Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Rao Balwant Singh v. *Rani Kishori (two Appeals consolidated, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered* 18*th February* 1898.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

In the suit which gives rise to this appeal the Plaintiff now Appellant claimed as heir-at-law of Rajah Jaswant Rao to be entitled to properties valued at 40 lacs of rupees, of which Jaswant's widow Kishori, the Defendant below and the Respondent here, had become possessed. As regards the larger portion of this property, principally moveable, the Plaintiff has failed in both the Courts below, and raises no further question. He still claims (1) the proprietary right in five villages conveyed as a gift by Jaswant to Kishori by deed dated 4th September 1875; (2) the proprietary right in two other villages purchased by the Defendant after Jaswant's death; and (3) a perpetual charge by way of malikana amounting to 10 per cent. of the revenue of seven other villages which were the subject of a grant by the Government of India to Jaswant dated 6th April 1861. The District Judge decided against the Plaintiff as to all these

properties except one of the five villages named Bakewar. As to that village the District Judge held that it was ancestral property which Jaswant had no power to alienate by way of gift, and he decreed possession of it to the Plaintiff. Both parties appealed to the High Court. Separate orders were made on the two appeals. The Plaintiff's appeal was dismissed; the Defendant's was allowed; so that the Plaintiff's suit stood dismissed as to all his claims. The Plaintiff has appealed from both these orders and his appeals, in form two but in substance one, have now been argued.

Except as regards the village of Bakewar which has been the subject of difference between the two Courts below, the facts of the case may be briefly stated :—All the villages in suit were at one time the estate of Khaman Singh, the father of Jaswant. Through extravagance or misfortune Khaman fell into poverty and he parted with the villages; whether in fact or only in appearance is matter of dispute in this suit. Jaswant became a successful man of business, and he also rendered active and valuable services to the Government at the time of the Sepoy mutiny. Thus he became able to repossess himself of the estates which Khaman had enjoyed, and the Government acknowledged his services by the grant in question. Khaman died in December 1844. His eldest son Lal Barian married Adhar Kunwar a lady of considerable private fortune, and died without issue. Jaswant was the only other son, and he married Kishori as his third wife. He died in August 1879.

The Plaintiff's claim under the grant stands on an entirely different footing from his other claims, and it may be disposed of at once. The Sanad of April 1861 recites the services of Jaswant and that they had been recognised by the bestowal of the title of "Rajah" and were

worthy of further recognition by the grant of a "jagir." It then continues:—"Be it known "that the possession and *jama* (revenue) of the "five villages granted for generation after gene- "ration, shall for ever be given up and remitted, "and that the revenue of the seven villages "granted for lifetime shall remain under re- "mission till his lifetime, to wit, their *zemindars* "who now pay the revenue to British Govern- "ment shall pay it to him, and after him they shall "ever pay 10 per cent. as *malikana* allowance to "his heir after the deduction of Government "revenue, for generation after generation." The five villages are the five villages before mentioned as contained in the deed of gift.

Mr. Ross does not contend that the words "generation after generation" confer any interest less than absolute ownership, nor does he now sustain the contention urged in the Lower Courts that the jama of the five villages did not pass to Jaswant in absolute ownership. His contention is that as regards the seven villages there are two distinct gifts; one to Jaswant for his life, and the other after his death; and that at his death the malikana is given in absolute ownership to the person who may then happen to be his heir. That would attribute to the Government the strange intention of acknowledging the personal merits of Jaswant by conferring a benefit on some unknown heir for whom he might or might not have a regard. The construction also appears to their Lordships to be as strained as it is improbable. They think that the obvious meaning of the expression "his "heir for generation after generation" is that the malikana is to form part of his heritable property; and that whereas he takes the whole income for his life only, he is to take the 10 per cent. malikana in absolute ownership. Both the

Courts below have taken substantially the same view, and the appeal fails on this point.

The next question is whether Jaswant could lawfully give the property in question to his wife. The District Judge states that the point is one on which there has been a great conflict of opinion; and without discussing it further he says that he follows the latest rulings in holding that if the property comprised in the gift was Jaswant's self-acquired property he could deal with it as he saw fit. The High Court have given no opinion on the point except so far as an opinion is involved in their affirmation of the District Judge's decree, nor did they hear argument upon it. It was one point of appeal by the Plaintiff but his Counsel did not open it till at the very end of his reply, when the Court ruled that it was not competent for him to argue it. In delivering judgment they stated their opinion that the Plaintiff by not addressing to them any remarks in support of this argument must be taken virtually to have abandoned it.

