*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bhugwandeen Doobey* v. *Myna Baee, from Bengal; delivered 14th March,* 1868.

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Present:

SIR JAMES W. COLVILE.
SIR EDWARD VAUGHAN WILLIAMS.
SIR RICHARD T. KINDERSLEY.
LORD JUSTICE ROLT.

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SIR LAWRENCE PEEL.

THE following are the undisputed facts upon which this Appeal arises:—Rae Deena Nath, a Hindoo banker, of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th of June, 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo law of the Benares school, were his two widows, viz., the Respondent, and Doola Baee, since deceased. Immediately after his death, however, a document, purporting to be a will, executed by him in favour of one Hunwunt Pershad, to whom, jointly with a person named Bithul Pershad, it gave the management of the property, was propounded. The title of Hunwunt Pershad, claiming under this alleged will, or as the adopted son of Rae Deena Nath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An Appeal to Her Majesty in Council against their decisions is pending, but it has not yet been set down for argument in consequence of the death of one of the parties; and for the purposes of

this Appeal it must be assumed that Deena Nath died childless and intestate, and that the claim of Hunwunt Pershad was unfounded. Nor would it be necessary to refer to that claim, but for the arguments which the Appellant's Counsel have founded on the partition between the widows, which was in some measure caused by it, and upon the alleged collusion of the Respondent with the Claimant.

The first consequence of the claim was that a summary suit under Act XIX of 1841, to determine the right to the immediate possession of the property, was instituted in the name of Doola Baee, who was then a minor, by her uncle and guardian, in which a curator was appointed under that Act. When this suit came to a hearing the Judge pronounced against the will; and directed that the whole estate of Deena Nath should be equally divided between the widows, and that the curator should carry out that order without delay. The property was thereupon divided according to the two lists set forth at pp. 51 and 58 of the record; each widow was put in possession of her share; and Doola Baee continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of November, 1857; having on the 21st of August, 1857, made a will which was registered on the same day, whereby she disposed of her share of the property inherited from her husband in favour of her father (the Appellant), and her infant brother Kalooram, who is also represented by the Appellant on this record.

Some steps seem to have been taken by the Respondent and also by Hunwunt Pershad to resist the registration of this will in the lifetime of Doola Baee; and upon her death the Respondent applied for the attachment of the property in dispute, being that taken by Doola Baee under the partition as specified in the list before referred to; and for the appointment of a curator under Act 19 of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Baee's will, she commenced the regular suit out of which this Appeal has arisen on the 21st of December, 1857, in the Court of the Principal Sudder Ameen of Benares.

The issues settled in the suit were :—

1. Whether there was any informality in the institution of the suit.

2. Whether the Plaintiff (the Respondent) was legally competent to institute it.

3. Whether Doola Baee was a minor or not at the date of the alleged execution of the will.

4. Whether the will was fraudulent or a *bonâ fide* instrument.

5. If a person die leaving two widows, and one of the widows subsequently dies leaving a will, who is entitled to succeed according to the Shasters, the surviving widow or the legatee of the will (supposing the husband's estate to have been divided between the widows, and also supposing no such division to have been made)? And is a widow competent to make a will in favour of her brother and father under the Shasters?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favour of the Appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal Sudder Ameen (Appendix, p. 68) found—first, that the Respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcileable with the averments made by her in the suit, under Act XIX of 1841, wherein she had supported the claim of Hunwunt Pershad; secondly, that by reason of the partition Doola Baee was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an Appeal to the Sudder Court of Agra. The first Judgment of the Court was adverse to the finding of the Principal Sudder Ameen on the first and second issues, and held that the Respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding that Doola Baee was competent to dispose of the inheritance derived from her husband, when it had been distinct and divided, and had effectually done so, it dismissed the Appeal. It treated her power to dispose of the moveable property as certain; her power to dispose of the immoveable property as more open to question.

The Respondent applied for a review of this Judg-

ment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was that the case was re-heard before a full Bench, when the Court decided that according to the law of the Benares school Doola Baee was incompetent to dispose of either the moveable or immoveable property which she had inherited from her husband, and made a Decree in favour of the Respondent. This present Appeal is against that Decree.

