
(1873) 04 CAL CK 0012

Calcutta High Court

Case No: Special Appeal No. 1870 of 1870

Moneeram Kolita

APPELLANT

Vs

Kery Kolutany

RESPONDENT

Date of Decision: April 9, 1873

Judgement

Mitter, J.

In this case I have already expressed my opinion at considerable length in the order of reference, and as I still adhere to that opinion, I do not think it necessary for me to do anything more than to make a few observations merely by way of supplement. It is I believe a proposition beyond all dispute, and indeed it was fairly conceded at the bar, that an unchaste widow has no right to succeed to the estate of her deceased husband, irrespective of any considerations arising from expiation or condonation. Baboo Shama Churn Sircar says, it is true (see Vyavastha Darpana, Vyavastha 663), that loss of chastity operates as a cause of disinherison in those cases only in which there has been no expiation by penance, or condonation by the husband; but the only authority which Baboo Shama Churn has been able to cite in support of his Vyavastha is the opinion of Mr. Colebrooke in the Trichinopoly case already noticed by me in the order of reference. Now, there is nothing whatever in that opinion to warrant the view taken by the Baboo. On the contrary, Mr. Colebrooke lays it down as undoubted law that an unchaste widow has no right to inherit her husband's property, without the slightest reference either to expiation, or condonation; and this opinion is supported not only by all the decided cases on the point, but also by the express provisions of Hindu law itself. According to that law, it is the chaste (shadhi) widow alone who is entitled to succeed to the estate of a man who dies without leaving any male issue; and, as it is beyond all question that neither expiation nor condonation can convert an unchaste woman into a chaste one, the opinion of Baboo Shama Churn, which, it should be remembered, does not possess any independent value of its own, must necessarily fall to the ground. So far, therefore, the ground being clear before us, I confess I feel considerable difficulty in understanding how, in the face of the above concession, and upon the authorities which we are bound to follow in this case, it can be contended that loss of chastity does not operate as a cause

of forfeiture also.

2. Of all the authorities above referred to, the Dayabhaga of Jimuta Vahana, the acknowledged founder of the Bengal school, is undoubtedly the highest; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,--namely, the texts of Vrihat Menu, cited in v. 7, s. 1, Ch. xi of Mr. Colebrooke's translation of the Dayabhaga; and that of Catyayana, cited in v. 56 of the same section and chapter. These two verses are as follows:--

(1.) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.

(2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.

3. It will be observed that the first of these two texts is cited by the author of the Dayabhaga for the purpose of establishing the widow's right to succeed to the whole estate of her husband, and not merely to a portion of it, barely sufficient for her maintenance; and the second, for that of defining the nature and extent of the interest which devolves upon her by virtue of such right, and which, as he afterwards explains to us, in terms too plain to be misunderstood, is nothing more than that of a mere holder for the benefit of her husband's soul. Both the texts, however, speak of the widow's obligation to preserve her chastity in precisely the same terms, the words used for that purpose in both of them being exactly the same in the translation as well as in the original. If, therefore, it be once conceded, as it has been, and as I think it must be, that the fulfillment of that obligation is a condition precedent to the widow's right to take her husband's estate under the first text, I cannot understand upon what principle of construction it can be contended that such fulfillment is not also a condition precedent to her right to enjoy that estate under the second. Surely we are bound to attach the same meaning to the words "keeping unsullied the bed of her lord" in the text of Catyayana, as we do to the words "keeping unsullied her husband's bed" in the text of Vrihat Menu; and if we once do so, what reason can we assign for holding that the injunction as to chastity is binding in the one case, and not in the other? So far as the principle upon which that injunction is based is concerned, it cannot be contended for one moment that there is the slightest difference between the two cases. I have already shown in the order of reference, and I may add that the correctness of that portion of my judgment has not even been questioned in the course of the argument, that an unchaste widow is absolutely incompetent to render any spiritual service to her deceased husband; and as the widow's estate is, under the express provisions of the Hindu law, destined solely and exclusively for such service, it requires no argument to show that if loss of chastity operates as a cause of disinherison, it must also operate as a cause of forfeiture, and for precisely the

same reason. Why then are we to hold that the condition of chastity is a valid and binding condition under the text of Vrihat Menu, but not under that of Catyayana? Suppose, for instance, that a Hindu dies leaving his property to his widow by a will, which contains a distinct provision to the effect that she should, while continuing to keep the testator's bed unsullied, use the property, until her death, for his spiritual benefit, and for no other purpose whatever. If the widow afterwards becomes unchaste, and thereby renders herself absolutely incompetent to use the property for the only purpose for which it was given to her, can it be said that there would be no forfeiture in such a case? I apprehend not.

4. Baboo Mohini Mohun Roy, who argued this case with great ability on behalf of the appellant, finding this difficulty staring him in the face, attempted to get rid of it by certain arguments, which, I am bound to say, are more ingenious than sound. He tried first of all to cast suspicion upon the authenticity of the text of Catyayana, upon the ground that the treatise of which it forms a part is not forthcoming. But to whatever cause the Baboo's failure to procure a copy of the Institutes of Catyayana may be ascribable, it is perfectly clear that the authenticity of the text in question does not admit of any doubt or dispute. The very fact that it is quoted with approbation by the author of the Dayabhaga is a conclusive refutation of the Baboo's argument; and if further authority is needed, I have only to refer to the decision of the Privy Council in the case of Bhugwandeem Doobey vs. Myna Baee, in which that very text is distinctly characterized by their Lordships as one of undoubted authority, and that for the purpose of determining the nature and extent of the interest which the widow acquires in her husband's estate under the provisions of the Hindu law.

5. The next argument advanced by Baboo Mohini Mohun Roy was that, in giving effect to the text in question, we should not go beyond the particular purpose for which it is cited in the Dayabhaga; and that, as the author of that treatise has not made any comments of his own upon the words "preserving unsullied the bed of her lord," it must be presumed that he has rejected that portion of the text which contains those words as possessing no binding force whatever. This, I confess, is rather a novel mode of interpreting a work like the Dayabhaga, which is professedly a mere commentary on the texts of the ancient rishis, the acknowledged fountain-head of the Hindu law. But be that as it may, let us see for what particular purpose the author of the Dayabhaga has cited the text under our consideration. That purpose was, as he himself tells us in the very verse in which the text is quoted, to establish the proposition that "the widow must only enjoy her husband's estate." What this right of enjoyment means he explains to us in the subsequent verses, in which he says, in the most express terms, that every use made by the widow of the property inherited by her from her husband, which is not conducive to his spiritual welfare, is an act of waste. Are we then to suppose that, at the very time when the author of the Dayabhaga was appealing to the text of Catyayana as an authority for showing that the widow's estate is destined solely and exclusively for the spiritual welfare of her husband, he was silently engaged in repudiating the binding force of that portion of the text which

imposes upon her the obligation of "preserving unsullied the bed of her lord," knowing full well, as he must be supposed to have done, that the strictest fulfillment of that obligation is indispensably necessary to enable a Hindu woman to promote such welfare. Such a course of procedure is, on the very face of it, so utterly self-contradictory, that, before we can impute it to a writer like the author of the Dayabhaga, we must have reason infinitely stronger than that put forward by the pleader for the appellants. With reference to that portion of the argument which is based upon the absence of any express comments by the author of the Dayabhaga upon the words "preserving unsullied the bed of her lord," I have to observe that it is entitled to no weight whatever. The pleader for the appellant seems to forget that the same remark is equally applicable to similar portions of the texts of Vrihat Menu and other rishis, which are quoted in the Dayabhaga for the purpose of establishing the widow's right of succession, and yet it is admitted on all hands that under those texts an unchaste widow is not entitled to inherit her husband's property. Nor need we go very far to find out the reason of this silence on the part of the author of the Dayabhaga. His functions, it should be borne in mind, were those of a mere commentator, and it was by no means incumbent upon him to explain every word in every text quoted by him, whether that word required an explanation or not. Take, for instance, the words "abiding with her venerable protector" in the very text of Catyayana which we have been considering. These words certainly required an explanation, and we accordingly find the author of the Dayabhaga explaining their meaning to us in the verse next to that in which the text is quoted,--that is to say, in v. 57. It would be simply absurd to contend that, at the very time when the author was insisting upon the widow's obligation to live under the protection of her husband's male relatives, he was silently releasing her from the main obligation, with reference to which the former is nothing but a means to an end,--namely, the obligation of "preserving unsullied the bed of her lord." It is true that it has been decided by the Privy Council that a widow does not forfeit her rights in her husband's estate merely by reason of her having quitted the protection of his male relatives; but their Lordships expressly put their decision upon the ground that the widow in the particular case before them had changed her place of residence from justifiable motives, and not for "unchaste purposes." This decision is certainly in support of my view; so far as it shows the importance attached by their Lordships to the fact that the widow had not left the protection of her husband's relatives for unchaste purposes. But, at any rate, it is conclusive authority on the point that the widow's obligation to live under the protection of her husband's male relatives is merely ancillary to the main obligation imposed upon her by the text of Catyayana,--namely, the obligation of "preserving unsullied the bed of her lord."