Mr. Ross has raised the question again in this appeal and has addressed to their Lordships a serious argument which requires consideration. His proposition is that a member of an undivided family subject to Mitakshara law has not the power of disposition over self-acquired immovable property at his will. The Indian Courts have differed on this question, and there is no decision of this Board which after examination of the authorities affirms the power in unqualified terms.

It is not surprising that conflicts of opinion should have arisen, seeing that the texts of the Mitakshara itself, as translated by Colebrooke whose translation has long been accepted as correct, are apparently and literally in conflict with one another. The passage cited by Mr. Ross

is found in Chapter I., section 1, clause 27, and is as follows:—Speaking of the father of a family, it says that "he is subject to the control of his sons "and the rest in regard to the immoveable estate "whether acquired by himself or inherited "from his father or other predecessor. "Since it is ordained, 'though immoveables "'or bipeds have been acquired by a man himself, "'a gift or sale of them should not be made "'without convening all the sons. They who are "'born, and they who are yet unbegotten, and "'they who are still in the womb, require the "'means of support. No gift or sale should "'therefore be made.'" And immediately below the commentator insists on a man's duty not to leave his family without means of support. Mr. Ross further points out that the rule so stated as to immoveable property is accepted as law by Sir Thomas Strange: see Vol. I., p. 261, Vol. II., pp. 436 and following.

On the other hand we find in the same source of law quite opposite precepts. In clause 21 of the same chapter and section the commentator quotes two texts, one from Yajnavalkya himself, to the same effect with clause 27; and then adds "they both relate to "immoveables which have descended from the "paternal grandfather." In Section V. of the same chapter, clause 9, the commentator speaking of a donation made by a father says "the son has no right of interference if the "effects were acquired by the father;" and in clause 10 the same precept is repeated with more particularity. So in Section IV., where the commentator appears to be dealing with the principle which lies at the root of the system of joint family property. He there explains what may not be divided; and in Clause 1 he says, "Whatever else is acquired by the co-parcener "himself . . . . does not appertain to the heirs ". . . . nor shall he who recovers hereditary

" property which had been taken away give it up " to the parceners." Clause 2 enlarges on the same point.

Pausing there to consider the authorities apart from decisions, their Lordships observe that the rule laid down in Section I. clause 27 of the Mitakshara rests upon an ulterior reason, " since " it is ordained," and so forth; and the reason ranges so far beyond the rule as seriously to weaken its support of a positive rule. The necessity of support to children applies in principle to the alienation of moveable property as well as immoveable. And the assertion of rights in those who are unbegotten conflicts with the principle uncontradicted as their Lordships understand by any decision, that a man may alienate even his descended estate if he has no child, or at least if he has no coparcener, in existence. See the cases cited for this proposition in Mr. Mayne's book on Hindoo Law, Section 318.

All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindoo law Sir W. Macnaghten says, " It by no means follows that because an " Act has been prohibited it should therefore be " considered as illegal. The distinction between " the *vinculum juris* and the *vinculum pudoris* " is not always discernible." (Hindoo Law. Principles and Precedents, p. vi of the preliminary remarks.) He illustrates this position by the example of the very subject of the present discussion. It is, as their Lordships think, the most reasonable inference that the passage in Section I. belongs to the former class of precepts, and those of Sections IV. and V. to the latter.

As regards the authority of Sir T. Strange which undoubtedly is great, their Lordships

observe that, though he does not bring the conflicting texts of the Mitakshara into comparison with one another, he introduces similar contradictions into the body of his own work. In his "Addenda" he corrected his own opinions by the authority of Sir Francis Macnaghten's (Considerations on Hindoo Law), which work he had seen after he had written his own. He says that he has used Macnaghten's work for supplementing, for correcting, or for confirming his own (Addenda, p. 4). Among the passages which he adopts is the following:—"It is desirable that "the extent to which a Hindoo in his lifetime "may give or make an unequal distribution of "his property should be ascertained. I think it "clear that he has a right to dispose of his "self-acquired property, whether moveable or "immoveable, according to his own pleasure, "and that he has the same right as to ancestorial "moveable property." Addenda, p. 8. It seems then that Strange intended to accept for Madras the opinion of Macnaghten who, though a Bengal judge, wrote of the Benares as well as the Bengal school. Macnaghten's opinion, clearly applying to the Mitakshara law, is that the Father of a family, with regard to all kinds of property acquired by himself, is at liberty to make any alienation he may think fit, subject only to spiritual responsibility.

