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delay. Their Lordships of the Privy Council held, that the suit being one in which the cause of action did not survive against the remaining respondent, the appeal abated. Applying this ruling to the present case, it is quite clear that as no representatives were brought on the record in the place of Nanhu the appeal abated. In our judgement the decree which was passed on the 15th of April, 1907, was not capable of being executed either against the surviving judgement-debtors or the representatives of Nanhu. The present application fails and is dismissed with costs.

In the appeal, the following judgement of the Court was delivered :—

For the reasons given in our judgement on the application of Sadarath Rai for review of judgement we allow this appeal and set aside the orders of both the courts below so far as they refuse to restore the property to the judgement-debtors on the condition that Imamuddin and Karimuddin do first repay the amount of money received by them from the decree-holder. The appellants will have their costs.

Application for review dismissed.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

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February 2.

DURGA DAT JOSHI (DEFENDANT) *v.* GANESH DAT JOSHI AND ANOTHER (PLAINTIFFS).*

Hindu law — Mitakshara — Partition — Self-acquired property — Gains of science—Astrology—Earnings made by unaided efforts without detriment to the family property.

In a joint Hindu family governed by the Mitakshara one of the sons obtained certain elementary education in astrology from his father, but no money of the family was expended on that education. While still quite young this son ceased to live with the rest of the family ; continued his studies in astrology on his own account, and ultimately managed, by the exercise of his skill as an astrologer, to acquire a considerable sum of money without detriment to the family property. *Held* that this money was his self-acquisition and could not properly be regarded as belonging to the joint family.

Katyayana's definition of " acquisition through learning which is not partiçipable " cited in the Mitakshara [I. 4,8.] is not exhaustive, but illustrative

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* First Appeal No. 231 of 1908 from a decree of Aziz-ur-Rahman, Subordinate Judge of Benares, dated the 1st of July 1908.

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merely. *Lachmin Kuar* v. *Debi Prasad* (1) and *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (2) referred to.

THIS was a suit for partition of joint family property. The defence was that the plaintiffs were in possession of property which they were bound to bring into hotchpot as part of the joint family property, but they had not done so. The plaintiffs replied that the property referred to was obtained by the elder plaintiff by the exercise of his skill as an astrologer, and was self-acquired property. The facts of the case are stated at some length in the judgment of the Court.

Dr. *Satish Chandra Banerji* (with him Babu *Harendra Krishna Mukerji*), for the appellant, contended upon the evidence that the family was joint and that even if the plaintiffs had, for some reason or other, lived apart, that did not alter the status of the family. The presumption, therefore, was that all property in the possession of the plaintiffs was joint family property ; *Ramraj Rai* v. *Salik Rai* (3). As to nucleus of ancestral property there could be no question ; *Lal Bahadur* v. *Kanhaiya Lal* (4). Among unseparated brothers improvement or augmentation of the common stock by one does not entitle him even to a double share. Mitakshara I, 4, 31. The question then is—May what the plaintiff has acquired by the practice of astrology be treated as "gains of science" within the meaning of Yajnyavalkya's texts, II, 118-9 ? Katyayana's definition of wealth gained by learning and not participable is cited in the Mitakshara (I, 4, 8) :— "Wealth, gained through science which was acquired from a stranger while receiving a foreign maintenance, is termed acquisition through learning." The plaintiff (Ganesh Dat) deposes :— "My father gave me education, that is, whatever knowledge I have, with which I have all along earned my living, was taught by him." The wealth which is in dispute, therefore, in this case was gained through science which was acquired from the father of the parties at a time when the plaintiff was being maintained by his father. There was detriment to the father's estate, inasmuch as the father maintained the plaintiff and personally instructed him at the sacrifice of time and other engagements. All

(1) (1898) I. L. R., 20 All., 435.
(2) (1877) I. L. R., 1 Mad., 252.
(3) Weekly Notes, 1899, p. 214.
(4) (1907) I. L. R., 29 All., 244.

