only is a term created, but it is apparent that the parties contemplated the discharge of the debt and interest in the manner expressed in the deed, and in no other manner.

There is no agreement for the payment of interest at an annual rate, but the parties have agreed that for the term a lump sum equal to the principal shall be accepted as interest, and that a small balance of rent shall then be paid, thus contemplating and providing for a settlement at the end of the term. Taking that net annual usufruct at a fixed sum, a term of years is created, during which the debt and interest are to be liquidated by that usufruct, the risk of seasons and the payment of quit-rent being undertaken by the mortgagee. Hence it is only reasonable to conclude that the basis of the contract was the enjoyment of the mortgaged property by the mortgagee for the period stipulated.

The decrees of the Court below are confirmed and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Kindersley and Mr. Justice Muttusámi Áyyar.

1880. August 16.

KANDASA'MI, A MINOR, BY HIS MOTHER AND GUARDIAN DORAI AMMA'L (PLAINTIFF), APPELLANT, *v.* DORAISA'MI A'YYAR AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN VEMBU AMMA'L (DEFENDANTS), RESPONDENTS.*

Hindú father, power of, to alter status *of family—Partition by, of family property, binding on sons, irrespective of consent, if* bonâ fide *and according to law.*

A partition made by the father is binding on the sons not only in respect of the father's share, but also of their own shares, provided that it is made subject to the restrictions mentioned in the Hindú law. It becomes obligatory by the will of the father as regulated and restrained by the law, irrespective of the consent of the sons.

When a father having five sons—three by one wife and two by another—executed in his last illness a document, whereby, after retaining a small portion for himself, he directed that the family property should be divided into three-fifths and two-fifths shares, with the manifest intention that from the date of the execution of the document it should operate as a severance, (1) of the interest of his sons by one wife from that of his sons by the other, and (2) of the interest of all his sons from his

* R.A. No. 111 of 1879 against the decree of F. Brandt, District Judge of Trichinopoly, dated 4th April 1879.

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own during his life but neither the guardian of the infant sons nor the eldest son, who was of age, were parties to the instrument :

Held, that this was not a will but a partition ; that it was competent to the father thus to alter the *status* of his sons ; that the question was whether the transaction was *bonâ fide* and in conformity with Hindú law, and not one of contract, as in the case of a partition between brothers.

T. Ráma Ráu, for the Appellant.

Mr. *Norton* and *R. Sadagopa Chári*, for second and third Respondents.

The facts and argument in the case sufficiently appear in the judgment of the Court (KINDERSLEY, J., and MUTTUSA'MI ÁYYAR, J.) which was delivered by

MUTTUSA'MI ÁYYAR, J.—This appeal arises from a suit instituted by one Dorai Ammál to recover for her son, the minor plaintiff, the landed property specified in exhibit D as allotted to his share, and to that of his uterine brother Subbaráyasámi, since deceased. Admittedly the property in litigation is ancestral; and at the date of his death Subbusámi had five sons, the minor plaintiff, and one Subbaráyasámi, since deceased, by his second wife Dorai Ammál, and the first three defendants by his senior wife Vembu Ammál. On the 30th June 1878 Subbusámi was seriously ill, and, in consequence, he made the *parikat* (deed of partition) D, as stated by himself in that document. By this instrument he constituted his second wife the guardian of his two minor sons, the present plaintiff and Subbaráyasámi; and his eldest son, the first defendant, as the guardian of the second and third defendants in this suit. He next reserved for his own subsistence 17·24 acres of land as particularized in the document, and directed that the rest of the landed property, consisting of 97 acres and houses and house-sites, should be divided into three-fifths and two-fifths shares, as specified in the instrument. He next divided the movable property, consisting of bonds, moneys due on pledge of jewels, and paddy in his house, among his sons in the same proportion, and provided for a similar division, a year after his death, of the land reserved for his subsistence, less 2·95 acres bestowed in gift upon his daughter's son, and for the payment, in like shares, of his funeral expenses, including those of his first annual ceremony. Though the first defendant was evidently regarded by his father as a major, yet neither he nor Dorai Ammál was required to sign the document. Whatever doubt there may exist as to the effect to