To turn to the decided cases, there is no decision of this Board which is adverse to the power of alienation claimed by the Defendant. Mr. Ross referred to the language of the Board in the Hunsapore case (12 Moo., I. A., p. 38) decided in 1867. Sir James Colvile, after showing that by that time testamentary powers, long disputed, had been established in Hindu law, spoke thus:—"Accordingly it has been "settled that even in those parts of India which "are governed by the stricter law of the "Mitakshara a Hindu without male descendants

" may dispose by will of his separate and self-
" acquired property whether moveable or
" immoveable ; and that one having male
" descendants may so dispose of self-acquired
" property if moveable; subject perhaps to the
" restriction that he cannot wholly disinherit
" any one of such descendants." It is argued that this passage shows that in the opinion of the Board the power of disposition by will does not extend to land and does not exist if there are male descendants. In that case however the Board gave no judicial opinion upon the point, because they held that the property in dispute was an indivisible Raj, subject to the custom of primogeniture, and that, as the heir was a consenting party to the disposition in dispute, the question of the testator's power did not arise. It is true that they did not affirm the proposition now contended for by the Defendant.

In the Bithoor case (9 Moo., I. A., p. 96, A.D. 1862) there came into question the validity of a will devising self-acquired property. There was a long and intricate discussion as to the genuineness of the will, which was ultimately established. It appears also that objection was taken to the legal power of the testator, but it does not appear on what grounds that point was argued. The only passage in the judgment bearing on this question is as follows :—" The rest of the
" evidence consists of the testimony of Pundits,
" who say that the Soobadar was always obedient
" to the Shasters, and that the Shasters forbid a
" father who has several sons to appropriate by
" will to one the property which by law ought
" to be equally divided amongst all. It is clear
" that in this district a strong feeling prevails
" among the Brahmins upon the subject of
" testamentary disposition, which though at
" length established by law as to self-acquired
" property, is opposed to the ancient usages and
" feelings of the country." That was a decision

in favour of the power to make such a will; but the grounds of it do not appear; the attention of the Board would seem to have been directed to the general question of testamentary power, rather than to distinctions between ancestral and self-acquired estate; and in the Hunsapore case the present proposition was treated by this Board as still open to argument and to qualifications.

Their Lordships do not think it necessary to go through the series of Indian decisions bearing on this point, but they will refer to some of the most important and of the latest date. It appears to them that the subject is one of those in which from the earliest times there have been two conflicting principles of law, one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half century or so. On each of those subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, viz., the use of property by the living generation, or its living heads. This their Lordships conceive is the kind of change referred to by Lord Kingsdown in the Bithoor case.

The earliest case in which their Lordships have found any exact comparison of the texts of the Mitakshara was decided by a division of the High Court of Calcutta in the year 1863. *Mudhu Gopal* v. *Rani Buksh* 6 W.R. p. 71. In that case the Plaintiff's father had sold to the Defendant property which was held to be self acquired. The learned Judges carefully compared the texts of the Mitakshara. They treat

those of Sections IV. and V. as the governing ones. They conclude, "We must hold that according to 'the law as laid down in the Mitakshara, a "father is not incompetent to sell immoveable "property acquired by himself."

In the year 1872 the question was discussed before a full bench in Calcutta (10 Beng. L. R. 192). A son disputed his father's disposition of property inherited by the father from a cousin and not from the grandfather. Sir Richard Couch compares the texts and quotes cases which as he says exhibit the better opinion among commentators. His conclusion is this: "It is only in "respect of property not liable to obstruction "that the wealth of the father or grandfather "becomes the property of his sons or grandsons "by virtue of birth." In this case the property being inherited by the father from a cousin was held to be obstructed as to inheritance.

