1866. February 23. O. S. No. 321 of 1865.

the Insolvent Court, and at the suggestion and requirement of the Commissioner that the Insolvent should come to some arrangement with the plaintiff in respect of the said debt. On demurrer, the Court held the plea good and the replication bad. Pollock, C. B., in giving judgment said, "We are all inclined to think that the Court had no authority to allow such an arrangement, and that the consent of the Court does not render it legal."

We have referred to these authorities more fully than we should otherwise have thought necessary—because we have reason to believe that arrangements similar to that which has been set up by way of defence to the present suit are of frequent occurrence, and it is desirable if any doubts are entertained as to the illegality of such arrangements, that those doubts should be at once removed.

As to the 2nd issue we need add nothing : for the defendant's Counsel did not and could not rely upon it. There must therefore be judgment for the plaintiff for the amount claimed with costs and for interest at 6 per cent.

Judgment for plaintiff.

APPELLATE JURISDICTION. (*a*)

Regular Appeal No. 61 *of* 1865. (*b*)

TARA CHAND.................................. *Appellant.*

REEB RAM.................................. *Respondent.*

A member of an undivided family brought a suit for partition against his father the managing member, and 8 others, of whom 2nd, 3rd and 4th defendants were plaintiff's infant brothers, and obtained a decree. The Civil Judge proceeded to ascertain the amount of the plaintiff's share in the following manner. He assessed what he considered to be the sum received by the 1st defendant from the estate ; deducted from that sum what he considered should have been the gross expenditure for the defendant, and decreed delivery by the defendant of $\frac{1}{5}$th of the remainder. *Held*, that such a decree is erroneous.

1866. August 11. R. A. No. 61 of 1865.

THIS was a regular appeal from the decree of J. H. Goldie the Civil Judge of Tinnevelly, in Original Suit No. 1 of 1864.

Miller, for the appellant, the 1st defendant.

Advocate General, for the respondent, the plaintiff.

(*a*) Present Holloway and Collett, J. J.

(*b*) See page 50 of this Vol.

1866. August 11. R. A. No. 61 of 1865.

This regular appeal coming on again for hearing upon the point reserved in the decree of this Court, dated 27th January 1866, the Court made the following order :

Per HOLLOWAY, J.—This suit was heard and finally decided upon the question of liability to division by my late colleague, Mr. Justice Frere, and myself. On examining the mode in which the sum payable by 1st defendant had been decreed (on which nothing except an objection to the mode in which the value of the coffee had been assessed, was said in the first argument), we thought it better to give judgment upon the point which appeared perfectly clear, and thereby save the parties the expense of an argument before another Judge, and liberty to speak again to the mode in which the account should be taken.

The Civil Judge has assessed what he conceives to be the sum received by the 1st defendant from the estate : he deducted from that sum what he conceives should have been the gross expenditure of the defendant, and has decreed delivery by the defendant of $\frac{1}{5}$th of the remainder. The first objection to this procedure is, that the interests of the second and third defendants, who remain in union, have not been considered. If the money has been spent and the plaintiff is entitled to treat it as still existent as against the 1st defendant, he would manifestly not be entitled to do so as against his brothers, the second and third defendants. Yet the effect of the present proceeding might well be to strip them of all beneficial interest in the estate. If after this decree it should be found that the whole of the remaining estate is exactly exhausted, it is clear that two of the children, who even upon the doctrine of the Civil Judge are perfectly innocent, will have nothing, while their brother will be in the enjoyment of the property awarded. It is manifest that, even if the present calculation can be upheld, the second and third defendants must have their shares secured. If the father's expenditure is a wrong to the plaintiff, it is equally a wrong to them, and all would have to be at once relieved. We are however, unable to assent to the propriety of the Court settling a certain rate of expenditure and debiting the 1st defendant, or rather the estate, with all the excess. There is no authority for such

decree and we are certainly not prepared to make such a precedent. It may perhaps, in consistency with some of the authorities, be said, that a father is bound to live upon his income and not bequeath a *damnosa hæreditas* to his successors. But we are not at all prepared to say that there is such a legal obligation to frugality, as can be enforced by rendering the father liable for all sums which a Court may think to have been unreasonably expended from the date of his coming into possession until the date of the suit for partition. As to sons who have passed their minority, it is quite manifest that there would be no justice in giving such relief. The power given of enforcing partition at any time is, in the hands of those not disqualified by age, an ample protection, and certainly there is no color for such an account, in the favor, at all events, of those who have attained their majority. Then because the ancestral estate has been encumbered, if by no means follows that the sum borrowed has been a wasteful expenditure. It may well be that the father has obtained by it something much more valuable than the original estate.

For example, the coffee and tobacco lands, which have been purchased by the first defendant, may be much more valuable than the property which descended from Ram Sing. Can it be contended with any justice that the plaintiff is entitled to participate in the acquired benefit and entirely rid himself of the encumbrances? Even supposing that the speculation had not proved fortunate, is every manager of property, when he has to the best of his skill and judgment invested funds in an adventure, with the bona fide hope and reasonable expectation of increasing his property for those who are to come after him, to be bound to impart an equal share to his sons, but to be himself liable for loss?

It seems to us quite clear that, if the first defendant could show that the property now to be divided is equal in value to that which descended to him, he would be absolutely exempt from any duty to account at all. If for the purpose of his present acquisitions he has encumbered the ancestral estate, then the plaintiff must take his share of it *cum onere*.