be given to it, there can be none as to the father's intention, viz., that it should operate from the date of its execution as a severance, first of the interest of his sons by the second wife in ancestral property from that of his sons by the first wife, and of the interest of all his sons therein from his own during his life. He caused the instrument to be attested by no less than twelve persons and to be registered; the Sub-Registrar calling at his house for the purpose of registering it. On the 7th July 1878 Subbusámi died, and during this interval no objection was apparently taken to the document D either by his first wife or by the first defendant, though it is reasonable to presume from the publicity attending its execution and registration that its existence was known to them both. It must also be observed, on the other hand, that the arrangement indicated in the instrument D was not carried out by Subbusámi during his life, either in part or in whole; and although an attempt was made for the plaintiff to show that a division of movable property and of documents was actually made on the 30th June 1878, I have no hesitation in expressing my concurrence in the opinion of the District Judge that the oral evidence bearing on this point is untrustworthy. On the 22nd July 1878 the first defendant executed the document A, acknowledging payment of plaintiff's share of Subbusámi's funeral expenses, and the receipt of movable property delivered to him for his and his younger brother's shares in accordance with the provisions of the instrument D.

Now, if the execution of the document be *bonâ fide*, it proves that the instrument D has been ratified by the first defendant, and acted upon in part between the 30th June and 22nd July 1878.

On the 9th August 1878 plaintiff's younger brother, then an infant of five or six months old, died, and upon the first defendant refusing after this event to register the receipt, its registration was enforced by judicial process in November 1878. It was alleged for the minor plaintiff that by virtue of the partition-deed D, he and his deceased brother Subbaráyasámi ceased to be co-parceners of the first three defendants; that on the death of Subbaráyasámi his undivided share lapsed to the plaintiff in preference to his divided brothers; that the first defendant confirmed and admitted the document D; that it had been acted upon in so far as it related to the division of movable property

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and to the payment of Subbusámi's funeral expenses; and that, after the death of Subbaráyasámi, the first defendant repudiated the exhibit D, and, in collusion with the other defendants, who are his father's tenants, refused to make over to the minor plaintiff the two-fifths share allotted to him and his deceased co-parcener.

The first defendant allowed the trial to proceed *ex parte;* and the first wife, who was made a party at her own instance, contended as the guardian of the second and third defendants that they were no parties to the instrument D; that it was not competent to their father to have executed it; that the income allotted to their share was smaller than that allotted to the plaintiff's share; that exhibit D was neither ratified nor acted upon in part; and that, owing to the plaintiff's minority, this suit was not at all maintainable. When examined as a witness for the plaintiff, the first defendant admitted the receipt exhibit A, and the payment made to him on account of his father's funeral expenses, but denied that he was of age either at the date of the partition or of the suit, and that the movable property was ever divided as stated in the receipt; adding that his own mother knew nothing of what he did, and that he allowed the trial to proceed *ex parte* at the instance of his stepmother, who promised to "settle some points" for him if he kept quiet. The main contention in the Court below was whether document D could take effect as a partition-deed so as to make the sons of the first and second wives of Subbusámi divided brothers as between themselves.

The District Judge, Mr. Brandt, held that Subbusámi was not competent to execute it; that it was in substance a testamentary disposition; that as such, it could not take effect as against the property in dispute; that though as a partition-deed it could operate to make the father a divided member from his sons, it could not render the sons divided members as between themselves; that the execution of exhibit D was neither *bonâ fide* nor beneficial to the minor sons; that no division of movable property took place as alleged for the plaintiff; that though he was inclined to think that the first defendant was still a minor, his age was not material, and that he executed the receipt exhibit A under some inducement held out to him by his stepmother. In this view the District Judge dismissed the suit with costs.

The main question for decision in this appeal is whether exhibit D is valid, and whether it could operate as a partition-deed not only as between the father and his sons, but also as between the sons by his first and second wives, whose respective shares were thereby separated and ascertained. Assuming that the father executed the document D *bonâ fide* and in accordance with the Hindú law, I see no reason to think that it could not alter the *status* of the sons. According to the Hindú law it is competent to a father to make a partition during his life, and the partition so made by him binds his sons, not because the sons are consenting parties to the arrangement, but because it is the result of a power conferred on him, though subject to certain restrictions imposed in the interest of his family. In cases like this the question is, not whether such partition is a contract like a partition made among brothers after their father's decease, but whether it is a legal transaction concluded in conformity to the Hindú law.