As regards the North-Western Provinces the question was carefully considered in the year 1877 by two experienced civilian Judges (*Sital* v. *Madho*, 1 All. p. 394). Those learned Judges did not consider themselves bound by a previous decision of the High Court in 1869, which negatived the father's power to alienate, but without citing the authorities. In their elaborate judgment they make more than one suggestion for reconciling the conflicting texts. They say that the Courts have recognised the principle that the prohibition of certain acts may be implied, yet where it is not declared that there is absolutely no power to do them those acts if done are not necessarily void. And in the end they adopt Sir Wm. Macnaghten's view "that with respect to "personal property whether ancestral or acquired, "and with respect to real property acquired or "recovered by the occupant, he (the father) is at "liberty to make any alienation which he may "think fit, subject only to spiritual responsi-"bility." (*See* Principles, &c., p. 3.) This is

the same view as is expressed by Sir Francis Macnaghten, and adopted by Sir T. Strange in the passage above quoted.

Their Lordships fully assent to the reasoning contained in the judgments they have cited; and they find that in India there is a decided preponderance of judicial authority in favour of the power claimed for Jaswant in this case.

It remains to mention a decision of this Board in the year 1873, which, though it falls under the Mithila law, appears to their Lordships to bear closely on the present case. It is reported n 12 Beng. L.R. p. 430, *Rajah Bishen* v. *Bour Misser*. The Mithila law differs in some respects from that of the Mitakshara, but on the subject in question follows it very closely. The leading text-book is the Vivada Chintamani and their Lordships quote from the translation made in 1863. In page 76 and again in page 229 are passages giving a free hand to the owners of self-acquired property. In p. 229 it is written "Such property as is acquired or recovered by "the father without the aid of the ancestral "estate shall be divided equally, or unequally, "or not divided at all, at his pleasure. The "father has full dominion over . . . . that "property which is gained by him through skill, "valour or the like, he may give it away at his "pleasure," and so forth. In p. 309 occurs this passage:—"It is declared in the work called "Prakasa that immoveable and biped property, "even if it be self-acquired, cannot be sold or "given away without the consent of the sons. "They who are born . . . . even they who are "not yet conceived, require paternal property "for their maintenance therefore it is improper "to deprive them of it." The decision of this Board was in accordance with the first set of texts. It is true that p. 309 is not referred to in

the judgment, but it can hardly be supposed that in a case fought up to the highest tribunal it was overlooked.

For the foregoing reasons their Lordships have no hesitation in laying it down that the law of the Mitakshara is shown after long conflicts of opinion due to the conflicting nature of the original texts, to be that which has been adopted from Sir William Macnaghten by the Courts of Calcutta and Allahabad.

Such being the law it remains to apply it to this case. The Plaintiff contends that the property in question was ancestral. As regards the four villages the dispute turns on matters of fact and the Courts below are agreed in finding them against the Plaintiff. That dispute cannot be reopened here. As regards Bakewar they have differed, and the Plaintiff asks their Lordships to say that the High Court is wrong in finding that this village was the self-acquired property of Jaswant. The question turns on transactions which took place in the year 1852.

In 1836 Khaman the father of Jaswant executed a simple mortgage of Bakewar to Luchmandas. In 1839 he executed a second mortgage by way of conditional sale to the father of Kunjbehari. Disputes arose between the two mortgagees, who under an award were put into possession each of a moiety. In 1847 Kunjbehari bought out Luchman and was placed in sole possession. In 1852 one Hurbans Rai, a creditor of Jaswant who had then succeeded to the property, got a decree against him. In the same year Kunjbehari applied for foreclosure under Regulation 17 of 1806. The year of grace expired, and the foreclosure became absolute. Hurbans endeavoured to execute his decree against Bakewar, but was opposed by Kunjbehari who brought a suit against both Jaswant and Hurbans to assert his title. The

First Court decided against him, apparently on the ground that his title was no better than that of Luchman whose simple mortgage did not carry the right to foreclosure or to possession. The Zillah Judge thought differently, and held that the mortgage had been finally foreclosed. Hurbans appealed to the Sudder Dewani Adawlat, who upheld the Zillah Judge's decree and granted Kunjbehari's claim to have the sale of the estate of Bakewar made absolute by expungement of the name of Jaswant and the entry of his own name. That final decree bears date the 14th February 1856. Kunjbehari was then in possession and he remained in possession, but he did not procure any mutation of name.