1866.
August 11.
R. A. No. 61
of 1865.

a decree and we are certainly not prepared to make such a precedent. It may perhaps, in consistency with some of the authorities, be said, that a father is bound to live upon his income and not bequeath a *damnosa hæreditas* to his successors. But we are not at all prepared to say that there is such a legal obligation to frugality, as can be enforced by rendering the father liable for all sums which a Court may think to have been unreasonably expended from the date of his coming into possession until the date of the suit for partition. As to sons who have passed their minority, it is quite manifest that there would be no justice in giving such relief. The power given of enforcing partition at any time is, in the hands of those not disqualified by age, an ample protection, and certainly there is no color for such an account, in the favor, at all events, of those who have attained their majority. Then because the ancestral estate has been encumbered, if by no means follows that the sum borrowed has been a wasteful expenditure. It may well be that the father has obtained by it something much more valuable than the original estate.

For example, the coffee and tobacco lands, which have been purchased by the first defendant, may be much more valuable than the property which descended from Ram Sing. Can it be contended with any justice that the plaintiff is entitled to participate in the acquired benefit and entirely rid himself of the encumbrances? Even supposing that the speculation had not proved fortunate, is every manager of property, when he has to the best of his skill and judgment invested funds in an adventure, with the bona fide hope and reasonable expectation of increasing his property for those who are to come after him, to be bound to impart an equal share to his sons, but to be himself liable for loss?

It seems to us quite clear that, if the first defendant could show that the property now to be divided is equal in value to that which descended to him, he would be absolutely exempt from any duty to account at all. If for the purpose of his present acquisitions he has encumbered the ancestral estate, then the plaintiff must take his share of it *cum onere*.

1866. *August* 11. *R. A. No.* 61 *of* 1865.

If he has sold it, then it is possible that the peculiarly rigid doctrines of the Benares School as to such alienations would render it necessary to adapt a circuitous remedy. The plaintiff might recover his share of the ancestral estate, and thereby charge upon $\frac{4}{5}$ of the grandfather's estate the whole sum, but adopting our present hypothesis that the estate to be divided is still as great as that which the grandfather left, it is our present impression that he would be bound to compensate the co-proprietors out of his own share either of the personal property or subsequently acquired real property.

We do not consider it necessary at present to determine whether a borrowing for the purpose of legitimate trade or commerce ought not to be subject to the same rule. We see strong reason, on the considerations already adverted to, for saying that it would. In the present case, we feel no doubt that the father is not bound to account for all sums in excess of what a frugal man would have expended.

The passage in the *Mitakshara* stating the right of the sons to prohibit excessive expenditure, by no means involves the logical consequence, that, if that right of prohibition has not been or from the non-age of the sons could not have been exercised, there would be, after the lapse of any period how long soever, a right of restitution. It may be said that the case of a minor requires a different consideration ; the law counter-balances his disabilities with many privileges, and it may well be that he might be entitled to restitution although a son of full age would not be. It may also be that the absence of the power of interposition would be a loss attendant upon his disability, from which no law could relieve him.

These are only a few of the questions which arise or may arise in this case, and it is obvious that upon most of them there is no definite authority, and the number and difficulty of them afford strong grounds for saying that we ought not, if on principle we can avoid it, complicate a suit for division with them. In the present case technically we are not bound, even if justified in doing so. The creditors have never been joined, and nothing which may be de-

termined as to the character of the debts, can affect them. They might re-open the whole question on the morrow of a decision that certain debts and charges were not properly charges upon the whole family estate, and the result would be the trying of the same question twice over, with results probably discordant. Litigation would not be simplified, but complicated by such a course, and on principle it seems to us that such a course is not proper, and certainly not so as this suit is framed. No possible inconvenience can happen by simply dividing the inheritance as it stands, and the inheritance comprises all debts as well as credits. If the share of the real property handed over to the plaintiff has not been charged in a manner capable of binding the co-heirs, this will in a suit properly constituted be a good defence. If an alienation (with the exception of such as the Civil Judge has upheld in his judgment, which on this point is in no way altered, as indeed it was not impeached in appeal) has been improperly made as against the plaintiff, he will be able to recover his share.

An account should in our opinion be taken of the state of the inheritance at the death of Ram Sing, the actual value of that which descended to the first defendant. The debts with which it was burdened at that time should be distinctly stated. As all the property which descended was self-acquired, there is no doubt whatever that his estate is, in the hands of the heirs, liable for those debts, and we cannot recognise the propriety of discharging it on the ground that the defendant ought to have paid the debts. An account of the charges upon the real property now existent should then be taken, and a fair estimate made of its value, deducting these charges. If the present value of the inheritance is equal to the value transmitted to first defendant, plaintiff can only entitle himself to participate in the subsequently acquired property, by consenting to bear his share of the charges imposed upon the ancestral property.

Should this state of facts be found to avoid circuity, the division should be simply made, and the final decree declare that the division is made subject to all existent liabilities.

1866. *August* 11. *R. A. No.* 61 *of* 1865.

If the estate has become less valuable, it does not follow that the defendant is bound to make good the deficiency. That will depend upon the solution of many complex questions, to which we have adverted above. In that case there should be a simple division of the assets actually existent, leaving all questions to be settled by the parties. It is impossible to deal finally with the matter in the present suit.

Although constant and painful experience has shown us the general fruitlessness of such suggestions, we cannot forbear saying how greatly it would conduce to the credit, as well as the benefit, of such near relatives, if they settled amicably the questions still remaining between them.

Ordered accordingly.