APPENDIX

The Reporter is indebted to Mr. Arthur Branson for the following copy of Mr. Teed's report of *Nàràyanasawmy Chetti* v. *Arunáchala Chetti*, referred to in the argument and judgment in *Vallinàyagam Pillai* v. *Pachche*, supra pp. 330, 336.

SUPREME COURT, WEDNESDAY, 8TH FEBRUARY.—On a former occasion we mentioned that the attention of the Supreme Court had been occupid with the question of Hindoo wills. The case arose [in 1832] out of the will of P. Kistnama Chitty, who was a member of a divided family. He died possessed of a considerable fortune,the principal part of which was self-acquired. He left widow and an infant son. By his will he bequeathed the greatest part of his property to his brothers, and he left a very inconsiderable share to his son. No provision whatever was made for his widow. A bill was filed by the widow and son against the brothers of the deceased, who were also his executors, seeking to have the will declared invalid, it being contrary to the principles of Hindoo law. The cause was heard, and the Court pronounced a decree in favour of the will. Subsequently, the case was re-heard, and the Advocate General and Mr. Teed contended at great length, that testaments were unknown to the Hindoo law, and that a Hindoo had no right by last will to disinherit his natural heir. Mr. Bathie, as Counsel for the defendants, argued on the other side, and the Court took time to consider its judgment. The case is one of considerable importance at this Presidency, and we believe that this is the only instance in which the point has been solemnly decided. We know that, some few years since, the legality of a Hindoo making wills at all, was considered so doubtful, the Court, composed then of Sir Edmund Stanley, Chief Justice, and Sir Charles Grey, Puisne Judge, refused to grant probates to Natives. The practice however seems to have been revived, but how, or when, we know not. This day the Judges gave judgment, and we believe the following is the substance of what fell from their Lordships.

P. Narrainasawmy Chitty and Rangamall against *P. Arnachella Chitty* and others. 1832. *February* 8

SIR R. PALMER, *Chief Justice*.

In this case on behalf of the complainant there were two questions raised. The first, whether a Hindoo can by will dispose of any part of his property from his heirs ? and, secondly,—if so, whether to the extent this testator has ? With regard to the first point, I think it is now, much too late to question it here. The Advocate General

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in his argument not only seemed to dispute the fact, but that there were decisions to the reverse. I therefore consider it necessary to go at length on this subject. In support of his assertion the Advocate General mentioned two cases which had been decided in this Court, one in March 1821 and the other in May 1818, in both of which cases the wills were set aside. But the circumstances of the cases account for such decisions. In one, *Mootoo Chetty* bequeathed the whole of his property to his five sons, and annexed thereto a direction that no division of the property should take place, or be attempted, under pain of forfeiture of a considerable portion from the shares of such of the brothers as wished for a division. The bill was filed by one of the sons for a division, and by the decree it was declared that the will was not binding on the plaintiff, but that he was entitled to one-fifth of the testator's property. Such a condition is void, for every joint owner has a right to a division. A case is reported in Calcutta in Mr. McNaghten's treatise, pages 324 and 327(*a*). A testator declared the estate should be undivided and a partition was ordered by the Court:—it appears therefore that the decree did not proceed on the ground that a Hindoo could not make a will. The other case is still less applicable. There the property divided [devised ?] away was common or ancestral property. And if a bequest away from the natural heir whether acquired or ancestral property is the same, where would be the use of making the distinction? Here there is a difference, considering it to be clear in the southern part of India that a Hindoo cannot give away ancestral property, without obtaining a partition of it, and such is laid down in the correspondence between Sir Thomas Strange and Mr. Colebrooke. So much for these decisions; and the reasoning fails, for in the present case the property is all self-acquired and not ancestral. The defendant's counsel mentioned two cases which had occurred here in which wills of Hindoos had been established: that of the *Advocate General* v. *Narsimaloo* and others. I shall leave out of the question—in the other case of the *Advocate General* v. *Annasawmy*, the decision was in favour of testamentary right, and I cannot see any difference between giving property in charity for feeding Bramins, and giving it to brothers or near relations. Besides these cases I shall rely on the decisions of former Judges. The wills of Hindoos have been admitted to probate in the Supreme Court for 30 years past, and on looking at the records which are now left, it appears they had been admitted to probate in the Mayor's Court in 1764, and in examining some of these wills from the style of language used, it is evident they must have been concocted.

(*a*) *Nubkissen Mitter* v. *Hurrischunder Mitter*, Sir. F. W. Macnaghten's *Considerations on the Hindu Law*, pp. 323-330.—W. S.

by Natives, and this does away with Sir Thomas Strange's remark which is not well founded, that the custom of making wills amongst the Natives is to be attributed to Europeans. In examining these records I find a will in 1778, which is of a pure native concoction, and eaves legacies to charities and persons not appearing to belong to the family the amount of 30,000 pagodas. In the same year *Chinnatomby Moodely* by his will leaves every thing to a son he had by a woman who had been living with him. In 1780 *Condapah* who having no children his wife would be his heir, but he makes a will and leaves all his property which was separate and self-acquired to his son-in-law to maintain his wife. There is one other case arising out of the will of *Tondavaroy*, viz., the case of *Vesvanada* v. *Sabaputty* in which the decree was made in May 1806 ; the property in that case was acquired by the testator, he gave legacies to the amount of 15,000 pagodas, leaving a surplus of nearly 25,000 pagodas, where two-fifths were given away. In the will of *Soobaroy Moodelliar*, who gave a considerable portion of his property to two infants, the plaintiffs were the two infants and their mother who called herself his widow, against his acknowledge wife, who was also administratrix with the will annexed during the minority of her son, the point raised was that he could not make a will, and it was submitted by the answer whether she was compellable to account ; the decree of 12th February 1820, directed an account and deposit of title deeds and declared the moveable and immoveable property legally *devised.*

