1863.
June 27.
S. A. No. 145 *of* 1863.

Karunagara Manavan for the appellant, the plaintiff.
Mayne, for the respondents, the defendants.
The facts appear from the following

JUDGMENT :—This was a suit by the plaintiff, as undivided brother of the second defendant, and of the deceased husband of the first defendant, to recover a two-thirds share of a house, said to have been illegally sold by the first defendant to the third.

The Lower Courts upheld the sale in question, and dismissed the plaintiff's claim, on the ground that the house was the self-acquired property of the first defendant's husband, and that the sale was made by the widow, the first defendant, for the purpose of paying her husband's debts.

We consider it clear that the grounds on which the Lower Courts have decided this case are untenable in point of law. The brothers being undivided, it is manifest that on the death of one of their number the widow had no right to deal with his property, whether self-acquired or not ; and the sale is consequently invalid. We therefore reverse the decision of the Principal Sadr Amin, and pass judgment in favour of the plaintiff for the property claimed in the plaint. The costs incurred by the plaintiff throughout the entire case will be charged to the first and third defendants jointly and severally.

Appeal allowed.

ORIGINAL JURISDICTION (*a*)

Original Suit No. 85 *of* 1863.

VIRASVÁMI CHETTI *against* APPASVÁMI CHETTI.

A Hindu wife is not entitled to maintenance if she leaves her husband without a justifying cause.

The husband's marrying a second wife is not such justifying cause.

Where, therefore, a Hindu husband married a second wife, and his first wife thereupon left him:—*Held* that the first wife had no implied authority to borrow money for her support.

Semble : the prohibition against a plurality of wives save under certain circumstances, is merely directory and not imperative.

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THIS was a suit to recover rupees 924-13-5, being rupees 700 lent to the defendant's wife on the 3rd September 1860, and rupees 224-13-5, being interest thereon at 12 per-cent. per annum from 3rd September 1860 to the 7th of May 1863.

(*a*) Present : Scotland, C. J. and Bittleston, J.

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The plaintiff affirmed and the defendant denied that he the plaintiff on or about the 3rd of September 1860 lent to the defendant's wife Vijjaya Ammál the sum of rupees 700. The first issue therefore was whether that sum was so lent as in the plaint alleged.

The plaintiff also affirmed and the defendant denied that the said sum was necessarily borrowed by the said N. Vijjaya Ammál for her maintenance and to enable her to prosecute a suit against the defendant for her maintenance. The defendant affirmed and the plaintiff denied that the said money was borrowed by N. Vijjaya Ammál without any authority from him the defendant to borrow the same and without any necessity on her part for so doing.

The second issue therefore was whether the said N. Vijjaya Ammál had authority to bind the defendant by her said contract.

All the parties were Hindus. It appeared from the evidence of Vijjaya Ammál that she had married the defendant twenty years ago, that they occupied adjoining houses at Mayilappur (both of which belonged to the defendant), but in other respects had lived as husband and wife down to the occurrence of the events which gave rise to the present action. She asked him for support: he answered, "my income from the garden has ceased: you had better borrow and support yourself." He went on for two or three years telling her to borrow. She borrowed money accordingly, and her mother falling sick at Tinnanur, she went thither. On her return to Mayilappur she found that her husband had married a second wife without her knowledge or consent: although she had heard a report that he was going to contract a second marriage. She thereupon left her husband. She never afterwards went and asked him to support her; but borrowed money from the plaintiff on the security of the house which she had occupied. There was no evidence that the first wife was unfaithful, ill-tempered, barren or productive only of daughters.

Branson, for the plaintiff.

Mayne, for the defendant, contended that the express authority to borrow ceased when the wife deserted her hus-

band. His marriage to a second wife did not justify the first wife in leaving him, and she had therefore no implied authority to bind him for maintenance or necessaries.

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Counsel did not go into any evidence; but as he had not intimated that he did not intend to call witnesses.

Branson, replied.

SCOTLAND, C. J.:—In this case the rights of the parties depend on our decision upon the question raised by the second issue, namely, whether or not the wife had the authority of her husband, the defendant, to enter into her contract with the plaintiff so as to make the defendant liable for the money borrowed, assuming it to have been lent for necessaries.

On this question the Hindu law appears to rest upon pretty much the same grounds as the English law. A person dealing with a wife and seeking to charge her husband must shew either that the wife is living with her husband and managing the household affairs—in which case an implied agency to buy necessaries is presumed—or he must shew the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance—when of course the law would give her an implied authority to bind him for necessaries supplied to her during such separation, in the event of his not providing her with maintenance.

