action for the expenses of the malicious prosecution as in the present case. We respectfully agree but in any event we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that, if any, of his executors are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Viswanatha Sastri.

ACHUTARAMAYYA AND 2 OTHERS (DEFENDANTS 3 TO 5), APPELLANTS,

1925, October 22.

v.

RATNAJEE BHOOTAJI AND 2 OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Hindu Law—Joint family—Debts—Commercial debts of father newly starting a trade—Liability of sons.

The text of Gautama, Chapter XII, 41, to the effect that the undivided sons of a Hindu are not liable for their father's commercial debts has long become obsolete; and ever since *Girdharee Lall* v. *Kantoo Lall* (1874) 1 I.A., 321, sons are liable for all debts of their father which are neither illegal nor immoral.

A trade is none the less ancestral because it was started only by the father.

APPEAL against the decree of S. SUBBAYYA SASTRI, Additional Subordinate Judge of Rajahmundry, in Original Suit No. 25 of 1920.

* Appeal No. 436 of 1922.

ACHUTA-RAMAYYA *v.* RATNAJEE BHOOTAJI.

The facts are given in the judgment of VISWANATHA SASTRI, J.

A. Satyanarayana for appellants.

G. Lakshmanna and *V. Viyyanna* for respondents.

JUDGMENT.

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—In this case the father of the appellants embarked on the hardware trade in 1914 and was sued with them in respect of debts contracted by him in the conduct of that venture. The appellants' vakil relied on a text of Gautama, XII, 41, which runs as follows:—

"Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor"

and the bold contention is put forward that the pious obligation does not extend therefore to commercial debts. I have discussed this subject at length in paragraph 303 of the 9th Edition of Mayne on Hindu Law and I have very little to add to what I said there. This Court has held in *Thangathammal* v. *Arunachalam Chettiar*(1) that sons are liable in the case of a surety bond executed by the father for payment as distinct from obligations as a surety for appearance and for honesty; and there are other decisions of the Calcutta and Patna Courts to the same effect. This appears to me to be based upon the view that the governing provision in the texts is that which excludes from the rule debts that are not *Vyavaharika*, an expression taken from Usanas (*apud* Mitakshara ii, 48) and Vyasa (*apud* Jagannatha I, 5, 203). From 1874 onwards the decisions of the Privy Council have adopted this view and have crystallized the translation as "illegal or immoral." It

(1) (1918) I.L.R., 41 Mad., 1071.

appears in *Girdharee Lall* v. *Kantoo Lall* (1) and has been repeated in many subsequent cases. If this be correct, it will follow, as I have said, that the particular instances given in the Smritis must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under the general words. A modern Court would therefore be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of to-day. I am clearly of opinion that commercial debts fall into this category and that we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama it was thought that to engage in trade was degrading, at any rate in the case of the higher castes. No one could pretend that that view would be entertained to-day. For these reasons I am of opinion that the sons are liable in this case and that the appeals must be dismissed with costs.

Of course the whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which, in my opinion, make it a working rule which in its actual application is neither inconvenient nor unjust.

VISWANATHA SASTRI, J.—Appeal No. 436 of 1922. Appeal by defendants 3 to 5 against the decree of the Court of the Additional Subordinate Judge, Rajahmundry, in Original Suit No. 25 of 1920.

Appellants are the sons of the first defendant, and the second defendant is their maternal uncle. The suit was laid for the recovery of a sum of money (Rs. 6,898-11-6) due in respect of money dealings between defendants 1 and 2 and plaintiff. Defendants 1

(1) (1874) 1 I.A., 321.

ACHUTA-RAMAYYA v. RATNAJEE BHOOTAJI.

VISWANATHA SASTRI, J.

and 2 are said to have carried on in partnership a trade in hardware, for the purpose of which trade money was being borrowed from time to time from plaintiff. It was also alleged that the first defendant and defendants 3 to 5 were undivided, and that the trade was being carried on by the first defendant for the benefit of the family. Defendants 3 to 5 contended that as they had become divided from their father (first defendant) they had nothing to do with the trade; that the trade was never an ancestral trade or a joint family trade, and that they were not liable. They also contended that the settlements of account alleged in the plaint, between plaintiff and defendants 1 and 2, were false. The Subordinate Judge held that the settlements of account were true, that the partition set up was brought about to defraud creditors; and he passed a decree against defendants 1 and 2, and against the joint family properties in the hands of defendants 3 to 5.

The contentions urged in appeal are:—(1) that the trade not being an ancestral trade, and the first defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for the purposes of the trade; and (2) that as Rs. 1,926-6-3 and Rs. 695-3-0 were due from third persons, and as the partnership took them over, they (defendants 3 to 5) were in any event not liable for the sums. The contention that defendants 3 to 5 had separated themselves from their father was not pressed before us.

Taking the second contention first, the allegation in paragraph 6 of the plaint is that on January 5, 1918, defendants 1 and 2 "made themselves liable in the sum of Rs. 1,926-6-3 for the share of E. Venkatasubbarayudu in the *katha* debt due by him and another K. Venkatanarayana Row, and the pro-note debt of the said E. Venkatasubbarayudu in the sum of Rs. 695-3-0."