6. It has been said that, under the Hindu law, an estate once vested cannot afterwards be divested. Now there is no work on Hindu law, that I am aware of, in which it is laid down, in so many terms, that an estate once vested cannot be divested; nor has the pleader for the appellant been able to point out any. On the contrary, I have already shown in the order of reference, that the Hindu law goes to the length of declaring, in the most express terms, that an unchaste woman forfeits all her rights even in her own stridhan, and this is

by far a stronger case of divesting than the one now before us. What then is the source from which the doctrine above referred to has been derived? That source, I venture to affirm, will be found in the simple fact that, in the generality of cases, the Hindu law makes no provision for the divesting of property once vested; and I am fully prepared to admit that, so far as those cases are concerned, the application of the doctrine in question is perfectly legitimate. But to apply it to the present case, without any reference to the nature of the estate under our consideration, or to the conditions which the Hindu law has expressly attached to the enjoyment of that estate, would be to assume the very question which we are called upon to determine.

7. It has been further said that the widow is not a trustee for the soul of her deceased husband, and in support of this position we have been referred to the case of *Chundrabulee Debia v. Brody* 9 W.R., 584, in which it was held, or rather remarked incidentally as I shall presently show, that the widow is the absolute mistress of the usufruct of her husband's estate, and that she can dispose of such usufruct in any manner she thinks proper.

8. Whether the word "trustee" is applicable to the widow in the strict sense in which that word is used in works on English law, is a question which I need not pause to determine. But I think I have conclusively shown, in the order of reference, that the only right which the widow acquires in her husband's property is the right of using that property for the benefit of his soul, and for no other purpose whatever; and such a right, I apprehend, is nothing more than that of a trustee. With reference to the alleged distinction between the usufruct and the corpus of the estate, I have to observe that there is nothing in the Hindu law to support it. It may be that the Courts of Justice in this country, constituted as they are at present, have neither the power nor the inclination to compel a Hindu widow to use her husband's property for his spiritual benefit; but they have no authority, in my opinion, to lay it down as a proposition of Hindu law that she is at liberty to use the income of that property in any manner she thinks proper. According to the *Dayabhaga*, the highest authority on the point, every "expenditure" incurred by the widow out of the estate inherited by her from her deceased husband, which is not conducive to his spiritual benefit, is an act of "waste:" and the author goes to the length of declaring, in the most express terms, that she is allowed to maintain herself out of that estate, simply because by preserving her person she confers a benefit upon his departed spirit. In the face of such express provisions, so perfectly general in their terms, what authority have we for drawing any distinction between the corpus and the income of the estate? It has been urged that the texts of *Catyayana* and other *rishis*, quoted in the *Dayabhaga* for the purpose of limiting the widow's dominion over the estate inherited by her from her husband, apply to the corpus of that estate, but not to the usufruct of it. But if so, from what other text or texts is it that the widow's right to enjoy the usufruct is derived? Then, again, it is an unquestionable proposition of Hindu law, that the portion of the usufruct which remains unspent at the time of the widow's death, goes not to her heirs, but to those of her husband. But if we are to hold that the texts in question refer solely and

exclusively to the corpus of the estate, where is the authority upon which the above proposition is to rest? The case of Chundrabulee Debia v. Brody 9 W.R., 584 is not at all in point. The only question raised and judicially determined in that case was, whether the portion of the usufruct, remaining unspent at the time of the widow's death, can be seized in execution of a personal decree against her: and so far as that question is concerned, the decision is certainly in support of my view. It is true that one of the learned Judges by whom that decision was passed remarked incidentally in his judgment that the widow can, during her lifetime, deal with the usufruct of her husband's estate in any manner she chooses; but that remark, I submit with the greatest deference, cannot be treated as an authoritative exposition of the law, inasmuch as the point with reference to which it was made was not before the Court on that occasion.

9. Before concluding this portion of my judgment, I wish to quote the following observations made by the Lords of the Judicial Committee in the case of Bhugwandeem Doobey vs. Myna Baee :--"The reasons for the restrictions," say their Lordships, "which the Hindu law imposes upon the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts imposing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule." These remarks, it is true, were made by their Lordships with reference to the moveable portion of the estate inherited by a widow from her husband. But they are, in my opinion, equally applicable to the usufruct of that estate.

10. The case of 6 M.L.A. 433 (Privy Council) is not at all in point. It is true that the marginal note of that case says that the title of a widow is not in the nature of a trust, but there is nothing whatever in the decision itself to support that position.

11. Assuming, however, for the sake of argument, that the widow is not a trustee for the soul of her deceased husband, I do not see any reason whatever why she should not abide by the condition of chastity, which the Hindu law has expressly imposed upon her. That law, as I have already shown, says, in the most positive terms, that she should enjoy her husband's estate while continuing to keep his bed unsullied; and it does not certainly lie in her mouth to say that the injunction as to chastity ought to be treated as a mere nullity. It has been said that, although, under the Hindu law as administered in the Bengal school, a sonless widowed daughter is not entitled to inherit her father's estate, a daughter who has once succeeded to such estate does not forfeit it by reason of her afterwards becoming a sonless widow. But this case is by no means parallel to the one now before us. It is true that the chief reason assigned by the writers of the Bengal school for allowing a daughter to inherit her father's property is, that she can perpetuate his lineage and pinda by giving birth to a son; but that reason has nothing whatever to do with the nature of the estate given to her, nor is it made a condition precedent to her right to enjoy that estate. The daughter's estate, it should be borne in mind, is precisely of the

same character as that of the widow, and is governed by the same text of Catyayana which has been so often referred to by me. "Or," says the author of the Dayabhaga, "the word "wife" (in the text of Catyayana quoted in v. 56) is employed with a general import; and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance, see v. 31, s. 2, Ch. xi, Colebrooke's translation of the Dayabhaga. Whatever, therefore, may be the reason upon which the daughter's right of succession is founded it clear that the estate inherited by her, by virtue of that right, is subject to this condition only, that she should, while keeping her husband's bed unsullied, continue to enjoy it solely and exclusively for the spiritual benefit of her father; and it is therefore beyond all dispute that so long as she is competent to fulfill that condition, no question of forfeiture can arise. The mere fact of a daughter becoming a sonless widow after the estate has once vested in her, does not, and cannot, render her incompetent to use that estate for the spiritual welfare of her, father; for she can still continue to promote such welfare by leading a chaste life, as well as by doing pious acts for the benefit of his soul; and as there is nothing in the Hindu law which says that she should hold her father's property only so long as she continues to be, or is likely to become, the mother of male children, there seems to be no reason whatever why the argument put forward by the pleader for the appellant should be considered to have any bearing upon the question now under our consideration. On the contrary, the daughter's case affords a striking refutation of the contention that the injunction as to unchastity laid down in the text of Catyayana is a mere moral injunction, not possessing any binding force from a legal point of view. It will be seen that the only portion of the Dayabhaga which is devoted to the discussion of the daughter's right of succession is the second section of the eleventh chapter of that treatise; and if we exclude v. 31 of that section, by which the author extends the operation of Catyayana's text to the daughter, as well as to other female heirs, there is not a single passage throughout the rest of the section, either in the shape of original text or commentary, in which the slightest reference is made to the subject of chastity. But if, as argued by the pleader for the appellant, the words "preserving unsullied the bed of her lord" in the text of Catyayana are to be treated as nugatory, or superfluous, there would be nothing to prevent an unchaste daughter from inheriting her father's property; and yet it is the admitted law of the land that such a daughter has no right of succession. The above remarks are also sufficient to show the futility of the argument drawn from the fact that the author of the Dayabhaga has made no comments of his own upon that portion of the text of Catyayana which contains the words "preserving unsullied the bed of her lord."