The subsequent events are involved in some obscurity. It seems that Kunjbehari got into trouble during the mutiny; that he was charged with serious offences and was in great danger of being hung; that Jaswant took up his cause, saved his life, and even gave him compensation to the amount of some thousands of rupees for injuries done to his estate (Rec., p. 274). On Kunjbehari's part we find that in an irregular way, by endorsement on the decree of February 1856, he purported to annul that decree in favour of Adhar Kunwar. The consideration stated is the sum of Rs. 4,526, apparently less than a year's revenue. That endorsement is dated 22nd June 1858. The Defendant alleges that soon afterwards Adhar Kunwar, also in an irregular way, made a verbal gift of the property to Jaswant (Rec., p. 480). The certain thing is that about this time Jaswant regained possession and remained in possession until his death. How far his title depended on Adhar Kunwar's gift, how far on Kunjbehari's relinquishment of possession and practical reconveyance, and how far Kunjbehari's

acceptance of the small sum given for purchase money was influenced by Jaswant's services to him, or why he took so small a sum, are questions which are not, and which need not be, cleared up.

In the year 1868 Kunjbehari sued to establish his right to Bakewar. The Defendants were Jaswant and Sheo Narain to whom it was stated that Jaswant had sold the property. Kunjbehari alleged that the endorsement on the decree was a forgery, and gave a different account of his transactions with Adhar Kunwar; admitting however that he took the money from her and that he, as he calls it, annulled the decree. The Subordinate Judge held that the arrangement of the 22nd June 1858 was a *bonâ fide* one, and that Jaswant got actual proprietary possession. (Rec. p. 280.)

On one of the issues he found that the foreclosure of the decree of February 1856 and the other previous transactions between Kunjbehari and Jaswant were wholly fictitious and collusive. It is impossible to accept such a finding as of any value. Nobody disputes that Kunjbehari had a genuine mortgage from Khaman or that the estate and the liability devolved on Jaswant. And the Subordinate Judge himself points out that the validity of the foreclosure was challenged by Hurbans who had a strong interest to upset it; but he adds "unfortunately these objections were not en-"tertained by any Court." (Rec. p. 273.)

There is also another finding on a separate issue, of a most extraordinary character. The Subordinate Judge finds that because Kunjbehari did not effect a mutation of name therefore his foreclosure decree became void and that he remained in possession as a mortgagee.

It is mainly on account of these two findings, on which Mr. Ross dwelt at great

length, that this voluminous intricate and confused judgment of the Subordinate Judge of 1869 has been put in. Of course they have no legal force as between the heir and the grantee of Jaswant. Nor had they any result as between the parties to that suit; seeing that it was dismissed with costs. (Rec. p. 283.)

The decision of the District Judge in this case is apparently founded on the last-mentioned finding of the Subordinate Judge of 1869, which he quotes as though it were conclusive. Their Lordships think it clear that the point of time and the event to look at is the foreclosure of 1853. If that were a mere sham the conclusion that the mortgage continued and that on its payment Jaswant only redeemed the estate he had inherited from Khaman might have some colour. But in the suit of 1853 the two appellate Courts held that the foreclosure was genuine and valid. That was held against the appeal of the execution creditor whose claim was defeated by it. It is not a decision between the present parties, but it is strong evidence, and their Lordships cannot find any substantial evidence for disputing it. If the foreclosure took place the former title of Bakewar was broken and its ancestral character destroyed. The exact mode of its reacquisition by Adhar Kunwar and Jaswant is not material. For money or for services, it passed from Kunjbehari to Jaswant and so was acquired by him. For the above reasons their Lordships agree with the High Court on this point.

The only other point taken for the Appellant is one of a very unusual character. It is alleged that the decree of the High Court is void because one of the Judges Mr. Burkitt was not properly appointed. The point was not taken in the Court below; nor is the nature of it explained in the printed case of the Appellant.

Their Lordships understand that the appointment is questioned on the ground that it was not made immediately upon, or within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot discover any ground for the objection. Under the High Courts Act the Lieutenant-Governor of the North-Western Provinces has power to appoint an acting Judge upon the happening of a vacancy among the puisne Judges of the Court. No limit of time is mentioned within which the appointment should be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a Court of Law to invent a restriction not contemplated by the Legislature.

The result is that the appeals fail on all points, and their Lordships will humbly advise Her Majesty to dismiss them. The Appellant must pay the costs.