In Chapter I, Section II, Vol. 2, the author of the Mitákshará says: When a father wishes to make a partition, he may, at his pleasure, separate his children from himself, whether one, two, or more sons. In commenting on this passage Bálambatta says: "He may make them distinct and several by giving to them shares of the inheritance." It appears from paragraph 6 that he may do so both with respect to property acquired by himself and property inherited by him; that in the one case the distribution may be unequal, while in the other it should be equal, subject in ancient times to be rendered unequal by means of a deduction in favor of senior sons as directed by the law. In paragraph 14 its legal effect is determined: "When the distribution of more or less among sons separated by an unequal partition is legal or such as is ordained by law, then the division made by the father is completely made, and cannot be set aside. Else it fails though made by the father." It is again observed that it is a power regulated by law, and must be exercised *bonâ fide* in accordance with it. Nárada is cited in the same paragraph as observing that a father who is afflicted with disease or influenced by wrath, whose mind is engrossed by a beloved object, or who acts otherwise than the law permits, has no power in the distribution of the estate. Thus, according to the Mitákshará, the father has a power to

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divide the property among his sons, whether the property is ancestral or self-acquired, and the partition made by him is complete and binding provided that he exercises that power *bonâ fide* and in accordance with law, which regulates and restricts it in the interest of his sons. This power on the part of the father is recognized by all the commentaries in the South and also by the Dáyabága and Dáyacrama Sungraha (see Kristnasámi Áiyar's translation of Smriti Chandrika, Chapter II, Section I; Madaviya, page 7; Burnell's translation Vivahára Mayuka, Chapter IV, Section VI, paragraphs 6, 8, 12, and 14; Vivahára Nirnáya, Burnell's translation, pages 3 and 4; Dáyabága, Chapter I; and Dáyacrama Sungraha, Chapter VI).

But the District Judge observes that the partition made by the father can only affect his status and his share in relation to his sons, and that it can have no influence either on the relation of the sons *inter se* or of their shares as between themselves, but it seems to me that this view cannot be maintained as one in conformity to the Hindú law. In Chapter II, Section II, paragraph 3, Mitákshará, it is stated that he (the father) may separate the eldest with the best share, the middlemost with a middle share, and the youngest with the worst share, and, though unequal partition by deduction is now obsolete, this passage shows clearly that the father's power is not restricted to the ascertainment of his own share, but that it extends also to the allotment of shares to his sons. Again, in paragraph 14 a compliance with the requirements of the Hindú law is mentioned as necessary to its validity, and it is declared to be the result of a power possessed by the father in the distribution of the estate. If it was necessary that in order that the partition might be valid, it should always be the concurrent act of both the father and the sons, the above passage would be superfluous. In Smriti Chandrika, Chapter II, Section I, paragraph 7, this power is deduced from the Védic text, in which it is stated that Menu distributed the heritage among his sons. In paragraphs 13 and 14 it is stated, as a reason for the father's power to decide whether the distribution is to be equal or with a deduction in favor of the eldest as permitted by Baudáyana, "he alone is the lord, and the selection of the one or the other mode rests entirely with him." Again, in paragraph 19 Nárada is cited as observing

"For such as have been separated with equal, greater, or less allotments of wealth, the distribution actually effected is a legal one, for the father is the lord of all."