12. The only other authority I wish to refer to is the Vivada Bhangarnava of Juggernath Turkopunchanun, a work which is commonly known by the name of Colebrooke's Digest. I have already shown in the order of reference that there are two passages in this work, in which it is expressly laid down that an unchaste widow forfeits all her rights in the estate inherited by her from her husband. It has been said, however, that Juggernath Turkopunchanun is no authority on questions of Hindu law, and in support of this position, we have been referred to certain remarks of Mr. Colebrooke, quoted in p. 25 of the

preface of Baboo Shama Churn's Vyavastha Darpana. I confess I was not a little surprised when I heard this bold assertion. That Juggernath Turkopunchanun is one of the most learned Pundits whom Bengal has ever produced, and that his opinion on question of Hindu law is still received with high respect by the millions of Hindus residing in that country, are propositions which do not, in my opinion, admit of any doubt or dispute. His knowledge of the Hindu shastras is proverbial, and I may add, on the authority of my own personal experience, that, even now, a Hindu inhabitant of Bengal, who wishes to repudiate the Vyavastha of any particular individual in regard to any point connected with those shastras, may be heard to say, "why am I bound to follow that man's opinion? he is not a Juggernath Turkopunchanun." I yield to no one in my veneration for the great and illustrious name of Mr. Colebrooke, but as the only test for determining whether a particular writer is to be considered as an authority on questions of Hindu law in any particular province of the country, is the estimation in which his opinions are held by the Hindu inhabitants of that province. I venture to affirm that, with the exception of the three leading writers of the Bengal school,--namely, the author of the Dayabhaga, the author of the Dayatatwa, and the author of the Dayakrama Sangraha,--the authority of Juggernath Turkopunchanun is, so far as that school is concerned, higher than that of any other writer on Hindu law, living or dead, not even excluding Mr. Colebrooke himself. Of course, in regard to points with reference to which there is a conflict of opinion between Juggernath Turkopunchanun and the three leading writers of the Bengal school mentioned above, the former must give way. But so far as the particular point now before us is concerned, there is not the slightest pretence for saying that any such conflict exists; and I do not therefore see any reason whatever why Juggernath's opinion on that point is to be treated as a nullity on the mere ipse dixit of the pleader for the appellant. The learned Pundits who were consulted in this case did not hesitate for one moment to refer to that opinion as an authoritative exposition of the Hindu law; and as for the remarks of Mr. Colebrooke, I wish to observe that there is nothing in them to justify the contention that Juggernath Turkopunchanun is no authority on question of Hindu law arising in the Bengal school. All that Mr. Colebrooke says is that the arrangement of the Vivada Bhangarnava is defective, inasmuch as the author has mixed up the discordant opinions maintained by the lawyers of the several schools without distinguishing, in an intelligible manner, which of them is the received doctrine: but there is a wide gulf between that statement and a statement to the effect that the opinion of Juggernath Turkopunchanun is entitled to no weight whatever. I wish to add that the Vivada Bhangarnava of Juggernath Turkopunchanun is distinctly mentioned by Sir William Macnaghten as one of the authorities "chiefly consulted" in Bengal; see p. 21 of the preface to his work on Hindu Law.

Markby, J.

13. Having regard to the judgments delivered in the case of [Srimati Matangini Debi Vs. Srimati Jaykali Debi](#) , and the judgment which is about to be delivered by the Chief Justice, in which I substantially concur, I do not think it necessary to deliver my opinion at

very great length.

14. I consider the question before us to be a general one relating to the succession to property amongst Hindus, and which, therefore, under s. 15 of Regulation IV of 1793, we are bound to decide to the best of our ability by the Hindu laws. By the "Hindu laws" I understand the same thing as in s. 27 of the Regulation of the 17th April 1780 was described as "the laws of the shastra." This I take together with the direction of the Privy Council in the case of [Anundai alias Rani Kunjara Nacheer and Another Vs. Rani Purvata Vurdany Nacheer and Another](#) , that our duty is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. Taking the texts of the Hindu law as they have been quoted one by one, I think it has been fully shown by the judgments delivered in this, and the former, case, that they do not warrant the proposition that the estate of a Hindu widow is forfeited ipso facto by unchastity.

15. But it is still said that, taken as a whole, the Hindu law does recognize the widow's right to hold her husband's estate only in case she should be chaste, or as it has been put by Mitter, J., in the judgment which refers this case for our decision, "chastity is a permanent condition attaching to the right itself." This is a consideration far more difficult than the meaning of particular texts, but it is one which we are, no doubt, bound to consider.

16. Upon this point I know of no authority comparable to that of Colebrooke. I know of no authority equal to. Colebrooke, who has considered this question in the way in which it can properly be considered,--namely, with a thorough and comprehensive acquaintance with the authoritative treatises on Hindu law, in which the answer to it is to be found. In saying this I intend no disrespect to the opinions of those of my colleagues who express a different opinion. On the contrary, the mere fact that persons so eminently qualified to form an opinion, and so infinitely better acquainted than I am with the modern usages of Hindus, do hold that the widow forfeits her estate ipso facto by unchastity, would lead me greatly to distrust my own conclusions. But, nevertheless, it is acknowledged that the authority for this position is the Hindu law as expounded in the Sanskrit commentaries, and upon the Hindu law so taken, and so viewed as a whole, I think Colebrooke's opinion is conclusive. That opinion is stated in 2 Strange, p. 272, in the form of a remark upon a Pundit's answer: and, with deference, I think that opinion was not given in any particular case, nor with reference to the law of any particular school. The particular Pundit's answer, upon which Colebrooke's remark is made, was given in a case which arose in the Trichinopoly Provincial Court. But the Pundit's answers, which are the foundation of Strange's work, are all commented on by Colebrooke with reference to the Hindu law generally, and not with reference either to the particular case in which the Pundit was consulted, or to the law of any particular school, unless there happens to be a difference between the schools, which is then pointed out. In fact, the Pundit's answers are there discussed precisely in the same way as the present question has been now discussed by

us. I would also point out that Mr. Ellis' remark ignores the distinction between a wife and widow--a distinction which has been frequently pointed out in the course of this case; and moreover (as appears from the preface), it was given on a journey without reference to books, and without having seen Colebrooke's opinion to the contrary.

17. I therefore simply repeat, what I said on a former occasion, that, under the Hindu law, after the property has once vested in the widow, she does not forfeit it by a simple act of unchastity, she not having been degraded or expelled from caste. Upon the construction of Act XXI of 1850, I express no opinion.

Glover, J.

18. The matter has been so fully detailed in Mitter, J.'s order of reference, that I do not feel it necessary to go into it at any length, for I concur to a great extent in the opinion expressed by the learned Judges who have referred the questions.

19. I say "to a great extent," because I wish to guard myself against being supposed to agree with their estimate of a Hindu widow's estate, or with the restrictions which they would place on her use of property descended to her. No doubt, a Hindu widow's estate is one of a peculiar and limited nature, but to the extent it reaches, the widow fully represents it, and she cannot, I think, in accordance with late rulings by the Privy Council, be in any way considered as a trustee for life only. The case of 6 M.L.A. 433 (Privy Council) is authority for this contention. Nor do I agree with the referring Judges as to the widow's power of using the profits of the estate. There are, of course, certain texts of Hindu law, together with glosses by commentators, which say that she is to use them sparingly, and that she herself is to live an austere and economical life; but the view of the law which has of late years obtained in the Privy Council, and in the High Courts of Calcutta and Madras, has been to give her the free use of the profits of the estate, so long as she is in a position to use them, and not to describe any item of expenditure, so long as it does not affect the corpus of the estate, as "waste"-- 3 M.H.C.R. 116 and Chundrabulee Debia v. Brody 9 W.R., 584.

20. It is unnecessary to go at length through the various texts of Hindu law which declare the continual subjection of women, and the effect of unchastity in a wife as working exclusion from inheritance. It has been fully admitted, in the course of the argument before us, that Hindu women are in that position, and that it is a principle of Hindu law to keep them so. And also that no unchaste wife can, as a widow, take her husband's inheritance. The question is whether having once taken it as a chaste woman, she can be made to forfeit it for subsequent unchastity.