From the foregoing statement it is obvious that the principal question between the parties is the broad and general one, whether according to the law of the Benares School a Hindoo widow is competent to dispose, by will or deed of gift, of either moveable or immoveable property inherited from her husband, to the prejudice of his next heirs.

The learned Counsel for the Appellant have, however, contested the right of the Respondent to have the present case decided on this issue upon various grounds. They contend—

1st. That, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Prineipal Sudder Ameen, she has so shaped her case on the pleadings that she cannot in this suit insist on her rights, whatever they may be, as next heir of her husband in succession to Doola Baee.

2ndly. That it was not competent to the Sudder Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immoveable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before, the determination of the principal and general question of Hindoo Law. One was raised by Mr. Leith on behalf of the Respondent, and was to the effect that as one of two Hindoo widows taking as co-heirs to their husband, she is in a more favourable position than that of a person claiming as next heir of the husband in succession to a single widow deceased.

The other, which was taken by the other side, is, what was the effect of the partition, either by way of enlarging the power of Doola Baee to dispose of the property, or affecting the right of the Respondent to question her disposition. Their

Lordships will consider all these questions in their order.

At the close of the argument for the Appellant, they intimated that in their Judgment the Respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her husband against the claims of Doola Baee. Their Lordships agree generally in that part of the first Judgment of the Sudder Court which ruled that the Respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the co-heirs of her husband, when that claim was decided to be untenable. Nor do they think that her alleged alienation of her share can be urged against her by the Appellant as a bar to the present suit. It may have been an improper act; it may be one which Doola Baee, had she been the survivor of the two widows, could have questioned, or which the next heirs of Deena Nath may yet question; but the improper alienation of part of her husband's estate cannot affect the Respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings their Lordships have to observe that the Plaint does not inaccurately state the Respondent's claim to the right to succeed, on the death of Doola Baee, to that property which the latter took by inheritance from her husband. The replication and the Petition of Appeal from the Decree of the Court of First Instance are no doubt more open to the objection taken. In order to meet the case of *quasi estoppel* set up, they attempt to draw a distinction between the claim to the original share which the Respondent took on her husband's death, and her claim to that to which she became entitled on Doola Baee's death; and make some confusion as to the character of her heirship. But this mispleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and that being the case it would be contrary to the practice of the Committee to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is whether the Decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the Sudder Court to review its prior Decree with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied that the proceedings on review were not within the powers of the Sudder Court. Two objections have been taken to them, viz., first, that the Respondent never petitioned for a review of Judgment, except as to the immoveable property; next, that whatever was the scope of her Petition, the order of Mr. Gubbins upon it must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think that the application for review at p. 84 must, on a fair construction of it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. Plea 1 seems to be confined to the latter; but Plea 2 is more general. It insists that the opinion of the Calcutta Pundit ought to be accepted as correct. That opinion, which is at pp. 72, 73, made (as he himself stated in his second opinion at p. 84) no distinction between moveable and immoveable property, but denied the right of the widow to dispose of either, to the prejudice of her husband's heirs.

Again, as regards the Acts of the Court: the Article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final order contemplated by that section was the order which, in the ordinary course, would have been made by Messrs. Ross and Pearson on the 15th of January, 1863 (see p. 86). The proceeding of Mr. Gubbins was merely his fiat for the issue of that notice to the opposite party, which is required by the proviso of the section.

It may be admitted that Mr. Gubbins understood the application to be limited to the immoveable property; that he so limited the notice; and that when the parties were together *in presence* before Messrs. Ross and Pearson, the written grounds for review "impugned the correctness of the decision, so far as it related to the real property only." But the question still remains whether it was not competent to the Judges by whom the order allowing or

rejecting the application for review was to be made, to enlarge those grounds on the oral application of the party, if satisfied that there was a proper case on the merits for so doing. There seems to be nothing in the Code of Procedure which expressly prohibits them from so doing. And their Lordships are of opinion that Messrs. Ross and Pearson, though they might have made a final order, granting or rejecting the application *in toto* or in part, were not incompetent to make the qualified order which they did make, leaving in the Court which was to review the decision a discretion as to the extent to which the review should be carried.