this has money-value ; besides, where there has been any detriment to the father's estate the *quantum* of that detriment is immaterial. Moreover, while the plaintiff, Ganesh Dat, had been prosecuting his astrological studies in comparative solitude, the defendant had been maintaining his wife and children at the family dwelling house out of the patrimony, and "he who maintains the family of a brother studying science shall take, be he ever so ignorant, a share of the wealth gained by science." Narada XIII, 10 (Jolly's translation, p. 191). Modern cases—the leading authority is *Lakshman* v. *Jamnabai* (1)—make a distinction between elementary education, which is the necessary stepping-stone to the acquisition of all science, and instruction in the special branch of the science which is the immediate source of the gain. But here the plaintiff himself admits that it was special instruction in the science of astrology which he received from his father and his entire knowledge of the subject was derived from him. The father was a distinguished astrologer, the plaintiff has followed the family profession and earned all that he has acquired as an astrologer.

The Hon'ble Pandit *Sundar Lal* (with him Munshi *Gokul Prasad* and Babu *Beni Madhub Ghosh*), for the respondents, argued that the evidence proved that the property in dispute was the plaintiff's self-acquisition, "acquired by himself without detriment to the father's estate" and "without using the patrimony." Manu, IX, 208, Mitakshara, I, 4, 6, 10. Ganesh Dat began to live apart when he was fourteen. He could have received from his father only rudimentary education. The father had incurred no extra expenditure over the son and the son acquired proficiency as an astrologer by his individual exertions and amassed a fortune without any assistance from his younger brother (defendant). The latter, therefore, is not entitled to any share in the property in dispute. He cited *Pauliem* v. *Pauliem* (2), *Lachmin Kuar* v. *Debi Prasad* (3), *Bachcho Kunwar* v. *Dharam Das* (4) and *Kanhaya Lal* v. *Lal Bahadur* (5).

Dr. *Satish Chandra Banerji* replied.

(1) (1882) I. L. R., 6 Bom., 225, 240-3. (3) (1898) I. L. R., 20 All., 435.
(2) (1877) I. L. R., 1 Mad., 252, 261. (4) (1906) I. L. R., 28 All., 347.
(5) Weekly Notes, 1902, p. 20.

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STANLEY, C. J. and BANERJI, J.—This appeal arises out of a suit for partition, and the facts shortly are these. Ganesh Dat, one of the plaintiffs, is the son of one Pandit Baldeo Dat Jotishi, deceased, and the other plaintiff, Kashi Dat, is his son. The defendant, Durga Dat, is the brother of Ganesh Dat. Baldeo Dat died about 26 years ago, leaving his wife and two sons him surviving. Ganesh Dat was at this time about 25 years of age, while Durga Dat was a lad of about seven years. Ganesh Dat devoted himself to the study of astrology, and with a view to uninterrupted study he, in the lifetime of his father, withdrew to and lived in seclusion in a garden house of the Maharaja of Dumraon, leaving his mother, his wife and his brother in the ancestral house of the family. After his father's death he lived for several years in the same garden house, but some years ago he built a new house and has been living in that house apart from the other members of the family ever since. Ganesh Dat became a distinguished astrologer and attracted the attention of notable Indian gentlemen, amongst others, Their Highnesses the Maharajas of Benares and Vizianagram and the Raja of Sarguja and others. For his services to his clients as an astrologer he received considerable sums of money which were invested in various ways. The ancestral property of the family had never been partitioned, and the suit out of which this appeal has arisen was instituted by Ganesh Dat and his son for partition of that property. The property so sought to be partitioned included a sum of Rs. 5,530, deposited by Baldeo Dat in the kothi of Babu Sita Ram Kesho Ram, and also a sum of Rs. 940 in deposit in the same kothi, alleged to represent money deposited by Ganesh Dat on account of income of the village of Kodupur. The defendant in his written statement alleged that the money deposited in the kothi of Babu Sita Ram Kesho Ram, did not belong to Baldeo Dat, but formed part of the estate of his mother, and that she before her death made an oral will and thereby gave the money in question to the defendant's wife and gave ornaments equal in value to the sum so deposited to the wife of Ganesh Dat. He further alleged that Ganesh Dat and he were not separate in food, but that on the contrary up to the month of *Bhadon Sambat* 1964, he and the plaintiff remained joint; and the business carried