21. In support of the proposition that she is to retain it, it has been argued that there are no precise texts of Hindu law which declare forfeiture by an unchaste widow; that unchastity is not to be found amongst the acts which exclude from inheritance; that other heirs who are by circumstances debarred from offering funeral oblations after succession

do not forfeit; and that, failing direct authority for forfeiture, the rule of Hindu law is that property once vested cannot be divested. I do not attach very much importance to the fact that there is no mention of unchastity as a ground of exclusion from inheritance. It seems to me to have been one of the first principles of the Hindu law relative to women, that unchastity was a thing that at once and altogether put them without the pale of all religious observances, and consequently deprived them of all power to fulfill the duties on which inheritance depended, and I should not therefore have expected to find this offence classed with the ordinary disqualifications. It was one about which there was to the Hindu mind no possibility of doubt, and the Hindu law-givers did not apparently think it necessary to include unchastity amongst the causes of disinherison, because it was an offence which admitted of no difference of opinion, and they had already stated in very many texts that the chaste wife only should take, and that the unchaste wife should be excluded. I do not see therefore any difficulty in the omission of unchastity from the chapter on exclusion. Unchaste women, both as wives and widows, undoubtedly were excluded, and I can conceive no reason for the omission of their offence in the grounds of exclusion other than the one I have above suggested. Suppose, by way of illustration, that, according to Hindu law, abnormally colored individuals, "albinos" for instance, were from the very fact of their color abominable and unable to inherit, that this was a well-known and fixed principle, should we expect to find "being of the color of an albino" amongst the grounds of exclusion from inheritance, and would not rather exclusion be taken for granted?

22. With regard to the absence of texts of law bearing exactly on the case before us, in the first place I am not prepared to admit that such texts do not exist; but even if they did not, I should feel inclined to follow the rule laid down by the most respected Hindu commentators, and approved in more than one case by the Judicial Committee of the Privy Council, and, instead of isolated texts, to apply what I conceive to be the general principles of Hindu law.

23. Now a Hindu widow, according to the practice obtaining in Bengal, takes her husband's property, where there is neither son, grandson, nor great-grandson, under very peculiar circumstances, and burthened with special obligations. She is supposed to represent half of her dead husband's body, and, by meritorious acts done in this world, to benefit the spirit of her husband in the other. The theory of the Hindu law of inheritance is the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed: and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer the greatest benefits; therefore they are first in the line of heirship. The widow comes next as being able to confer considerable, though less, benefits, and it is only because she is able to do this that she is allowed to take her husband's share.

24. It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this

respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers his father from the hell called put; and, whether in after-life he offer the funeral oblations or no, he succeeds to his father's inheritance from the fact of being able to offer them. "With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases. There are many texts of Hindu law to this effect which have been quoted in Mitter, J.'s referring order. I will mention one only as shewing more forcibly perhaps than the others that unchastity in a woman makes all offerings of hers worthless. "Gifts, fastings, religious and other good acts of an unchaste woman are vain; their religious merits also, spotless beauty, are fruitless. Those wicked women who by the commission of adultery deceive their husbands, lose from that time the fruits of religious acts, and are doomed to hell." This passage, it is argued, refers to women during coverture; but if that be so, the principle enunciated applies equally to widows,--namely, that unchastity, from the time of its being committed, spoils immediately the effect of religious acts; in other words, prevents a widow from offering funeral oblations to her deceased husband, and so does away with the only reason for which she was allowed to succeed to his property before other and nearer relations. From the moment of her becoming unchaste, she, so far from benefiting, dooms her husband's soul to torment; and the property which was to be expended in funeral oblations, and other ceremonies comforting to the dead man's soul, is useless for either purpose. The widow is in a position to rescue her husband's soul from hell, and it is because through the temptations of indigence she might do improper acts, and cause thereby "her husband to fall into a region of horror," she is vested with means to lead a reputable life.

25. I do not think it necessary to recapitulate all the texts of Hindu law referred to by Mitter, J., but there are two of undoubted authority, which seem to me very distinct (so far as any isolated texts can be distinct) as to the necessity of a widow's remaining chaste if she would retain her husband's estate. The first is from Catyayana (quoted in Dayabhaga, Ch. xi, s. 1, v. 56):--"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death." This, it is contended, means that the widow shall retain the property so long as she lives, provided that when she took it she had not sullied the bed of her lord. This seems to me a very unnatural construction of the passage which I assume that Mr. Colebrooke, a specially learned Sanskrit scholar, has properly translated: "keeping and preserving unsullied the bed of her lord" must surely denote continuance, and refer to the time after the woman took the property originally as a chaste widow. The use of the present form of participle seems to denote this; and when we read the words in connexion with the numerous texts which declare that the chaste widow only is entitled to succeed to her husband's estate, and that unchastity renders useless all the religious ceremonies for performing which the property came to her, it seems difficult to construe the words "keeping unsullied" in any other way than that the widow retains the property only so long as she remains chaste. Besides, if the words "keeping unsullied" refer only to

past time, what is to be made of the other part of the condition "living with her venerable protector." She cannot live with him until she is a widow, and whilst she lives with him, she is to keep unsullied, &c. &c.

26. The second text is to my mind still clearer. It comes from Vrihat Menu, an author quoted with approval in the Dayabhaga, and is to the following effect:--"The widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation and obtain his share." Now the use of the word "persevering" is remarkable. The widow whilst she was a wife could perform no religious observances; therefore these must be referred to some time after her husband's death. Supposing that she was chaste, then she might perform ceremonies and take his share; but she could only persevere in these ceremonies, provided she continued chaste, for unchastity would disqualify her from performing them; the word "take" therefore, which in the original Sanskrit means "gain," "profit," (labh), must, I apprehend, be construed as meaning keeping or retaining; for the widow took before she had any time to persevere (which is a word denoting continuance), and simply because she was her husband's widow, and qualified, by being chaste, to succeed to his share. I do not understand how the word "persevere" refers to anything less than a continually abiding condition.

27. And there is a third text, which may also be quoted from Sreekissen Turkolunkar, a great authority in the Bengal school of law, who referring to the widow says, "shadhi, chaste, otherwise dominion ceases." It is not easy to apply these words to any other time than one after the widow has become vested with the property.

28. There are several other texts, some of a later date, others by authors who do not enjoy the same authority as those above recited. They have been quoted at length in the order of reference, and they are so far useful as showing the general consensus of professional opinion amongst Hindu sages and Pundits, and which even goes to the length of declaring that the peculiar property of a woman,--i.e., her stridhan,--is liable to be forfeited for unchastity. For the forfeiture under similar circumstances of maintenance, there are undoubted texts of Hindu law.

29. I do not forget that a great authority on all matters of Hindu law, Mr. Colebrooke, has, in connexion with a case arising in the Madras Presidency, given an opinion that a widow once having succeeded to her husband's property cannot be deprived of it unless for loss of caste, unexpiated by penance, and unredeemed by atonement; but no texts are given in support of the proposition, and it is opposed to other authority in the opinion of Mr. Ellis. Sir W. Macnaghten, who is also an undoubted authority, mentions cases in which although the word "succession" is used, there is evident reference to a time after the property has become vested in the widow; and in one case particularly (2 Macnaghten's Hindu Law, p. 112) endorses an opinion that the widow who violates her late husband's bed is degraded, and has no right to her husband's heritage, and cannot even claim maintenance. This was a case in which the property had undoubtedly vested in the widow, for she had given it up to the next heirs on condition of receiving maintenance.

30. As to the so-called axiom of Hindu law that property once vested cannot be divested, I am not aware of any such inflexible rule; and there have apparently been cases in which it was sought to divest property already inherited, on the ground that the owner was disqualified for some one of the reasons set down in the rules of exclusion. And what, moreover, is the case of a widow who has received from her late husband a power to adopt? So long as she declines to exercise that power, the property remains vested in her; directly she adopts, it divests from her and vests in the adopted son, and if that son dies, the property comes back again, and reverts in the widow, to be again divested, if she has the power and inclination to adopt more than once. Besides, the widow's estate is not an absolute one such as cannot be divested. It is a limited estate for life: and although the widow fully represents it for the time being, she only does so with reference to certain exigencies which the Hindu law allows of. She takes it for a special purpose,--i.e., the good of her husband's soul,--and under special restrictions, one of which is chastity; and if, by her own misconduct, she places herself in a position which forbids her doing the thing for which the estate was given her, I cannot see why she should retain it, remembering that, according to native ideas, her doing so keeps her late husband in torment.

