while each son would be entitled to $\frac{1}{4}$ of the same remainder, i.e., 5th defendant would be entitled to 18 parts out of 144, each daughter to 21 parts and each son to 42. By the death of Habib, his share would be divisible, but this advantage to plaintiff's share, by following Mahomedan Law, cannot be taken into account, as the question of whether the compromise was or was not a fair one must be determined with reference to the actual state of things at the date of the

kararnama. Plaintiff, therefore, would take $\frac{1}{2}$ of the whole share of Magdooom or $\frac{1}{4}$ of the two shares of Magdooom and 3rd and 4th defendants.

Now the entire estate including the Madras business is said to be worth rupees 3,50,000.

The distribution would be as follows:—1,75,000 to 3rd and 4th defendants. 1,75,000 to Magdooom's share. In this $\frac{1}{2}$ to the widow or 21,875.

Of the remainder 1,53,125 the two daughters would be entitled each to $\frac{1}{2}$ and the two sons each to $\frac{1}{4}$.

One-sixth equals 25,520. The shares of the two daughters, therefore would, be 51,040, and the share of each son would be 51,040.

By the compromise plaintiff's share is rupees 58,000. So that under the compromise or family arrangement, it is clear that plaintiff takes more than he would be entitled to under Mahomedan Law.

If, however, plaintiff be not restricted to the narrow basis of his claim to have the instruments set aside as involving a distribution of the property contrary to Mahomedan Law, but if, instead, we enquire whether the compromise is a fair one for plaintiff in the only other possible view of his right, viz, that succession and distribution follow the rules of Hindu Law, then the case stands thus.

No doubt if 1st and 2nd defendants be excluded from a share in the estate, the amount which each of the four sharers Habib and plaintiff and 3rd and 4th defendants would take, would exceed that which they will receive under the kararnama. But the way in which Magdooom treated 1st and 2nd defendants; the bequests to them in the Will; the general consent of all the members of the family, even Habib, after the execution of the kararnama to the application for a certificate under Act XXVII of 1860 being made by 1st defendant; the number of years during which they have lived jointly with Magdooom and had the most important share in the management of Magdooom's business to the increase of which it is not disputed they very largely contributed; all point to 1st and 2nd defendants having in the family a position very different to that of mere managers.

It may be that they would be in a position to establish a right either under a promise from Magdooom in consideration of their further services, or in some other way, to share largely in what they had contributed so largely to increase. And this the compromise seems to show was the opinion of those members of the family who voluntarily joined in it, as otherwise it is scarcely conceivable that Habib and 3rd and 4th defendants with the assent of Haidroos who attested, would have surrendered to 1st and 2nd defendants so large a share in the estate. I think, therefore, that the members of the family most interested and best capable of judging regarded it as

fair and right to allot a share to 1st and 2nd defendants and that it must be held that the share so allotted was a proper share and not an excessive share. If that be so, it follows that the apportionment of the remainder of the estate between Habib and plaintiff on the one hand and 3rd and 4th defendants on the other in a manner very favorable to the former was certainly not such an arrangement as plaintiff is entitled to call in question on the score of unfairness.

The question, however, of fairness or unfairness as regards plaintiff does not conclude the whole matter.

There is still the question whether as regards other persons interested the kararnama was a fair arrangement.

The cases therefore of 5th, 6th and 7th defendants have to be noticed.

I have already said that the evidence taken as to the customs of the Lebbais shows that the widow would not be entitled to share, so that the separate provision made for her by the kararnama is more than she would have a right to claim.

That evidence also establishes that the exclusion of 7th defendant the married daughter from a share or provision, and of 6th defendant from a share or present provision, is in strict accordance with the customs in regard to the devolution and distribution of property by which this Lebbai family was governed. 7th defendant appears to me to have assented to the arrangement as she attested without remonstrance made either at the time or afterwards; the circumstances rendering it impossible that she should have been ignorant of what was being openly and publicly done.

For the same reason I think there can be no doubt that 5th defendant in attesting freely assented. 6th defendant was, I think, sufficiently represented by Habib her brother and 5th defendant her mother.