They are also of opinion that even if the Court below had been wrong in its procednre, its miscarriage ought not to prevent this Committee from deciding the question touching the disposition of the moveable estate on its merits. There has been no surprise. The question was fully argued before the full Bench of the Sudder Court on ample notice to both parties. It has been fully argued here. The objection, therefore, is purely technical, and the result of yielding to it might be to place the Respondent at a very unfair disadvantage. She had a right to appeal to Her Majesty against the whole or any part of the first Decree of the Sudder Court. She would not have lost that right of appeal even if she had limited her application for a review to the immoveable property. She was relieved from the necessity of appealing by obtaining a final Decree in her favour as to the whole of the property, whether moveable or immoveable. If this objection were to prevail there could be no final determination of the question as to the former or its merits; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first Decree of the Sudder. They are of opinion that no such formality is necessary; and that it is competent to the Respondent, who has been brought here on appeal, to maintain, if she can, the Decree which is under appeal, by showing that it is right upon the merits.

Their Lordships being, therefore, of opinion that there is no obstacle to the determination on this Appeal, and between these parties, of the general question involved in the Judgment under appeal,

will now address themselves to the consideration of that question.

The parties have brought together a large amount of conflicting authority concerning it, consisting partly of the Bywusthas or opinions of Pundits; partly of decided cases; and partly of passages from ancient or modern authorities, which are accepted as authoritative in the Courts of India.

It is impossible to reconcile the various opinions of the Pundits which are to be found in the Record. They are divisible into three classes, viz., 1st, that of opinions taken in other suits; 2ndly, that of opinions taken by the parties themselves for the purposes of this suit; and 3rdly, that of opinions given in answer to the questions put by the Sudder Court in this suit.

Of the first class are No. 10 at p. 19; probably No. 11 at p. 19; No. 33 at p. 63; and No. 28 at p. 36. Three of these are not very material. As far as they go, the two first support the contention of the Respondent; the third seems to be good law, but it has really no bearing on the question now under consideration. The point was, whether on the death of the widow, the daughter or a nephew should succeed to property derived from the husband; and inasmuch as the widow could not have taken the property if it had not been divided, it followed that it must continue to descend in the course of succession to separate estate; and therefore to a daughter before a nephew. The fourth is strong against the right of a widow to alienate immoveable property inherited from her husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta Pundit who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a widow has power to dispose of land inherited from her husband.

The second class consists of No. 12 at p. 19, being the opinion of thirty-seven Benares Pundits filed by the Respondent; and of No. 14 at p. 49, being the opinion of twenty-one Pundits of the same place, filed by the Appellant. The first ruled that the surviving widow was entitled to succeed to the share of the deceased widow; and that that right could not be defeated by the disposition of the

deceased widow. The other goes the length of contesting the right of one widow to succeed to another widow of her deceased husband in any case; it affirms the proposition that the property being once vested in the wives, each had an absolute interest in her share, and might dispose of it as she pleased. It held also, that in the case of intestacy, the father and brother of the deceased widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 at p. 72, being the opinion of Ram Nath, one of the Pundits at the Sudder Court of Agra; of No. 7 at p. 73, being the opinion of four Benares Pundits, taken by the Judge of that place under orders from the Sudder Court at Agra; No. 5 at p. 72, and No. 3 at p. 85, being the two opinions of Heerna Nund, the other Pundit at the Sudder Court of Agra; and No. 6 at p. 72, and No. 2 at p. 84, being the *two opinions of the Calcutta Pundit*. All *these*, except the later opinions of Heerna Nund and of the Calcutta Pundit, which were taken on the proceedings in review, were given in answer to the questions put by the Sudder Court before its first Judgment.

The questions were prefaced by the following "preamble" or statement:—

A. dies, leaving two wives, B and C, who inherit his property, real and personal. B and C make a complete partition of the property, and live separately from each other. C dies, having as blood relations a brother and an uncle; and the questions were—

1st. Does the property left by C descend by inheritance to the other widow, B, or to the brother or uncle of C?

2nd. Would C be competent to bequeath by will to her blood relatives the share of the property which she inherited from A (so divided), to the prejudice of B, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two widows, and it substitutes an uncle for the father of the deceased widow. The only variation in the references to the different Pundits was that, from accident or design, that to Heerna Nund was confined to *real* property.

To these questions the four Benares Pundits answered:—1st. That the brother of C was her foremost heir, and after him her uncle, and that while these two existed B could not succeed. 2nd. That any testamentary disposition by the widow of the property which she had inherited from her husband should be held valid, the property having been exclusively her own, and that she was therefore at liberty to dispose of it in any way she thought proper.