31. The question, whether unchastity in a widow operates as a forfeiture, has not often come before our Courts; there are however some cases in which the point has been decided. The first, *Doe d. Radamoney Raur v. Neelmoney Doss Montrion*'s H.L. Ca., 314, was decided by the Full Bench of the Supreme Court in 1792, and it was there laid down that a Hindu widow by her incontinence forfeited her right to her husband's estate. It has been contended that the report of this case is very meagre, and that no reasons are given. This may be, but the decision is couched in perfectly clear and unmistakable language; and one of the Judges who concurred in it was that very distinguished oriental scholar, Sir William Jones. Any decision on a point of Hindu law in which that learned Judge took part is entitled to the greatest respect. I do not, moreover, think I am incorrect in saying that, at the time this judgment was given, the knowledge of Sanskrit was much more diffused than it is at present, and that the class of Pundits was much more respectable and learned.

32. There are two cases in 1811, notes of which are to be found in 2 Macnaghten's Hindu Law, pp. 20, 21, in which the forfeiture of an unchaste widow is declared. The first case is not very clear as to whether the property had been actually vested in the widow, although the words used lead me to believe that such was the case. In the other it is more distinctly ruled that the widow who did not keep her husband's bed unsullied had no right to his property, and ought to be expelled from the house. The case in p. 112 is still more to the point, and has been already referred to. In all of these cases, the word "succession" is no doubt used, but it is clear that the widow had already taken the property, for that, according to Hindu law, cannot remain in abeyance, but vests in the next heir directly on the death of the owner. Any act of unchastity, therefore, committed by a widow and next heir would be committed after the property had vested in her, and could not be said to

prevent her from inheriting, but rather to make her forfeit what had already been inherited. In *Cossinaut Bysack v. Hurroosoondry Dossee Shama Churn's Vyavastha Darpana* 97; S.C., Morl. Dig., 198, and *Clarke's Add. Ca.*, 91, a widow who had ceased to reside in her husband's family for some other cause than unchaste purposes was declared not to forfeit. The case is not of course directly in point, but it raises a strong presumption as to what the judgment of the Court would have been had the widow gone away for unchaste purposes. In *Treekumjee Laljee v. Mussamut Laroo* 1 Morl. Dig., 280, it was held that a widow who had married again,--i.e., had not kept her first husband's bed unsullied according to Hindu ideas,--forfeited her dower money in consequence. The two cases decided in the *Sudder Dewany Adawlut* in 1843 and 1858 do not help us. Particularly in *Maharanee Bussunt Koomaree v. Maharanee Kummul Koomaree* 7 Sel. Rep., 144, the *Sudder Court* held that an elopement, which I imagine presumed unchastity, was enough to cause forfeiture of the maintenance received from the late husband's family. In the other case, *Rajkoonwaree Dassee v. Golabee Dassee* S.D.D., 1858, 1891, the unchastity pleaded took place during the lifetime of the husband, and had no reference to the acts of a widow. The case is useful as showing the *Sudder Court Judge's* opinion as to the bearing of Act XXI of 1850 in such cases, but does not touch the point I am now considering.

33. Contra, there are the cases of *Doe d. Saummoney Dossee v. Nemychurn Doss* 2 T. & B., 300 and of [Srimati Matangini Debi Vs. Srimati Jaykali Debi](#), the last of which has caused this reference. The case of *Doe d. Saummoney Dossee v. Nemychurn Doss* 2 T. & B., 300 is not I think quite satisfactory, for the decision appeared to have turned chiefly on the "absence of any decision of a Court of law showing that such a person" (viz., widow) "for such a cause as above stated" (viz., unchastity) "might be expelled from possession." Now there was a decision on the point--the decision of all the Judges of the Supreme Court in the case of *Doe d. Radamoney Raur v. Neelmoney Doss Montriou's* H.L. Ca., 314,--and taking the words of the judgment into consideration, it might very well be that the decision would have been different had the previous case of 1792 been brought to the Court's notice. [Srimati Matangini Debi Vs. Srimati Jaykali Debi](#) is of course exactly in point, and I have considered it with great care and respect. For the reasons above given, however, I am unable to agree with its conclusion.

34. An argument was made of the unmarried daughter's right of succession, and it was contended that, inasmuch as such a daughter, dying childless, or becoming a widow immediately after she had taken her father's property, was allowed by Hindu law to retain that property till her death, notwithstanding that she conferred none of the benefits on her father's soul which were expected of her, the widow, although unchaste, and similarly unable to confer those benefits, should, by a parity of reasoning, be allowed to retain her life-estate. I do not see any analogy between the two cases. The daughter is declared by Menu to be equal to the son, who is even as the man himself, and she by oblations duly presented confers great benefits on her deceased father. No doubt she would confer far greater benefits, if she perpetuated his race and bore a son, but she can still present

oblations even as a sonless widow, and the next heir could not, for the oblation would cease with the daughter's son. This seems to me very sufficient reason why the sonless daughter, having succeeded whilst in a position to bear sons, should retain the inheritance for life; and it is surely far different with the widow who has, by her own misconduct, rendered herself incapable of offering any oblations, or of conferring any of those benefits, which formed the sole ground for her taking the estate of her husband. From the moment she becomes unchaste the widow's religious observances are useless, and her deceased husband falls, as the Hindu commentators style it, "into torment."

35. It has been said that much inconvenience is likely to be caused by declaring unchastity in a widow a cause of forfeiture, and that many conveyances may be avoided, and much litigation set on foot. Of this, I suppose we must take our chance. My experience tells me that purchasers from Hindu widows know perfectly well what they are about, and make up for the risks they run by paying very little for what they buy. I have rarely seen a purchase from a widow that was a fair one, and if this class of speculative buyers be put to inconvenience or loss, I do not think it a matter for much regret.

36. On the whole, and after the best consideration I can give to the subject, I would answer the first question referred by the Division Bench in the affirmative.

37. The second question does not arise, there being no contention that the widow has been excluded from caste, but if it did, I should be strongly of opinion that Act XXI of 1850 did not bar the forfeiture. That Act was meant for the relief of those who, from conscientious motives, found it necessary to abandon the faith of their ancestors, and not for cases like the present. If a Hindu widow can become unchaste, and still under cover of this law retain her estate, she makes (setting moral considerations aside) a very good thing of her incontinence. The Hindu religion forbids her offering oblations, or performing religious ceremonies, for her husband, and consequently she has to expend no part of her property on these observances, but keeps it all for herself. It can hardly be supposed that the Act had this in view, or intended to hold out a premium to immorality.

Phear, J.

38. I have had the advantage of perusing the draft of the judgment which the Chief Justice is about to deliver, and as I concur substantially in the whole of it, I think it is unnecessary that I should now give at length, in other words, the reasons for my opinion. I desire, however, to say that I quite perceive the great force of the argument by which my learned brother Mitter, J., has in referring the case supported his view of the law applicable to the case, and the clearness with which he has expounded the ancient texts. Had the matter been *res integra*, and had we been now called upon for the first time to determine, upon the foundation of these texts alone, the limitations to which a Hindu widow's enjoyment of property should be subjected, I think it possible that we might arrive at a result very different from anything which has hitherto been recognized by our Courts as the widow's right. At the same time, I also feel very certain that nothing can be

conceived much more remote from that which was probably in contemplation of the Hindu law sages, than the exceedingly artificial subject, which the special respondents now ask us to say is the result of their precepts,--namely, an estate of inheritance in the widow, subject to defeasance, after vesting, upon the occurrence of a contingent event. We have only to look at this principal text of Narada:--"When the husband is dead, his kin are the guardians of his childless widow. In the disposal of the property and care of her person, as well as in her maintenance, they have full power,"--in order to become aware how great is the modification, and the amount of adaptation to modern requirements, which the old Hindu texts must be made to undergo, before we can reach through them even to the proposition of the defendants. The truth is, as it seems to me, that it is now much too late to seek merely the primitive meanings of the venerable authorities, which have been quoted before us, because these have long ago, in regard to the very matter now in question, received solemn interpretation in the light afforded by the exigencies of modern society. It has been for some time judicially settled by the long series of decisions with which the Chief Justice deals, that, according to Hindu law, inclusive of the texts discussed before us, the widow does, at her husband's death, in the absence of a son, grandson, &c., if she be then without disqualification, succeed to her husband's property, and represents it fully as an estate of inheritance; and further, that she does not forfeit it on the subsequent occurrence of disqualification; that in these two particulars she is in the same situation as a male heir. We are now asked to say that so far as the last particular is concerned, the decisions have violated the spirit of the Hindu law, as it may be ascertained in the cited texts, and are therefore wrong. It appears to me that we cannot do this, without at the same time saying that they are wrong in the same particular with regard to males, nay further, that they are wrong in giving the widow the estate of inheritance at all.

39. With these views, I am of opinion that the first question ought to be answered in the negative; and if that be so answered, the second question does not arise.