At the same time, if it be once established that 5th, 6th, and 7th, defendants by the custom of their community are not entitled to a share but only to a provision on marriage, their assent to the kararnama was not necessary, except in the case of 6th and 7th defendants as renouncing the provisions of the Will in their favor bequeathing them 500 rupees each. 7th defendant is already married and provided for, and 6th defendant will still be entitled on her marriage to a suitable provision, so that by the compromise, they are not in a worse position than the customs of their community would ordinarily entail, and in the absence of any application on their part to have this kararnama set aside, I do not see that I am called upon to pronounce it invalid or defective because it withholds from them the sums which the testator bequeathed to them by his Will.

I dismiss the suit with costs.

2nd August 1878.

(Signed) L. C. INNES.

APPENDIX III.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*Wednesday, the fourteenth day of September,
One thousand eight hundred and eighty-one.*

PRESENT:—

THE HONOURABLE SIR CHARLES A. TURNER, KNIGHT, C.I.E.,
Chief Justice.

THE HONOURABLE MR. JUSTICE INNES.

APPEAL No. 138 of 1880.

Ramanāmi Seshamma, Rāmāyā, } *Appellants (Defendants.)*
and Lakshmayya.

Deshamukhi Rāmanāmi } *(Respondent Plaintiff.)*
Swami Rau.

Appeal against the Decree of the District Court of Kurnool in Original Suit No. 3 of 1880.

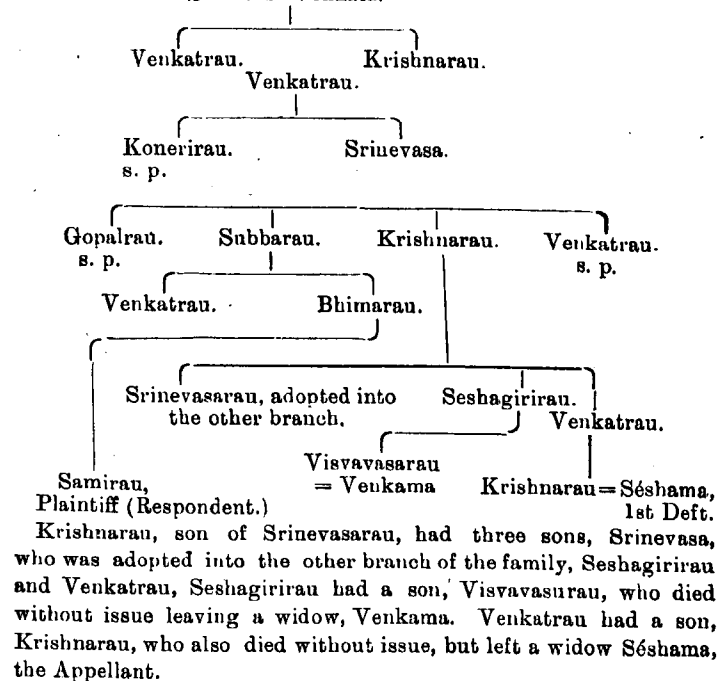
JUDGMENT.

The original Sanad-holder of the Inams of which one moiety is claimed in this suit was Srinivasa Venkata. On his death, his two sons, Venkatrau and Krishnarau, succeeded, and it is admitted, held the Inams in equal moieties. Venkatrau left two sons, Konerirau, who died without issue, and Srinivasarau.

Srinivasarau left four sons, Gopalrau, Subbarau, Krishnarau, and Venkatrau, of whom Venkatrau and Gopalrau, died without issue.

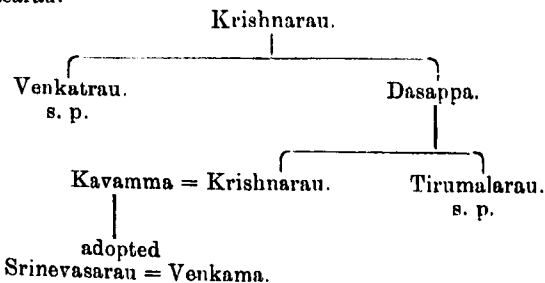
Subbarau had two sons, Venkatrau and Bhimaru.

Bhimarau had one son Samirau, the Plaintiff, Respondent.
Sriveasa Venkata.



To return to the other branch of the family.

Krishnarau had two sons, Venkatrau and Dasappa, Venkatrau died without issue. Dasappa had two sons, Tirumalarau and Krishnarau, who died in their father's lifetime without issue, but Kavamma, the widow of Krishnarau, with the consent of Dasappa, adopted Sriveasaran.