In the case of the will of *Gopaul*, the bill was filed in 1802, the decree establishing the will was made in 1806. The cause was re-heard in May 1806 and a final decree given in 1818, which affirmed the first decree. *P. Narrainsawmy Naidoo* v. *Vasuntapuram Ramasawmy Braminy*. The plaintiff showed that the property bequeathed away was undivided and claimed the same as heir. The defendant, the executor, by his answer stated that the family were separated, and it was submitted whether a Hindoo could make a will. No one can by testament defeat the succession.

There is only one more case which has occurred in this Court that I shall mention—the case of *Chingleroy* v. *Trivator Annasawmy Moodelliar* arising out of the will of *Mauréapah*. The suit was for payment of a legacy, and the question raised was that a testator was not at liberty to dispose of his property by a testamentary paper. The case was heard and reheard, and the decree was affirmed directing the paymen of the legacy. It was heard first in October 1816, and it appears a second time in the Registrar's Book of 1816 and 1817. By the decisions in those cases the Court have sanctioned bequests which in part disinherit the heir. In looking at the Regulations

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of Government, No. III of 1802 [sec. XVI] directs the execution of wills to be carried into effect, thereby acknowledging or contemplating Hindoo wills. Twenty-seven years afterwards, in 1829, this regulation is partially rescinded. In the second volume of Sir Thomas Strange's *Elements*, page 414, [2d. ed., p. 426] a case in the zillah of Chingleput, and the following case property is given from the heir. The pundits say the will would be good if only half were given away ; but independent of such authorities I must repeat that it is not now to be argued that a Hindoo cannot make a will partly disinheriting his heir.

The next question is, can a Hindoo make a will bequeathing away from his heir property to the extent that this man has done ? Let us see what the proportions are:—It is said that four-fifths are given to his brothers and but one-fift to his son :—it is said that if the bequest is against the Dharma Sastra it is bad ; if according to it, it is good. Now where are we to look for these provisions, what is good or bad, but we must look to the law relating to voluntary gifts. The law of gift has been adopted in such cases, and it is stated that a Hindoo can bequeath what he can dispose of by gift, as far as regards self-acquired property ; and the question now is, whether a testator can give to his brothers four-fifths of his self-acquired property and to his son only one-fifth ? I think he can. *Mitakshara*, chap. 1, sec. 2, cl. 9, p. 229. From the passages here quoted, a Hindoo has sole power over his self-acquired property; and may give away every pice of it ; though he ought not to give away so as to leave his children entirely destitute. After stating what cannot be given, it states what can.

Now I shall comment on what can be given away : every thing that will not distress the family, who are entitled to food and raiment, can be given away—gifts good and binding are such as are given to friends and relatives. In Mr. Colebrooke's correspondence with Sir Thomas Strange, it lays down the points on gifts in this part of India : the result of the authorities and pundits is, that, subject to a provision and maintenance for the widow and children, the will is good. Here no such objection exists, although it was objected however that the son was not entitled to the benefit of the legacy till he attained his age of maturity, and that nothing was left to the widow. The testator has not given away all his property, but the remainder is sufficient for their maintenance, and the bill says, he left 15 lacs of rupees. And as to the widow all she is entitled to, is food and raiment. My opinion with respect to the will is the same as on the former hearing, that the will is not void but is binding, and I give no opinion with respect to the moveable property which is not bequeathed—at the rehearing the plaintiff failing to set aside the will, the bill should be dismissed. The doctrine of *Colchester* v.

Colchester, Select Chancery Cases [13 (*a*)] does not apply here. The order was that this cause should be re-heard generally and left it quite open to the defendant to insist on what he has. But although the plaintiff has failed in his re-hearing, he is as son and heir entitled te the residue, and if the allegations in the bill are true there will be a very large sum, and this is sufficient to entitle the plaintiff to have an account. The former decree affirmed without costs.

Sir R. COMYN.—This case involves only one legal question which is, whether a Hindoo can dispose of his self-acquired property by will? I am of opinion that he can; and in this Court and in Calcutta the wills of natives are constantly recognized. But the only ground of analogy which I can find to support Hindoo wills is that of gifts. I think a Hindoo might make a gift of all his self-acquired moveable property; and it seems quite clear that he might make an unequal division of his self-acquired property amongst his heirs, but, not so if ancestral property. The plaintiff only calls on the Court to set aside his father's will on the ground that a Hindoo cannot make a will. It would be a strange inconsistency if, when we are daily admitting Native wills to probate, [we were] to say that they are illegal.

(*a*) "If the petition of re-hearing be against the decree in general the whole cause is open; otherwise, if it be only in respect of particular parts of it."—W. S.