Jackson, J.

40. The question here raised for determination by the Full Bench is not only of some difficulty, but of really vast importance.

41. From unascertained causes, immoveable property is notoriously,--in some parts of Bengal to a very large extent,--in the hands of Hindu widows, whose relations with the families of their deceased husbands are not always amicable; whose personal liberty is now, it may be said, wholly unlimited; and whose enjoyment of the estate not merely differs, but often seriously impairs the prospects of reversioners. If, therefore, it be recognized as a rule of law by this tribunal (which, constituted as it is to-day, concludes and binds by its decision every Court of Justice in a province numbering forty-two millions of Hindu inhabitants) that a Hindu widow forfeits, by unchastity, the estate which she has taken as the heir of her husband, then, I apprehend, not only will a fruitful cause of domestic discord be largely extended, but a motive will be afforded, to say the least of it,

for publishing and bringing into Court the most deplorable scandals. That such a ruling will tend, in any great degree, to purity of life and manners, I do not believe; but it is likely enough to furnish a stimulant to perjury, or to collusive proceeding equally nefarious. This, indeed, is not a reason for deciding in one sense or the other the question we have before us, but it is mentioned only for the purpose of showing the gravity of that question.

42. It is, I think, a matter of regret, that so important an issue has been raised in the particular case before the Court; because it does not appear necessarily to arise upon the original contention of the parties upon the issues framed in, or the decision passed by, the Court of first instance; also because the status of the parties (people of the blacksmith caste in Assam), and the trivial amount of the matter in dispute, have been unfavorable to that full research and discussion which the importance of the abstract question demanded. The broad question now submitted to us was not so much as touched upon in the judgment of the Munsif, who, as it happened, was a native of Assam, and who maintained the widow in enjoyment of the husband's property, on the ground that she had contracted no second marriage, and that, consequently, the first marriage was still undissolved and valid. If the question had been fairly raised below, it is probable that some evidence would have been produced as to the rules of caste, and the condition of the tribe to which the litigants belong, of which at present we are in utter ignorance: and I confess that this is a circumstance which, in my opinion, takes away much of its value from the evidence given by the Pundits, who were examined by order of the Division Bench. I was surprised at finding so little allusion to their testimony in the argument before us, and I take it, these learned persons deposed rather to the law as it is found in the shastras, than to observances of the present day; and I do not Understand that they pretended to any knowledge of the customs of Assam. Without any disparagement of the learned and ingenious gentlemen who addressed us on behalf of the respondent (reversioner), it must be admitted that everything which could be said on that side of the case has been set forth in the referring judgment of Mitter, J., with his accustomed ability, force, and knowledge of the subject; and I also admit that we have derived great assistance from the really able, temperate, and judicious argument of Baboo Mohini Mohun Roy on behalf of the widow, special appellant.

43. I have had the advantage of reading the judgment which the Chief Justice is about to deliver, and his opinion so far as it is stated in that judgment has my entire concurrence,—that is to say, I consider that the reasoning of the referring Judges is fully answered by that judgment, and that, if we were obliged to base our decision of this appeal upon the passages quoted from the ancient Hindu sages, and the several digests or systematic books, I should hold, for the reasons there given, that the widow did not forfeit the estate, which has once devolved upon her, by reason of subsequent unchastity. The whole of the passages examined, with one exception to which I shall presently advert, seem to me applicable to wives and widows whose known, or suspected, incontinence debars them from succeeding to the estate of their husbands; and the impression left on my mind from the perusal of those texts and quotations is, that the

ancient Hindu law was vigilant against the succession of wives who were unworthy to succeed, but did not enjoin or sanction an inquiry, in the interests of reversioners, whether or not women, chaste at the time when the succession opened, afterwards maintained a blameless character.

44. The exception to which I alluded is the second verse of the text of Catyayana, quoted as text 477, Bk. v, Ch. ix, s. 1 (Colebrooke's Digest, vol. iv, pp. 277-8, folio edit., 1788), where it is said:--"The childless widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents, may frugally enjoy the estate until she die; after her the legal heirs shall take it." This text does appear at first sight to require chastity as a condition of enjoyment; it also requires obedience to her spiritual parents; but it contains no express authority to deprive her if unchaste or disobedient; on the other hand, it provides that after her (without adding, or in case of her failing to comply with the conditions), the legal heirs shall take it. It will not be now contended that she could be deprived for an act of contumacy towards her spiritual parents: as far as the text goes, it must, I think, be taken as a whole, and so far as the sanction goes of a law emanating from authority regarded as divine, if the breach of one clause will not deprive, no more will a breach of the other.

45. To the argument derived from the sanctity of the marriage tie, I will advert presently, but for the moment we are dealing with the absolute commands of the lawgivers, and not with the considerations on which those commands were probably founded.

46. In other passages cited, such as that of Vridha Menu in text 408 of the same volume of Colebrooke's Digest, it is declared that a chaste, sonless widow "who strictly performs the duties of widowhood" shall alone succeed to his whole share. What those duties are, if the widow elects to survive her husband, may be read in Colebrooke, Bk. 4, Ch. iii, s. 2, from which it appears, amongst other things, that a widowed woman, sleeping on a bed, would cause her husband "to fall from a region of joy," and it would be monstrous to contend that a widow who took a second repast in the day, who failed to keep her tongue in subjection, or who omitted fasts, pilgrimages, and utterances of the name of Vishnu in the month of Baisakh or of Kartik, would, by any of these acts or omissions, or all of them together, forfeit her estate.

47. The Hindu shastras, then, appear to me to fall short of requiring the forfeiture contended for by the respondent; and the attempt to transmute into a positive rule of law, affecting the enjoyment of property, that which is to be found there in the way of precept, would only involve us in endless absurdities.

48. But I go further. I cannot concede that the Courts of this country are bound to enforce, or would be justified in enforcing, the principles of the shastras, merely as such, by way of property law; and I say this quite irrespectively of the British or foreign origin of those Courts, or of the element which our Legislature has introduced into the law of India. I say it, too, bearing fully in mind the rule laid down in Regulation IV of 1793, s. 15 (which was

in force when this suit was before the lower Courts) to the effect that "in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mahomedan laws with respect to Mahomedans, and the Hindu laws with regard to Hindus, are to be considered as the general rules by which the Judges are to form their decisions." That rule has now been replaced by s. 24, Act VI of 1871, the Bengal Civil Courts Act. It was for the purposes of this argument, I think, tantamount to the declaration contained in s. 17, Act 21 Geo. III, c. 70, that in disputes between the native inhabitants of Calcutta, "their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party, shall be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos by the laws and usages of Gentoos."

49. Regard being had to the remote antiquity of the shastras, to their vulgarly accepted sacred origin, and immutable character, and to the changes, nevertheless, sweeping and progressive, in the constitution and condition of Hindu society during the centuries since Narada and Menu wrote, to the fragmentary-state, the obscure and too often conflicting tenor of these writings, finally to their inapplicability even at the time of their composition to the whole people,--regard, I say, being had to these things, I conceive that we must act upon the shastras, in dealing with property and judicable rights, only so far as they are sanctioned and continued by the usage and custom of the people.

50. This is not merely my own opinion--if it was, I should scarcely venture to advance it--but is the opinion of persons whose competence to speak will not be denied. Sir Henry Maine in his *Ancient Law*, p. 17 (edit., 1863), observes:--"The Hindu code called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observations of the Hindu race; but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. "It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law."

51. Mr. Steele, in the preface to his valuable work on the Law and Custom of Hindu Castes (edit., 1868), quotes from a minute of the Governor of Bombay (no less an authority than the Hon^{ble} Mount Stuart Elphinstone), dated 22nd July 1823:--"The Dhurma shastra, it is understood, is a collection of ancient treatises, neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge perhaps of the most learned Pundits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, founded on the Dhurma shastra, but modified by the convenience of different castes or communities, and no longer deriving authority from any written text." It was the inquiry into these customs, made under the orders of the Government of Bombay, that resulted in the publication of Mr. Steele's interesting book: and one cannot help regretting that further efforts have not been made in this direction at Bombay and other places.