In paragraphs 20 and 21 the author of the Smriti Chandrika says: "None of the sons should demur to a legal, though an unequal, partition made by the father, since the father's will renders the partition legal, and since Vrihaspati directs that sons who do not abide by a legal partition, and who fail to maintain the distribution made by the father, should be chastised." It seems to me to be clear that according to the Hindú law a partition made by the father is binding on the sons, not only in respect of the father's share, but also of their own shares, provided that it is made subject to the restriction mentioned in the Hindú law, and that it becomes obligatory by will of the father, as regulated and restrained by the law, irrespective of the consent of sons. There are also cases in which a partition made between brothers themselves becomes binding on those who are no parties to it by the will of the adult co-parceners exercised in accordance with law. For instance, in the case of a minor who has no guardian but his brothers, or of a brother who is absent, the adult co-parceners are at liberty to make a partition subject to the obligation of preserving the minor's or absentee's share until he attains his age, or returns from abroad, and subject further to the right of either to repudiate it on the ground, not that he was no party to the arrangement, but that it was not made in accordance with law. In the case reported in II, M.H.C.R., 182, it was decided that a partition made during minority, at which the minor was represented by his mother, might be binding if it was fair and *bonâ fide*. In *Appovier's* case(1) the compromise, which it was considered amounted to a partition, was held to be binding upon a minor, though the minor was not separately represented, and this case recognized the principle that a partition might become binding by the will of the adult co-parceners, provided that it was neither unfair nor illegal, in which case the minor might set aside on coming of age. The text of Kátyáyana and that of Baudáyana (Colebrook's Digest, texts 452 and 453), as explained by Jaganáda, imply a valid partition during minority by the

(1) 11 M.I.A., 75.

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will of the adults alone, the co-heirs being under an obligation to preserve the share which belongs to a minor, or an absent co-parcener, with its accumulations, and the minor or absentee being at liberty to set aside, if either unfair or fraudulent, when he attains his age or returns from abroad. Hence it was held in *Nallapa Reddi* v. *Ballammál*(1) that a partition might take place as regards a minor's share during minority. Though in that case the minor was represented at the partition by his mother, such representation is not necessary to its validity, though it is often cogent evidence to show that it was fair and *bonâ fide*.

A partition may be partial either as regards the persons who seek to divide or as regards the property to be divided, but whether it is partial in either sense or complete depends rather on the contents than on the nature of the partition-deed. No doubt it is a general rule that even when it purports to separate one co-parcener and to leave the others in co-parcenery, the arrangement must be the concurrent act of all in respect to the property allotted to the co-parcener who desires to separate. But this rule is subject, as shown above, to two exceptions: first, the case of a minor or absentee from necessity; and secondly, that a partition made by the father who possesses, subject to certain restraints, a power to distribute the heritage among his sons, whether adults or minors. The real question, therefore, in the case before us is whether the partition evidenced by document D was fair and *bonâ fide*. Another question is whether exhibit D is, in substance, as observed by the District Judge, a testamentary disposition. Document D purports to be a deed of partition; it reserves a share to the father and says: "There shall hereafter exist between you (sons of the first wife on one side and those of the second on the other) only a connexion of friendship, and no connexion whatever in respect of property." Hence the document is both in form and substance a deed of partition, intended to take effect by virtue of the power vesting in him as a father to distribute the property among himself and his sons. No doubt the instrument was executed by the father in his last illness, seven days before his death, when he might have had reason to think that he might die; but in the absence of a rule of law

(1) 2 M.H.C.R., 182.

that agreements for partition made during the last illness of a co-parcener are invalid, it is a reason rather for examining whether the arrangement is fair and impartial than for setting it aside at once. He might have hoped to recover, though his illness might have led him to think that a partition was necessary for the peace of his family and to prevent his two wives from quarrelling with one another, and thereby injuring the interest of his sons, four of whom were minors. I am therefore of opinion that the document D cannot bear the construction that it was intended to operate as a will. I may add that this power was in ancient times intended to be exercised, according to the texts, when the father's connexion with the family as its head was about to cease. Accordingly Hárita says: "A father during his life distributing his property may retire to the forest, or enter into the order suitable to an aged man, or he may remain at home, having distributed small allotments and keeping a greater portion" (Dáyabága, Chapter II, 57). In Dáyarahasiya the order suitable to an aged man is explained as follows: "If the period of becoming an anchorite be arrived, let him become an anchorite. If the period for the order suitable to old age or that of a resigned recluse is come, let him make his resignation. If neither of these be the case, the author declares he may remain, having distributed allotments, having given them to his sons or other descendants." Thus it will be seen that this power was intended to be exercised when he was about to sever his connexion with the family as its head either by becoming a religious anchorite or a resigned recluse. Who else could be better entrusted with this power than a father, who from his position would be best able to decide whether it was to the interest of his sons that they should live in union or apart from one another, and as a general rule to make an impartial distribution? Lest this power might be abused, the law insisted upon the distribution being equal, subject to certain recognized exceptions. As a will was unknown to Hindú law, a partition-deed was the form in which this power was ordinarily exercised until lately. The District Judge was probably influenced by a remark of West and Bühler that a partition made by the father cannot effect a separation among his sons individually independently of their own desire (W. and B., 301). They refer to a passage in the Commentary by Bálam-