Then as to the evidence. The plaintiff's case is not met by the other side; and we must therefore give his evidence its full and fair effect. Doing so, then, the first question raised is does the plaintiff's evidence establish that express authority was at one time given by the husband to the wife to bind him for necessaries supplied to her? [His Lordship here analysed the evidence and came to the conclusion that such authority was established.] Then the next question is, can we extend the express authority to borrow which the defendant unquestionably gave her before she went to Tinnanur, and whilst they were living together as man and wife, to the period after her return to Madras, when she was of her own will living apart from him, because he had married a second wife, and for no other reason, or are the circumstances such as to prove that an implied authority existed?

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The evidence shows distinctly that she neither returned to her husband nor made any application to him. According to Hindu law and usage, it seems clear that whatever may be thought of the morality of the step amongst Hindus, polygamy is permitted, and that it is competent to a Hindu to have several wives. How many wives, as Sir T. Strange observes in his *Hindu Law*, vol. 1, p. 56, it is competent for him to have at one and the same time, does not distinctly appear. The prohibition which is to be found directed against a plurality of wives save under certain justifying circumstances, such as the first wife's infidelity, bad temper, barrenness, or production only of daughters, appears to be treated, like so many other rules of Hindu law, as merely directory and not imperative. If, then, in the present case it was permitted to the defendant to supersede his first wife by taking another wife to live with him—and this was her sole reason for refusing to live with him—his doing so did not, according to Hindu law, justify his first wife in separating herself and remaining apart from him of her own free will, and could not without more give her implied authority as his agent to bind him for debts incurred for necessaries. She admitted in her evidence that she never went to him or asked him for maintenance after her return from Tinnanur, and there is nothing to show any disinclination on his part to receive and provide for her in his family. Her conduct in effect amounted to this—that with wounded feelings as a wife she was disinclined to return to her husband and chose without any communication with him to live apart and borrow money.

We cannot extend to this period an express authority given when she and the defendant were living together in every respect as husband and wife. There being, then, no evidence of any other express authority, and none from which, consistently with Hindu law, any authority can, I think, be implied, the defendant must have a verdict on the second issue.

BITTLESTON, J.:—In cases of this kind the burden of proof lies wholly on the plaintiff. He contracts with one and sues another. He must therefore show that the party with whom he contracted had power to bind the party whom he seeks to charge. By the law of England, in the case of hus-

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band and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family. And according to Hindu law, also, a wife has authority to bind her husband by contracting for necessaries in proportion as the management of the family is confided to her. By Hindu law, perhaps, the presumption of authority is not so strong as it is by English law. But it is not necessary now to consider that point, for here the husband and wife were living separate when the contract was made ; and if husband and wife are living apart, special circumstances must be shewn to raise any implication of authority in her to bind him by her contracts. A Hindu wife is not entitled to maintenance when she voluntarily and groundlessly abandons her husband and lives apart from him. A fortiori, therefore, she has no authority to borrow money for her maintenance. In the present case, there is nothing to justify the wife in absenting herself from her husband, and insisting on her right to maintenance. So far, therefore, as the implied authority goes, the plaintiff's case fails. Then it is said there is evidence of express authority from her husband ; but does the evidence make out such an authority as will include this claim ? The evidence is of an authority before the separation. While the husband and wife were living together (though in adjoining houses) he said to her, " my income from the garden has ceased : you may borrow." Did this warrant her in borrowing 700 rupees for the purpose of instituting a suit against her husband, after leaving him without any reasonable cause ; If we held that it did, I think that we should be stretching the express authority too far. The express authority therefore fails as well as the implied authority, and the suit must be dismissed with costs.

Judgment for the defendant with costs.

NOTE.—" Kátyáyana says : Debts incurred for domestic uses, by the slave,*wife*, mother or disciple of one gone to a far country or deceased, and also by his son, must be paid :" So says Bhrigu. " And Yájnavalkya holds : a woman shall not pay debts incurred by her husband or son, neither a father those of his son ; *nor a husband those of his wife, unless contracted for the benefit of the family*," *Vyavahara Mayukha*, chap. V, sec. IV, § 20 :

And see per Devala cited Ibid., chap. IV, sec. X, § 11 : 1, Coleb. Dig. 303 : Coleb. Oblig, 28, 29.