52. It is useful and instructive to observe in many particulars the divergence of custom from the written law,--see upon this very question, pp. 35 and 176,--and some such instances are summarized by Mr. Lyon of the Bombay Civil Service in a very useful work recently published, called the "Law of India," vol. i, p. 13. Mr. Burnell, in his introduction to a translation of part of the Madhavajee Commentary (Dayavibhaga), p. 13, uses the following language:--"The digests, however, were never intended to be actual codes of law; there is not a particle of evidence to show that these works were ever even used by the Judges of ancient India as authoritative guides; they were, it is certain, considered as merely speculative treatises, and bore the same relation to the actual practice of the Courts, as in Europe treatises on jurisprudence to the law which is actually administered." And so West and Buhler, in their Digest of Hindu Law, Introduction, p. 36:--"It is therefore unreasonable to charge the Smriti "codes" with a want of precision, and of discrimination between moral and legal maxims, &c. Such strictures would only be justified if they were really "codes" intended from the first to settle the law between man and man."

53. I would also refer to the observations on a very similar question which arose in the Supreme Court of Bombay in 1847, before Perry, C.J., in the case of the Kojahs and Memon Cutchees 2 Morl. Dig., 431; at p. 442. The parties there were Mahomedans, and a practice was set up quite at variance with Mahomedan law, and being found to prevail among these people, it was maintained. In that case the plaintiff sued as a daughter for a share in her father's property. In answer it was set up that, according to the custom peculiar to the Khoja sect, daughters were excluded from inheritance. The case was fully argued and allowed to stand over for judgment. In the meantime another case of the same description arose on the part of some persons of the Memon Cutchee caste, in which it was intimated that exactly the same question was involved, and Sir Erskine Perry in passing judgment in the case makes the following observations:--After reading the following clause of the Charter of the Bombay Court,--"In the case of Mahomedan or Gentoos, their inheritance and succession shall be determined, in the case of the Mahomedans, by the laws and usages of the Mahomedans; and where the parties are Gentoos, by the laws and usages of the Gentoos, or by such laws and usages as the same would have been determined by if the suit had been brought, and the action commenced, in a native Court,"--he says: "Now, if the meaning of this clause is, that it is an absolute enactment or adoption of the Koran, as of a positive unchangeable law, without regard to what the usages of the Mahomedans of India, whether Shias, Sunnis, or Sectarians, might have been, undoubtedly, the custom set up in conflict with the text of the Koran cannot be sustained. But I think it is quite clear that the clause in question was framed solely on political views, and without any reference to orthodoxy, or the purity of any particular religious belief." In a further passage he says:--"I am clearly, therefore, of opinion that the effect of the clause in the Charter is not to adopt the text of the Koran as law, any further than it has been adopted in the laws and usages of the Mahomedans who came under our sway: and if any class of Mahomedans--Mahomedan dissenters as they may be called--are found to be in possession of any usage which is otherwise valid

as a legal custom, and which does not conflict with any express law of the English Government, they are just as much entitled to the protection of this clause as the most orthodox Sunni who can come before the Court." Again:--"It should also be further observed that these Mahomedan sectarians have lived chiefly in countries reigned over by Hindu princes; and I can have no doubts whatever on the evidence, and on what we know of the manner in which native Courts dispose of the controversies of their subjects, that if the present suit had been brought before the Rao of Cutch, or any of the Rajput Rajas of Kattiwar, upon payment of the dues of office--the 25 per cent., or whatever the exaction might be--the decision would have been in conformity to that which is revered by all mankind, but by Hindus, perhaps, more than any other portion of mankind, ancient usage. If this be the true exposition of the rule which would be meted out to these people in their own country, it would be a monstrous thing that an English Court of Justice should be obliged to reverse such a time-honored custom, and almost to revolutionize the internal economy of two whole castes out of some supposed obligatory force in a text called divine, which neither the Judge nor the parties to the suit believe in." It does not appear that this decision was ever appealed against.

54. It would be a stupendous effort of legislation to combine into one mass the whole body of Hindu jurisprudence, to eliminate all that was false or unsuited to the times, to amend that which was defective, supply what was wanting, and re-enact the whole into a great scheme of modern Hindu law: but no such task is likely to be attempted. Our duty, I take it, is very different. "We have only to administer the living Hindu law; and we are not to deprive parties of their property through the operation of rules, framed by ourselves in supposed accordance with its abstract principles, I wish, however, emphatically to say that it is far from my intention to question, or to undermine, the original authority of the Hindu shastras. Near thirty years spent in the public service in this country have not taught me to undervalue the great sources of law, of usage, of morality, from which millions of Her Majesty's subjects derive their rules of daily conduct; and I know in what eloquent and impressive terms the duty of maintaining those fountains of law has been proclaimed by men of the highest eminence as statesmen and as scholars. But I firmly believe that such declaration has been rightfully, and in fact, based upon the assumption that the laws so to be protected are not only regarded by the Hindu community with superstitious respect, but also endeared to its members by long and unbroken observance. A rule of Hindu law on which the Courts are bound to act, and may act with safety, will therefore, I conceive, be found to originate in the Dharma shastras, to be extracted and embodied in the great comparatively modern law treatises, such as the Mitakshara, the Dayabhaga, and others, and to have come down to present times preserved in the usages of Hindu society, and occasionally enforced by the action of the Courts; and many of the rules in most frequent requisition, those for instance of succession, partition, and adoption, will bear this test very well; cases being of frequent occurrence, the shastras and the Hindu law books being constantly appealed to, and the Courts having applied themselves with much diligence and some success to the work of interpretation, especially of late when a reasonable, instead of a servile or literal, mode of

construction has begun to be adopted. In the case of Rao Kurun Sing vs. Nowab Mahomed Fyaz Alee Khan, their Lordships in the Judicial Committee say:--"It is entirely opposed to the spirit of the Hindu race to allow the words of the law to control its long received interpretation, as practically exhibited by rules of descent and rules of property founded on the decisions of the Courts of the country; and it seems to their Lordships that it would be extremely mischievous to disturb, upon points taken here for the first time, any such course of decision."

55. Let this mode of investigation be applied to the present controversy, and let us see the result.

56. It may, in the first instance, be conceded--1st, that previous known incontinence will exclude a widow from succession; 2ndly, that a widow receiving maintenance loses her right thereto by subsequent profligacy.

57. The first of these positions was admitted by the appellant's pleader: it is not only clear from the books, ancient and modern, but also it would seem to be supported by practice and by the decisions of the Courts which have been cited. The other rule is also distinctly laid down, is fully recognized, and is in accordance with reason and justice; for a man cannot be bound to feed misconduct in his own family, or to recognize a bond of union which the widow herself has trampled under foot. Conceding these points, we exclude the authorities which go to support them and no further, and then what do we find bearing on the point at issue. An obscurely worded and fragmentary religious precept, no positive enactment of forfeiture, no evidence of custom, unfrequent resort to Courts, and in the only cases where, so far as we can see, the question was really raised and decided, a decision in favor of the widow. In the most recent case, there is the concurrent opinion of the late Chief Justice and of two other Judges of this Court; and this decision, the learned Judges who refer this case feel themselves bound to say, is "contrary to the Hindu law." I should not venture to say so, and I do not think so; and, of course by the "Hindu law," I mean that Hindu law which we are bound to administer. As to its being contrary to the principle and spirit of Hindu law, I shall say something further on.

58. I have just asserted that the Hindu law books contained no positive declaration of forfeiture in such cases. The only thing of this kind suggested was the remark of Sreekissen Turkolunkar, quoted at page 13 of the referring judgment "shadhi (chaste), otherwise the right ceases." This I think was well explained by Baboo Mohini Mohun Roy in his reply. Sreekissen does not appear to say anything of the kind in his own treatise, the Dayakrama Sangraha, and certainly the phrase "cessation of right" is a different thing from "forfeiture of property." As to Juggernath Turkopunchanun, admitting fully his vast and noted erudition, I do not think he would be a safe guide for the Courts, on the strength of his own opinion, upon such a matter. He seems indeed to be, like many of the writers on Hindu law, a merely learned person, neither judge nor lawyer, but pundit and logician, and without their merits of being accurate and precise.