In the case of a suretyship for payment, it may be taken as well settled that a Hindu son is liable. See *Sitaramayya* v. *Venkatramanna*(1), *Thangathammal* v. *Arunachalam Chettiar*(2), *Tukarambhat* v. *Gangaram*(3), *Rasik Lal Mandal* v. *Singheswar Rai*(4). The decision in *Narayan* v. *Venkatacharya*(5) relates to the liability of a grandson and has no application to the case before us. The text of Gautama (section 41) was referred to by the vakil for the appellants, but it appears to me that Gautama simply repeats Manu (section 159) and that he refers only to a suretyship for appearance. In the case of a suretyship for payment, the text of Yajnavalkya recognizes the liability of a son. This contention therefore cannot prevail.

Coming to the first contention, it was urged that the father was not continuing any ancestral trade but was starting a new trade and that for debts contracted for a new trade, the sons were not liable. That under ancient texts a son was under a legal obligation to pay his father's debts was the opinion held by that eminent Judge (MUTTUSWAMI AYYAR, J.) in *Ponnappa Pillai* v. *Pappuvayyangar*(6). According to Yajnavalkya, if a father be long absent in a distant country or be dead the debt must be repaid by the son. It is equally well settled that the son was not under any such liability in the case of debts contracted for illegal or immoral purposes. According to Yajnavalkya, a son was not bound to pay a debt, even though ancestral, if it was contracted for the purpose of drinking, debauchery or gambling. According to Gautama, a son was not bound to discharge a debt incurred by his deceased father if due by him to a wine shop or a gambling saloon.

(1) (1888) I.L.R., 11 Mad., 373.
(2) (1918) I.L.R., 41 Mad., 1071.
(3) (1899) I.L.R., 23 Bom., 454.
(4) (1912) I.L.R., 39 Calc., 843.
(5) (1904) I.L.R., 28 Bom., 408.
(6) (1882) I.L.R., 4 Mad., 1 (F.B.), at p. 18.

ACHUTA-RAMAYYA v. RATNAJEE BHOOTAJI.

VISWANATHA SASTRI, J.

"By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt."

See *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*(1). In *Suraj Bunsi Koer* v. *Sheo Persad Singh*(2), their Lordships of the Privy Council refer to the following dictum of WESTROPP, C.J., in the case of *Udaram* v. *Ranu*(3):—

"subject to certain limited exceptions (as for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

In the case before us the trade the father carried on was a trade in hardware, and there was nothing illegal or immoral about it. There is not even any suggestion to this effect in the written statement; and all that is alleged is that the business was neither an ancestral nor family business; that the sons had become divided from their father; and that the business was carried on by the father for his sole benefit. The finding is that the business was carried on for the benefit of the family and that the partition was fraudulent. In *Ramkishna Trimbak* v. *Narayan*(4) it was held that a son cannot escape liability for payment of the debts of his father contracted in fish trade. The decision in *The Official Assignee of Madras* v. *Palaniappa Chetty*(5) is no authority for the proposition that where a Hindu father starts for the first time a new trade, and for the purpose of the trade contracts debts his sons cannot be held liable for the debts so contracted. In that case the question arose in bankruptcy proceedings whether a Hindu son can be adjudicated insolvent in respect of debts incurred

(1) (1856) 6 M.I.A., 393 at 421.
(2) (1880) I.L.R., 5 Calc., 148 (P.C.) at 162. (3) (1874) 11 Bom. H.C.R., 88.
(4) (1916) I.L.R., 40 Bom., 126. (5) (1918) I.L.R., 41 Mad., 824.

in a business newly started by his father during his minority, and in which he actively participated after attaining majority, and there was no question as to the liability of joint family properties for such debts.

I would therefore dismiss the appeal with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Devadoss and Mr. Justice Waller.

M. A. R. R. M. P. MUTHU VEERAPPA CHETTIAR, PETITIONING CREDITOR (APPELLANT),

1925, September 3.

v.

U. K. SIVAGURUNATHA PILLAI, RESPONDENT (RESPONDENT). *

Provincial Insolvency Act (V of 1920), secs. 9, 13, 20 and 28—Joint Hindu family—Debt incurred by the father for the benefit of the family—Death of father, leaving major and minor sons—Major sons whether can be adjudicated insolvents.

There is nothing in the Provincial Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family; each case depends on its circumstances; the relation of creditor and debtor exists between the lender and the members of a joint family in respect of debts incurred by the family.

Chokkalingam Chettiar v. *Thiruvenkatasami Naidu*, C.M.A. No. 47 of 1916 (unreported), followed.

APPEAL against the order of R. A. JENKINS, District Judge of Coimbatore, in Insolvency Petition No. 43 of 1924.

The appellant, a creditor of the father of the respondent, filed a petition in the District Court to adjudicate the respondent an insolvent. The petitioner alleged that the father

* Appeal against Order No. 369 of 1924.