Three out of the four consulted Pundits appear to be included amongst the twenty-one who had previously given the opinion above referred to at the instance of the Appellant, and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny so strongly as the first the right of the surviving widow to succeed to the share of the deceased widow in any case.

The answer of Ramnath to the first question was that C's share would descend by inheritance to B, because C could not be succeeded by her brother or uncle during the existence of her husband's *sapinda*; and although, in his answer to the second question, he admits the power of C to defeat this right of B by her will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly, "She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of Heerna Nund and the Calcutta Pundit, upon which the ultimate judgment was in great measure grounded, was, of course, in favour of the Respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the Bye-wusthas of the Pundits. If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court Pundits would agree in holding that the Respondent, as the next heir of her husband, is entitled to take by succession the share of Doola Baee; and that that

right cannot be defeated, either as to moveable or immoveable property, by the will of Doola Baee. Ram Nath, however, holds that, by reason of the partition, Doola Baee acquired the right of disposition. Again, the twenty-one or twenty-two Benares Pundits who are in favour of the Appellant's title are opposed by the twenty-seven Pundits of the same place, who have given their opinion in favour of the Respondent. And the Byewusthas given in other cases are more favourable to the Respondent than they are to the Appellant.

The Benares Pundits who are in favour of the Appellant refer only generally to the Mitacshara, but the particular passages on which they rely are probably the 1st and 11th sections of the second chapter, and especially the second article of the 11th section. Those passages, and the arguments in favour of the widow's right of disposition which were deduced from them, were lately under the consideration of this Committee in the case of Choteh Bebee, decided on the 1st of February, 1867. The following is the conclusion to which their Lordships then came (see printed Judgment, pp. 10 to 13):—"The result of the authorities seems to be that although the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from aliening any immoveable property which she has so inherited; and that on her death the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband. To the authorities then cited and reviewed by their Lordships may be added Sir William MacNaghten's observations in his work on Hindoo Law, vol. i, pp. 19 to 21; Cases XIV and XV in the second volume of the same work, pp. 31 and 37; and also some of the cases which will hereafter be mentioned which, whilst they support the doctrine of the widow's power to dispose of moveable property, admit that she cannot dispose of immoveable property inherited from her husband."

It must, then, be taken upon the authorities to be settled law that under the law of Benares a Hindoo widow has not the power to dispose of immoveable property inherited from her husband to the prejudice of his next heirs; and the only question open

to doubt is whether she has any such power over moveable property.

It must be admitted that in favour of this supposed distinction there appears at first sight to be a considerable body of positive authority. In the case of Cossinauth Bysack *v.* Hurroosoondury Dabee, the leading case upon the rights and disabilities of a Hindoo widow in Bengal, it was at first supposed that the distinction was recognized even by that School. The first Decree in that case declared the widow entitled to an interest for life in the immoveable, but to an absolute interest in the moveable estate of her late husband. That was altered by the Decree made on a Bill of Review, which declared her entitled to the real and personal estate of her husband, to be possessed, used, and enjoyed by her as a widow of a Hindoo husband, dying without issue, in the manner prescribed by the Hindoo Law. On an Appeal from that Decree the whole subject was reviewed by Lord Giffard. His Judgment (which is reported in the Appendix to Mr. Longueville Clark's rules and orders), whilst it establishes that, according to the law of Bengal, there is no distinction between moveable and immoveable property in respect to the widow's power of disposition over it, seems to proceed on the ground that the treatises known as the "Vivada Chintamani" and the "Ratnacára" are overruled and qualified in this respect by the "Daya Bhaga" and "Dayatutwa," which give the law to Lower Bengal, and that where the two former treatises prevail the distinction may exist. This Judgment, therefore, affords some ground for the argument that the law of Bengal, which does not recognize the distinction, is an exception from the general Hindoo Law. Again, in Bijai Govind Sing *v.* Najunder Narain Rae (2 Moore's I. A. 181), decided here in 1839, the right of the widow to dispose of moveable property inherited from her husband, and its devolution on her dying intestate, are treated as open questions under the law of the Mithila School.