Sriveasaran died 1823-24 in the lifetime of Kavamma who died in 1835, and Venkama died in May 1870.

The moiety of the Inams which descended to Krishnarau, son of the Sanad-holder, is the subject of this suit, but before detailing its devolution it will be desirable to advert to the circumstances of the other which descended in the line of Venkatrau, and eventually came into the possession of Krishnarau, the Appellant's husband.

In 1858 Venkatrau, the uncle of the Respondent, returned from a distant part of the country, where he and his father Subbarau had long been residing and laid claim to a $\frac{1}{4}$ th share of the Inams, being one moiety of the moiety held by his cousin Krishnarau, the Appellant's husband. The claim was compromised by an agreement of which the material provisions are as follow:—"As I have not had the enjoyment of the lands for a long time, and as you say you will not make a partition of the lands, and as a few elders, after a consideration of the income of the lands you are enjoying [have arranged] you should pay me an annuity of Rupees 30-0-0 * * you are on or before the 15th *Magha* in each year to pay to me, or in my absence the person named by me, the said sum of rupees 30. So long as the said Inams continue in your possession or in that of your heirs, myself and my heirs shall be entitled to receive only the said annuity of rupees 30. Neither my heirs nor I shall ask any share in the Inams. * * If at any time you should make default in the payment of the said annuity, you shall make over to us the just portion of the Inams in your possession, due to us according to the genealogical tree."

The moiety of Krishnarau, son of the Inam-holder, had descended on his death to his son, Dasappa. When Kavamma, with the consent of her father-in-law, adopted Sriveasa, Dasappa probably apprehensive lest the effect of an adoption under such circumstances should not be understood, registered in the Mahakima Court of Nandial, a deed of gift conveying his moiety of the Inams to Sriveasa. After Dasappa's death, dissension broke out between Kavamma and her adopted son. She appealed to the civil power and obtained an allotment of a portion of the Inam lands for her maintenance. On the death of Sriveasa in 1823-24, without issue, she took possession of the entire moiety. Her claim was contested not by the widow Venkama, the true heir, but by Venkatrau, the natural brother of Sriveasa, who apparently on behalf of his branch of the family, instituted proceedings in the Mahakima Court of the Nawab of Kurnool, with the result that the case was treated as if it were governed by the Mahomedan law, as understood by the Court, and the Court pronounced its opinion that a $\frac{1}{4}$ th share appertained to the widow, Venkama, and that the residue appertained to the natural brothers of Sriveasa in equal shares.

Having ascertained the mind of the Court, Kavamma appealed to

her opponents to allow her to remain in possession during her life, and it was arranged that she should remain in possession during her life, but without power of alienation: and this arrangement was embodied in the final proceeding in that suit.

Kavamma accordingly held possession until her death in 1835, when Venkama, the widow and rightful heir of Srinevasa, obtained possession.

In 1864 Venkama, pretending she had received authority from her husband, assumed to adopt her sister's son, and endeavoured to get his title to the moiety recognized by the issue of puttahs in his name. Thereupon, Krishnarau, the husband of the Appellant, instituted a suit in which, admitting the title of Venkama to a life-interest in the property, he sought to avoid the attempted alienation by Venkama, and prayed for a declaration of his right to succeed on her death as reversioner. Venkama, in defence, pleaded an adoption made in pursuance of an authority from her husband. She failed to prove such an authority, and it was declared she was incompetent to alienate, but the Judge properly refused to declare the title of the then plaintiff as reversioner, observing that such a declaration might be rendered of no avail by the appearance of a nearer heir. In 1870-71 after the death of Venkama, Krishnarau, the Appellant's husband, instituted a number of suits to recover from the tenants the lands, and obtained decrees.

The Respondent applied to be made a party to these suits in order to assert his own title, but his application was refused on the ground, that it would have introduced a question of succession between persons having conflicting claims to the proprietary right.

In 1872 Krishnarau, by deed of gift, conveyed the lands Nos. 75, 76, 77, and 78 in the plaint to Mulla Sastrulu, the elder brother of the Appellants, Rámayya and Lakshmayya.

In January 1880 the Respondent applied in *forma pauperis* for leave to sue for a one-half share in the moiety of the Inams held by Venkama.

His petition having been granted and converted into a plaint, he subsequently applied for leave to include in the plaint a claim for mesne profits. This was granted before the Appellants filed their written statements.