on by them was carried on as a joint family business, Ganesh Dat doing all the work as manager of the family. He claimed that the moneys received by Ganesh Dat as a return for his services as astrologer and the property acquired with such moneys formed joint family property and should be brought into hotchpot in the partition sought to be effected. In a schedule to the written statement a large quantity of property is specified which the defendant alleges formed part of the joint family property.

The court below held that the sum deposited in the *kothi* of *Babu Sita Ram, Kesho Ram* was ancestral property and that the defendant's allegation that it was his mother's *stridhan* was without foundation. It also held that no will was made by the defendant's mother as alleged, and that the allegation that the defendant's mother gave the money in deposit to the defendant's wife and jewelry to Ganesh Dat's wife was a made-up story. It also held that the old ancestral house and the profits of the alluvial lands deposited with Sita Ram and Kesho Ram were partible as joint family property. As to the properties claimed by the defendant to be ancestral, the court below held as to some of them that they never existed, and as to those that existed that they were acquired after the death of Baldeo Dat by the plaintiff Ganesh Dat alone. As to this last mentioned property the court found that it was acquired by Ganesh Dat by his own intellectual exertions and as the reward of his services as an astrologer. It held that it was fully established beyond possibility of contradiction that Ganesh Dat did not have in his possession any of the ancestral properties or their income, or the profits of them; that the principal of the money deposited with Sita Ram Kesho Ram was still in deposit and the interest was from time to time taken and appropriated by the defendant and his mother and plaintiff never touched it. The court below further found that as to three houses, which the defendant claimed to be joint family property, they were acquired by Ganesh Dat after the death of his father and that he paid the consideration for them out of his own earnings and that the defendant had no right to claim any share in those houses. A decree for partition was accordingly given for the property found to be joint ancestral property.

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The defendant has preferred this appeal, and the main grounds of appeal relied upon before us are that the family was a joint family up to *Bhadon, Sambat* 1964, and that all acquisitions made by Ganesh Dat formed part of the joint family property; that there was a nucleus of family property, and with its aid, it should be held, the disputed properties representing the earnings of Ganesh Dat were acquired.

The learned advocate for the appellant has laid before us the evidence bearing upon the disputed facts in the case and we have listened to his arguments with attention. The conclusion at which we have arrived is that the learned Subordinate Judge rightly decided the questions of fact raised in the issues. As to the alleged oral will of the widow of Baldeo Dat the defendant has wholly failed to prove it. There is likewise no evidence to satisfy us that the widow of Baldeo Dat gave any jewelry to the plaintiff's wife. We are also satisfied as to the correctness of the findings in regard to the items of property which, in the opinion of the learned Subordinate Judge, were not shown to be in existence.

It only remains to consider the arguments which have been advanced in regard to the property which has been found to be the separate and self-acquired property of the plaintiff and therefore not liable to partition. The appellant's allegation is that all acquisitions of Ganesh Dat made whilst the family remained joint formed joint property of all the members of the family, and as such is partible. As to the manner in which these acquisitions were made we think that the testimony of the plaintiff is altogether reliable. He deposed that at the time of his father's death he was 27 years of age, whilst his brother Durga Dat was only six years old; that he had been living jointly with his father up to the time of his death, and that his father used to supply him with food and clothing, but that as he worked as an astrologer he used to live apart in the Dumraonwala garden, so that nobody might interfere with his work; that he deposited in the kothi of Babu Sita Ram Kesho Ram whatever he earned and did not give the same to his father; that his father gave him his education and that whatever knowledge he had was acquired from his father; that the agreement between him and his father was that he should not take any share in