Of decided cases affirming the distinction, we have that in the High Court of Bengal, which was cited at the Bar from the "Indian Jurist" of the 31st of March, 1866, p. 128; and which appears to be a case governed by the law of the Mithila School.

We have further the four cases cited in the Judgment in that case, of which two show that the distinction has been recognized by the Sudder Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognized by the High Court of Bombay as prevailing n that Presidency. And lastly, we have Case II, at p. 46 of the second volume of Sir W. MacNaghten's Hindoo Law, in which the law which ought to have been applied was that of the Benares School.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those provinces of Lower Bengal which are governed by the Daya Bhága, these cases might afford ground for saying that the doctrine under consideration, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of Calcutta say in the Judgment just referred to, "This case comes from Tirhoot, one of the districts forming the ancient province of Mithila, but the law is admittedly the same in this particular, both for Mithila and for the provinces governed by the Mitacshára." Their Lordships, however, are not satisfied that this statement is correct.

The Mitacshára is no doubt accepted as a high authority by all the Schools, even by that of Bengal, when it is not controlled by the Daya Bhága, and other treatises peculiar to that School. But the other four Schools have, like that of Bengal, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitacshara and give rise to the differences between those Schools. In proof of this it is only necessary to refer to the "Preliminary Remarks" of Sir William Mc Naghten, pp. xxi to xxiii. From these it would appear that whilst the Mithila School follows implicitly the "Vivada Chintamani" and the "Ratnacára;" the south of India, the "Smriti Chandrika" and the "Madhavya;" and the Presidency of Bombay, the "Vyavahára Mayucha;" these works are by no means held in equal estimation at Benares.

Now, it appears from the Judgment of Lord Giffard that the works which were supposed to go furthest towards establishing the distinction between moveable and immoveable property, which is now under consideration, were the "Vivada Chintamani" and the "Ratnacára." These may well be taken to establish such a distinction, according to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the "Mayúkha" is cited as an authority for the decision of the case, at p. 43 of the second volume of McNaghten. And, in the Judgment under appeal it is expressly stated that that treatise is not accepted as an authority by the Benares School; and, consequently, that the case in question was not binding on the Court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on treatises and authorities peculiar to the south of India, and not accepted at Benares. From the reports of these, at p. 117 of the Sudder Decisions for 1849, and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the Byewusthas of Pundits. In the former case the authorities relied on by the Pundits are not given; but, in the latter, mention is made of the books called "Madhaveyen" and "Suraswativilása," as well as of the Mitacshára (then called "Vijnanswareyen"); and it appears, from Sir William McNaghten's remarks, that the two latter works are of paramount authority in the territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta, in so far as it confirmed the title of the purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of Moore's Indian Appeals, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and that at p. 46 of the second volume of McNaghten's, were decided according to the peculiar law of the Bombay

Presidency, including the "Mayúkha;" and those at Madras according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the Pundits show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitacshara, on which, as has already been shown, the Appellant must mainly rely, is the second paragraph of section xi of chapter ii, which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between moveable and immoveable property; yet it is settled, beyond all question, as we have already stated, that the immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her stridhun. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband forms part of a woman's peculium or stridhun. Sir William MacNaghten, indeed (vol. i, p. 38), excludes from stridhun all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of stridhun all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred; but that the right to alienate immoveable property, whether inherited from the husband, or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.

This argument, however, would fail to show why immoveable property, inherited from a husband, should not (and all the decided cases show it does not) descend as stridhun; but passes on the widow's death to the next kin of the husband. The truth seems to be, that the texts which restrict a woman's power of disposition over immoveable property given

to her by her husband in his lifetime are different from those which both restrict her power over immoveable property inherited from her husband, and regulate the course of its devolution.

To the former class belong the text of *Nareda*, "Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of *Katyáyana*, "What a woman has received as a gift from her husband, she may dispose of at pleasure after his death, if it be moveable; but as long as he lives, let her preserve it with frugality." To the second class belongs the test of *Katyayana*, on which the Judgment under appeal so much proceeds, viz.: "The childless widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by Mr. Colebrooke (3 Dig. 575 and 576).

It is impossible to deny, as will be seen on reference to the Digest, that there has been a considerable conflict of opinion amongst the commentators concerning the texts. The better opinion, however, seems tobe that they relate to different subjects.