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batta on the Mitákshará (W. and B., 301) and to the remarks of Jaganáda on text 430 (Higg. Edition, Colebrook's Digest, Vol. II, 554). In Mitákshará, Chapter I, Section II, Vignyanésvarayogi observes, "When a father wishes to make a partition, let him separate *from himself* whether one or two or more sons," and the expression "from himself" is construed by Bálambatta as fixing a limit to the separation, and as affirming by implication the general principle that a co-parcener becomes separate only by his own choice. But in paragraphs 3 to 12 the Mitákshará speaks of distribution both of ancestral property and property acquired by the father; and in paragraphs 13 and 14 the partition made by the father, whether equal or unequal, is said to be binding, not because the sons are parties to it, but because the distribution by the father, whether equal or unequal, is impartial and is made as directed by the law. Again, in paragraphs 20 and 21, Section I, Chapter II, of the Smriti Chandrika, which is a work of special authority in Southern India, the distribution is expressly stated to be of the sons' shares as between themselves and to be independent of their consent. Upon the texts of authority in this part of India this power of distribution is an exception in the case of a partition made by the father, and an incident, not of ownership, but of paternal power, though that power must be exercised without partiality and within the limits fixed by the law. As to the text 430 cited in Colebrook's Digest, it relates to re-union, and in it Vrihaspati says: "He is re-united who, having made a partition, lives again, through affection, with joint property in the same house with his father, his brother, or his paternal uncle." In his remarks on this text Jaganáda says that after partition, it may be annulled and a re-union is possible and legal, and that where among four brothers two are separated and two remain undivided, but the effects are distributed by arithmetical computation—for instance, when 10 rupees out of 20 rupees have been allotted to two brothers and 5 rupees to each of the other two, there can be no re-union in the case of the former since there was no partition between them, and an arithmetical computation of their shares was not an act of partition between them, but a means of ascertaining the shares to be allotted to the latter two who have separated. Though he speaks of a partition by common consent of all the brothers, he is referring to the general rule and not

negativing the case of a distribution by the father as an exception. It seems to me therefore that West and Bühler are not warranted in regarding the distribution made by a father as a mere incident of ownership, and not as an incident also of paternal power. As no re-union is alleged in the case before us, the real question, as already observed, is whether the distribution in the circumstances in which it was made in this case was *bonâ fide* and legal.

Before expressing an opinion on this question, it is desirable to ascertain whether the income of the property allotted for the share of the plaintiff and his brother Subbaráyasámi is larger than that of the lands allotted for the shares of the first three defendants. We shall therefore refer the following issue for trial upon the evidence already recorded and upon such further evidence as the parties may adduce, whether the property allotted for the shares of the plaintiff and Subbaráyasámi yields a larger income in proportion to the shares than that of the lands allotted for the shares of the defendants.

The District Judge is requested to return his finding in the above issue, together with the evidence, to this Court within two months from the date of receiving this order, when ten days will be allowed for filing objections.

KINDERSLEY, J.—I concur in this Judgment.

NOTE.—Upon the return of the findings of the District Judge on the issues sent down, the High Court, finding the partition unequal and invalid, directed that the plaintiff should be put into possession of one-fourth share of the lands sued for (instead of two-fifths originally claimed), as being his share under the general Hindú law, in order to prevent further litigation; and after ascertaining by a further inquiry the amount of mesne profits due to the plaintiff, ordered each party to bear their own costs.