his father's income and should not give any of his income to his father; that his mother and Durga Dat continued to live in the old ancestral house, and that his father at the time of his death had Rs. 5,530 in deposit in his name in the kothi of Babu Sita Ram, and that he, the witness, had about Rs. 6,000 deposited in his own name in the same kothi; that after his father's death his mother and Durga Dat were maintained out of the money of Baldeo Dat deposited in the kothi of Babu Sita Ram, and that he, the plaintiff, did not support his mother or Durga Dat, or furnish them with funds; that he purchased a house at an auction sale about 24 years ago and subsequently rebuilt it, and after the building was completed he lived in it; that his father supported his wife as long as he lived; that after his death she went to her parent's house in the Alwar State until the house which he had purchased was ready for her use, and that since then she has been living with him in that house. He further stated that any property which was left by his father was in the possession of the defendant. Then he deposed to the building of a house described as No. 73 with his own money and also to the purchase of a house bearing the No. 72 in the name of his son, and another house bearing the No. 107 in his own name. He also stated that he had in deposit with the Bank of Bengal a sum of Rs. 7,000, also a sum of Rs. 6,000 in deposit with Babu Narendra Bahadur, and a sum of Rs. 2,000 lent to one Babu Chunnu Lal; that these and other moneys to which he refers, the details of which it is unnecessary to give, exclusively belonged to him and represented his earnings. The defendant never, he said, gave him any help in his work as astrologer, nor did he help him in any way in connection with the houses which he built, and the land which was granted to him by the Maharaja of Benares, was granted to him personally. It is apparent from the evidence that the plaintiff acquired the confidence of the public as an astrologer and by his unaided efforts was able to amass a considerable sum of money representing his exclusive earnings. It is also clear that this money was obtained without detriment to the family property. The plaintiff, as he says, no doubt obtained his elementary education in astology from his father, but no money of the family was expended on that education.

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On the question as to what are self-acquisitions Manu lays down the general rule that "what a brother has acquired by labour or skill without using the patrimony he shall not give up without his assent, for it was gained by his own exertion" (Manu, IX, clauses 206 to 209). In the Mitakshara the following rule is laid down:—"Whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or gift at nuptials does not appertain to the heirs" (Chapter I, section 4, clause 118). This rule is explained by Vijnanesvara to mean that the phrase "anything acquired by himself without detriment to the father's estate" must be everywhere understood, and it is thus connected with each member of the sentence, namely, "what is obtained from a friend without detriment to the paternal estate, what is received in marriage without waste of the patrimony; what is redeemed of the hereditary estate without expenditure of ancestral property; what is gained by science without use of the father's goods." The learned advocate for the appellant relied upon the definition given by Katyayana of wealth which is not participable, gained by learning, thus:—"Wealth gained through science which was acquired from a stranger while receiving a foreign maintenance is termed acquisition through learning," and he contended that inasmuch as the plaintiff Ganesh Dat did not acquire his knowledge of astrology from a stranger while receiving a foreign maintenance, but from his father, his earnings as an astrologer could not be regarded as acquired without detriment to his father's estate. He also contended that the learning which the plaintiff received from his father had a money value, and that this fact must be taken into account. We are not prepared to hold that the definition of "wealth which is not participable" given by Katyayana is exhaustive. It appears to us to be illustrative merely. Mr. Ghose in his work on the principles of Hindu law, dealing with the rules laid down by Manu, Narada, Vishnu, Katyayana and Yajnavalkya, also mentions the definition of Katyayana and passes this comment upon it:—"He defined gains of science 'as what is gained by one educated whilst supported by a stranger.' He probably meant to emphasize the rule of Narada, but he says nothing about it. He only says that in the case of a