They pleaded, that the title of Venkatrau, the father of Krishnarau, was established by the decree of 1830; that Venkama had enjoyed possession not in virtue of her own right, but by the permission of Venkatrau and Krishnarau; that the Respondent had, by the agreement of 1858, altogether renounced his title to the Inams, accepting the annuity of rupees 30 in lieu thereof; that Krishnarau had been put to considerable expense in recovering the moiety held

by Venkama by means of the suits instituted by him in 1870 and 1871, for which compensation was due by the award of a $\frac{1}{4}$ th share before partition of the residue; that the gift by Krishnarau of lands Nos. 75, 76, 77, and 78 to the 2nd and 3rd Appellants could not be impeached, and that the claim for mesne profits was exaggerated. The Judge held that the agreement of 1858 did not estop the Respondent from advancing the claim made in this suit, inasmuch as on the true constructions of the agreement it related to that moiety only of the Inams of which Krishnarau was at the time in possession. He found that the decree of 1830 had been treated by the family as a dead letter. He held that, assuming the rule which gives a share to a co-sharer for the trouble and expense incurred by him in recovering property, which had been lost to the family, the rule could not apply to the circumstances of the litigation in 1830 or of the litigation in 1870-71, inasmuch as the property had neither been lost to the family nor recovered; and as to the mesne profits, in default of reliable information which might have been supplied by the Appellants, he accepted to a considerable extent the estimate of the Respondent, confirmed as it was generally by the valuation adopted by the husband of the 1st Appellant in other proceedings. Consequently, he decreed, that the Respondent should obtain possession of the immoveable property claimed by him, with the exception of the interest claimed in Nos. 31 and 33, which had been surrendered to the Collector, and should recover mesne profits at the rate of rupees 619-8-0 for three years before suit.

In appeal, substantially the same pleas are repeated with the addition, that it has been argued orally that the claim is barred by limitation, and that objection is now taken to the competency of the Judge to allow the addition of the claim for mesne profits.

The objection, that the claim is barred by limitation, rests on the assertion that the possession enjoyed by Kavamma and Venkama was hostile to the reversioners.

The first questions then that present themselves for determination are, whether or not the succession to the moiety of the Inams appertaining to the line of Krishnarau, son of Srinevasa Venkata, was interrupted by the possession of Kavamma, and the decree of 1830, so as to defeat the claims of heirs claiming under Srinevasa, the adopted son of Dasappa, and whether, if it had been so interrupted, the subsequent possession by Venkama was not in right of her title as widow, and, as such, whether it did not operate to restore the succession, and, lastly, whether the members of the family who might have taken advantage of the decree did not acquiesce in the possession of Venkama in right of her husband, and in the effect which the recovery of possession by her had on the succession.

Of the proceedings in 1830 we have but the judgment of the Court. It is apparent from the recital of the claim then made, that Venkatrao did not advance a claim solely on his account, nor on account of himself and his brother Seshagirirao for he stated Seshagirirao was dead. He traced the pedigree of the family and mentioned apparently as persons interested besides himself, his nephew Viava-sarao and his cousins, Bhimarao and Venkatrao, and he complained that Kavamma contemplated alienating the property by gift to her son-in-law and other relatives, thereby destroying "our" hereditary right. It also appears from the same document that after the opinion of the Mahomedan Judge had been pronounced as to the persons entitled to the succession, the "plaintiffs and others" assented to the arrangement, which was finally embodied in the Judgment and which simply secured to Kavamma a life-interest in the property, and declared her incapable to aliene any portion of it. The terms "ours" and plaintiffs and "others" may have included all members of the family who could claim in succession to Srinevasa. However this may be, there is sufficient evidence to show that the members of the family who might have advanced their claims under colour of the opinion pronounced in the judgment of 1830 thereafter acquiesced in the devolution of the inheritance in accordance with their own personal law.