Again the latter text certainly includes both moveable and immoveable property; and it seems to be only by reason of confounding the law as to property given by, with that relating to property inherited from, the husband, that the words "after her the legal heirs shall take it," can be restricted to the immoveable portions of the husband's estate. The preponderance of authority is certainly in favour of the proposition that whether the widow has or has not the power to dispose of inherited moveables, they, as well as the immoveable property, if not disposed of, pass on her death to the next heirs of the husband.

It is also worth remarking that the doctrine that property inherited from her husband forms part of a woman's stridhun, receives no colour from two of the treatises current in other Schools which are supposed to recognize the widow's power to dispose of moveables so inherited. Both the "Vivada Chintamani" and the "Mayukha" confine stridhun within the definitions of Menu and Katyayana.

They exclude property inherited and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitacshara, but are excluded by Sir William McNaghten.

They have distinct chapters for "the separate property of women," and "her right of succession to a husband who leaves no son." The "Vivada Chintamani" expressly says (p. 262) that the text of Katyayana does not refer to the peculiar property of a woman; and although it cites from Katyayana, "let a woman on the death of her husband enjoy her husband's property at discretion," and explains that this refers to property other than immoveable, it also, at page 292, quotes from the Mahabarata, "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth;" to which it adds, by way of explanation, "Here waste means sale and gift at their own choice." See "Vivada Chintamani," pp. 256 and 266, and "Mayukha," pp. 84 and 78.

Another argument against including the wealth inherited from her husband in a woman's stridhun, as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitacshára, may be derived from the clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to "the whole property as above described." This is intelligible, if the words "property which she may have acquired by inheritance," in the second clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the widows' dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pundits is sufficient to show that the supposed distinction

between moveable and immoveable property is anything but well established in that School. And the unanimous Judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pundits, has, in this case, ruled that the distinction does not exist. Such a Judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the Law of the Benares School, notwithstanding the ambiguous passage in the Mitacshara, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her stridhun or particular property: and that the text of *Katyáyana*, which is general in its terms, and of which the authority is undoubted, must be taken to determine: first, that her power of disposition over both is limited to certain purposes; and secondly, that on her death both pass to the next heir of her husband. They have already stated the grounds on which they think that the cases decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions; except that in so far as they proceed, as that in the High Court of Calcutta unquestionably does in part proceed, on a different construction of the passage in the Mitacshara, they cannot be supported on that particular ground.

Their Lordships have now to consider whether the effect of the so-called partition was to give Doola Baee any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question whether her interest does not become absolute, though in a case coming from Lower Bengal the contrary was decided by this Committee on an Appeal from the Supreme Court of Calcutta. But here the so-called partition was between two widows, each having the limited interest of a Hindoo widow in her husband's estate. It does not appear that it was made at the suit or on the application of either. It was made by order of a Judge who,

in the particular proceeding (one under Act XIX of 1841) ad no jurisdiction to determine questions of title, who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her husband.

It may be said that the question here is only whether the Respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and as part of that contract to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. The acquiescence of the widows in the Judge's proceedings cannot have done more than bind each not to disturb the other's possession.

If this be so, it follows that the opinions of those Pundits which were given in favour of the Appellant on the assumption of a complete and regular partition lose much of their power. It follows also that the case of the Respondent is stronger than it would have been had she claimed merely as next heir to her husband in succession to Doola Baee. For the estate of two widows, who take their husband's property by inheritance, is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. (2 W. Mac. Hindoo Law, p. 38, note 1.) They are therefore, in the strictest sense, coparceners, and between undivided coparceners there can be no alienation by one without the consent of the other. And accordingly this case might have been decided in favour of the Respondent on this ground alone.

Upon the whole, then, their Lordships are of opinion that the Decree under appeal is substantially right, and ought to be affirmed. Considering, however, that what has here been decided in respect to Doola Baee's interest is equally applicable to that of the Respondent and that the latter is

said to have assumed a power of disposing of her own share, they think it may be well to insert in the Decree a declaration that the property recovered by the Respondent is to be possessed and enjoyed by her as a widow of a Hindoo husband dying without issue in the manner prescribed by the Hindoo law." Their Lordships will humbly recommend Her Majesty, with that variation, to confirm the final decree of the Sudder Court of Agra. The Appellant must pay the costs of this Appeal.