person trained in arms by his father or brothers, the gains of his valour are divisible among the family according to Vrihaspati. In the text of Katyayana on the subject we find him quoting authority for his position. Unfortunately we do not possess the texts which were probably before him." Later on he says:— "From the above it is tolerably clear that the rule of Manu as modified by Narada, agreeing as it does with that of Vishnu, Gautama and Yajnavalkya, is the law governing self-acquisitions, including gains of learning, and that it is a simple rule consonant with reasoning and natural justice." (2nd edition, pages 520, 521, 522). At the age of fourteen, the plaintiff left his father's house and from the evidence we gather that any education which he received from his father was such elementary education as a boy of tender years could imbibe. In regard to advanced education in the science of astrology he was a self-taught man. In the case of *Lachmin Kuar* v. *Debi Prasad* (1) the facts were these: three brothers, Ram Narain, Sheo Narain and Jai Narain, whose ancestral home was at Bilar in the Cawnpore district, went out into the world and obtained employment in the Commissariat department, and in the course of time each acquired considerable wealth. They were not shown to have had any assistance from the joint family funds except in their support in early years and rudimentary education. It was not shown that any money was raised on the ancestral house to start any of them in life. They did not work jointly and no one of them was shown to have had any concern with the savings and accumulations of the other brothers. The question before the Court was whether the savings and accumulations of one of the brothers formed joint family property, and it was contended in support of the affirmative that Sheo Narain was educated when a boy at the family expense, and that, therefore, his subsequent earnings and accumulations should be treated as joint family property. Burkitt and Dillon, JJ., repelled this contention and referred to the observations of their Lordships of the Privy Council in *Pauliem Valoo Chetty* v. *Pauliem Sooryah Chetty* (2), in the course of which a similar contention was stated to be "a some what startling proposition of law." They held that the fruits

(1) (1898) I. L. R., 20 All., 435. (2) (1877) I. L. R., 1 Mad., 252.

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of an ordinary elementary education could not be regarded as the gains of science acquired at the expense of ancestral wealth.

In view of the fact that no portion of the joint family property, be it principal or interest, was spent upon the plaintiff's education, and that he lived separate and apart from the family and acquired his skill in astrology by his own unaided efforts, we are of opinion that his earnings cannot properly be regarded as belonging to the joint family. The joint estate suffered no detriment by the education given to the plaintiff by his father, and it would, we think, be unduly extending the rule laid down by Hindu law-givers if we were to hold that the earnings of the plaintiff as an astrologer under the circumstances of this case are partible amongst the members of the family. We think that the view of the court below upon this question is correct and we dismiss the appeal with costs.

Appeal dismissed.

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February 4.

Before Mr. Justice Richards and Mr. Justice Tudball.

DULARI (PLAINTIFF) *v.* MUL CHAND AND OTHERS (DEFENDANTS).*

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 22 *—Occupancy holding—Succession—Hindu law.*

An occupancy tenant died before the coming into operation of the Agra Tenancy Act leaving two daughters, one indigent and the other rich, and was succeeded by the former. After the Tenancy Act came into operation the indigent daughter died. *Held* that the rich daughter was entitled to inherit the holding upon the death of her sister in preference to the latter's son; her right, which had accrued on the death of her father, having been merely postponed during the lifetime of the indigent daughter.

THE facts of this case were as follows:—

One Thakuri, an occupancy tenant, died twenty-five years before this suit leaving two daughters, named Musammat Shibbo and Musammat Dulari. Musammat Shibbo the indigent daughter succeeded according to the Hindu Law. Musammat Shibbo died in 1906. Musammat Dulari, her sister, brought this suit against the defendants, the sons of Musammat Shibbo. The defence was that section 22 of the new Agra Tenancy Act applied. The court of first instance decreed the suit in part. The lower appellate

*Second Appeal No. 951 of 1908 from a decree of Muhammad Mubarak Husain, Subordinate Judge of Shahjahanpur, dated the 10th of July 1908, reversing a decree of Kanhaya Lal, Munsif of Shahjahanpur, dated the 14th of January 1908.