On the death of Kavamma, Venkama took possession, so far as it appears without opposition, of the whole estate of her husband. In his deposition (IV) taken by the Tahsildar in 1865 Krishnarao, the 1st Appellant's husband, did indeed advert to the decision of 1830, and stating that it recognised Venkama as entitled to a 1/4th share, accounts for her possession of the entire moiety by stating that his father, paternal uncle, and others were then dead and he was a young boy living at a distance with his maternal grandfather, but he went on to say that he had mentioned the circumstances to the Inam Commissioner, who after consideration had informed him he would have it after Venkama's death, and that he had assented to the decision. He subsequently stated he had no desire to interfere with Venkama's enjoyment during her life, and desired only that she should be restrained from making an adoption, and that if she should adopt the name of the person adopted, might not be entered in the Revenue Registers as proprietor of the Inam villages. The suit, instituted by him in November 1865, was prosecuted on the same footing, namely, that Venkama was, as heiress of her husband, entitled to hold the property during her life, and that on her death it would pass to the persons entitled in reversion, and on that footing Venkama defended the suit. She did not assert a title in part founded on the decision of 1830, and in part on prescription; she claimed, as her husband's widow, the right of adopting a successor to the estate held by her as

the estate of her husband, in virtue of an authority conferred on her by her husband; and on the same footing that the property was held by the widow in virtue of her right as widow, and that on her death it would revert to the other heirs of her husband the Judge inhibited the widow from aliening it, and refused to declare an absolute title in Krishnarao as reversioner. We are in accord then with the District Judge in the opinion he has expressed that the family treated the decision of 1830 as a dead letter so far as it purported to declare rights at variance with the rights which would devolve on them under their personal law. The possession of Kavamma subsequently to the decree of 1830, could hardly be regarded as a possession hostile to the family. The possession of Venkama certainly was not hostile. We, therefore, hold that the claim is not barred by limitation.

We are also in accord with the Judge that on the true construction of the agreement of August 10th, 1858, the Respondent released his claim on that moiety only of the Inams which appertained to the common ancestor of the parties to the agreement, Venkatrao son of the Sannad-holder. The Respondent had demanded and been refused partition. To determine the amount that should be paid to the Respondent account was taken of the income of the lands enjoyed by Krishnarao, and the release was to take effect so long as the property to which it related *continued* in the possession of Krishnarao and his heirs.

At the time the agreement was made Krishnarao was in possession only of the moiety of Venkatrao. It would have been unreasonable to take account of the income which then and for many years after was enjoyed by Venkama. The agreement was the compromise of a claim for partition; but partition could at that time have extended only to the lands held by Venkama. For these reasons we hold that the Respondent is not estopped by the agreement of August 10th, 1858, from maintaining a claim to the moiety of the Inams which reverted to his branch of the family on the death of Venkama.

It is next urged that Krishnarao would have been entitled on partition to a larger share because he had been at the pains to recover it for the family. But among other conditions which are required to authorize the application of that rule it must be shown the property was held hostilely to the family, and that there had been an abandonment, express or implied, of their rights of suit by members of the family who were competent to sue.

When Krishnarao instituted proceedings against Venkama, she did not hold adversely to the claims of the reversioners. They might have sued, but were not bound to sue for a decree declaring the widow incompetent to aliene the estate. The abstinence of the Res-

pondent from taking part in the proceedings against Venkama, if he was aware of their institution, could not be regarded as an implied abandonment of his rights in favour of Krishnarau. In the litigations, instituted by Krishnarau against the tenants after Venkama's death, the Respondent so far from abandoning his claim endeavoured to intervene.

The rule then will not, under the circumstances, apply, and the objection taken to the decree on this ground cannot be sustained.

The gift made by Krishnarau cannot affect the Respondent's right to obtain, what he seeks in this suit, a half share in the moiety of the Inams which, on Venkama's death, reverted to him and Krishnarau jointly. There is, it is true, no express provision of the Code authorizing the addition of a cause of action after the plaint has been filed: we are not however, prepared to hold the Judge was wrong in allowing the addition of a claim for mesne profits, that being a claim cognate to the principal claims made in the suit.

The provisions of Section 53 appear to apply to cases in which the Court has a discretion to reject a plaint or allow it to be amended, and where if it were not amended it would be defective or badly framed.

The claim for mesne profits was added probably before the parties were served and certainly before they filed their written statements and issues were framed. They cannot have been prejudiced by the action of the Judge in allowing the Respondent to include in one suit a cognate demand which otherwise would have been made the subject of a separate suit at an increase of cost to the parties.

The Appellant, who was in the better position to give evidence of the amount of mesne profits actually received, failed to produce all the evidence it was in her power to produce, and the Judge was entitled to consider the estimate which had been made by the Appellant's husband in previous litigation. It is not shown the amount awarded is excessive. The appeal fails and is dismissed with costs.

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