59. But it has been said that this question cannot be viewed apart from the religious element in the Hindu law; that by the Hindu marriage is regarded as a sacrament, the foundation of the family, and therefore of society; that it was one of the chief aims of the Hindu legislators to preserve the purity of the conjugal relation; that, with this view, restraints were imposed on the weakness of women, forfeiture of property being one of them; and that the removal of these restraints, without substituting better ones, would be a dangerous innovation. I have said before that it would not, in my opinion, be an efficient or proper check upon a weak and thoughtless woman, to put it in the power of her husband's relations to obtain the transfer of her property to themselves on proof of her frailty. I am not aware that the Hindu system is at all peculiar in its tenderness towards the marriage tie; and if Hindu women differ from others in being weaker and more ignorant, that, it seems to me, is a reason for pity, and not for harshness. But how does the case really stand? Let those who would enforce, in the case of Hindu wives and widows, all the duties, and all the penalties of the shastras, consider what Hindu marriage was in the days, and among the people, in which, and for whom, those books were written, and what it is now. Those were not the days of child marriages, or of Koolin marriages. Professor "Wilson says (2nd vol., Essays on the Religion of the Hindus, pp. 58-9):--"The Vedas then did not sanction the marriage of children. In fact, it was impossible for a man to marry before maturity at the earliest he could not have been married before he was seventeen, an early age enough, in one estimation, but absolute manhood as compared with the age of nine or ten at which Hindu boys are according to the present practice husbands. There is no doubt that many other innovations for the worse have been made in the marriage ritual and usages of the Hindu and the whole system, the premature age at which the parties are married, the practice of polygamy, and the circumstances under which the alliance is commonly contracted involving the utter degradation of the female sex is equally fatal to the development of the moral virtues and intellectual energies of the man, and is utterly destructive both of public advancement and domestic felicity." And although Professor "Wilson does not say so, neglect of a wife by her husband in respect of the connubial relation was not permitted, but was declared to be punishable according to law. I do not cite the passage, but it may be found in 2 Colebrooke's Digest, Bk. iv, v. 15. All this however, would seem to be thought of no consequence as long as an extreme penalty is reserved for the punishment of an erring woman, whose education left her frail and ignorant, and whose married life has made her miserable. No doubt there will be many cases to the contrary, and a Hindu wife may be as happy as another. That is true, but those are not the cases in which after-misconduct is most to be apprehended, nor will the Court be at liberty (if it must obey the shastras, and the shastras SO require) to choose the instances in which the penalty is to be inflicted. The child-widow must be true to the boy-husband who never reached the age of puberty. The Koolin's wife must "preserve unsullied the bed of her lord " which perhaps she has never seen, or has shared with co-wives to the number of five or fifty. To be sure, Koolin husbands are commonly necessitous gentlemen, and it might not be worth their relations" while to maintain a watch over the morality of their widows.

60. It may be argued that a widow who leads an immoral life ought not to be placed in a better position than one who honestly takes the benefit of Act XV of 1856, and, by so doing, renounces all rights in her deceased husband's property. But the Legislature, as to this last provision, was simply in accord with native custom as shown by Steele at page 176 of the book already cited, and it would certainly be a severe shock to native opinion, that a widow, by remarriage, should be able to carry away her first husband's property into a strange family, neither his nor her own, and besides, by remarrying, she acquires certain rights, or probable rights, in the estate of her second husband. If those who advocate the widow's forfeiture for incontinence do so merely in the interests of morality, it seems to me they would best accomplish this end by inducing the Legislature to punish with fine and imprisonment the men who bring shame upon Hindu families, which course would be infinitely juster than visiting it on the widows.

61. I will only add a few words as to my view of the effect of Act XXI of 1850 on the present question. The Act provides for the cases of those who (1) have renounced, or (2) have been excluded from the communion of any religion, or (3) have been deprived of caste;--meaning I conceive those who, by their own choice, or by the action of their caste fellows, have been finally-shut out, or temporarily deprived, though capable of being restored on the making of proper expiation.

62. I have already remarked that the extensive changes in public usages, manners, and feelings have gradually produced, in certain matters, a wide gap between existing facts and the Hindu law, which, like those of the Medes and Persians, changes not, being reputed divine. It may well have seemed to the Legislature that, as many injunctions and many penalties had become obsolete, those which remained in force would be found to be distinctly marked as retaining their force in popular estimation by the simple, but effectual, brand of outcasting; and that it would not be attempted to enforce any loss of civil rights, without first resorting to the tribunal of social opinion, and putting the offender out of caste; and, in fact, that such loss of caste, and not the misconduct by which it had been occasioned, would be usually insisted upon as working the forfeiture. But we need not consider now whether this speculation is correct or no.

63. On the grounds I have already stated, as well as those assigned by the Chief Justice, and generally by my colleagues who are of the same opinion, I think that in this case the widow does not incur forfeiture by reason of her incontinence.

Kemp, J.

64. On the question referred to this Bench by the Second Bench, I concur entirely in the referring judgment and in that just delivered by Mitter, J. I can add nothing to those judgments, but I wish, as Glover, J., has done, to guard myself from its being supposed that I concur in that portion of the learned Judge's judgment of reference which limits the enjoyment of the widow in the estate of the husband. I do not take the limited view which Mitter, J., takes of the estate of a Hindu widow, and I concur with Glover, J., in his

remarks as to the extent of that estate, although that was not a question referred to this Bench.

65. In every other respect, and with due deference to the opinion of the learned Judge in as far as the enjoyment of the estate of her husband by the widow is concerned, in which I cannot concur, I entirely agree with Mitter, J.

Couch, C.J., Macpherson, Pontifex, and Ainslie, JJ.

66. Up to the time of this reference there had been no conflict of decisions in this Court, the only case being [Srimati Matangini Debi Vs. Srimati Jaykali Debi](#), where the decision of Markby, J., that a widow did not forfeit her right, was affirmed by Sir Barnes Peacock, C.J., and Macpherson, J. But the learned Judges who have referred the question state that they feel themselves bound to say that that decision is contrary to Hindu law, and we are in effect asked to overrule it. The authorities bearing on the question, and the reasons for an opposite decision, are very fully and elaborately stated by Mitter, J., in the referring judgment.

67. I propose first to consider that judgment; and will afterwards refer to any authorities or arguments that have been produced, which are not in it. It first notices that the authorities in the different schools of Hindu law appear to be unanimous in holding that an act of unchastity is one of the gravest delinquencies of which a woman can be guilty. The texts cited need not be repeated here, and it may be allowed, as the judgment says, that they are in full unison with the feelings of the Hindu community in general, and that the social status and privileges of Hindu women are still ordinarily determined and regulated by them. They may be, as is also said in the judgment, a valuable guide in the present decision; but it must be kept in mind that the question is what is the doctrine that has been received by the Bengal school, by the law of which this case is governed, and that has been sanctioned by usage.

68. It is then remarked that the estate of a widow under the Hindu law is one of a very peculiar character, which is now so fully understood and admitted that I need not refer to the authorities upon it. And then it is said:--"Indeed, according to the true theory of the Hindu law, she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression." The words "if we may use the expression" show that the learned Judges felt they were speaking figuratively, to which there can be no objection if care is taken to distinguish the figurative from what it resembles, and not in reasoning to substitute the former for the latter. I may here quote the words of Lord Westbury in *Knox v. Gye* L.R., 5 H.L., 656; at p. 675:--"Another source of error in this matter is the looseness with which the word "trustee" is frequently used. The surviving partner is often called a "trustee," but the term is used inaccurately. . . . It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were

a trustee by express declaration--in other words, a complete trustee--holding the property exclusively for the benefit of the cestui que trust, well illustrates the remark made by Lord Mansfield that nothing in law is SO apt to mislead as a metaphor." But in truth the word "trustee" ought not to be used, at least in the sense which is ordinarily attributed to it, and if used in any other, it proves nothing. A widow is not a trustee. She has the usufruct as well as the property in the thing inherited from her husband. Thus Vyasa, as quoted in the judgment, says:--"For women the property of their husbands is intended only for use, let them not make waste of it on any account." And the text of Catyayana, also quoted, is:--"Let the childless widow keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property after his death." It is true that Sir William Macnaghten, in his Principles of Hindu Law, p. 19, speaking of the estate to which a widow succeeds, says:--"She can be considered in no other light than as a holder in trust for certain uses;" but he goes on to say that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing; not that by making waste she forfeits her estate.

69. It is then remarked that "it should not be supposed that these provisions were intended by their framers as mere moral precepts which the widow is at liberty to obey or disobey at her pleasure; on the contrary, the utmost precaution is taken by them to secure their strict enforcement." But as there is no text that if she disobeys she shall lose her property, it may be inferred that it was not intended she should. Texts are then cited to show that, in the disposal of her property and care of her person, a childless widow is subject to the control of her husband's family, and the widow's estate is compared with that of a male heir under the Hindu law. In both cases the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession: and it is remarked that no effective restriction whatever is put upon the right of enjoyment of the male heir; that the reason for this distinction between male and female heirs is that women are incapacitated from performing the ceremony of parvana sraddh, which constitutes, as it were, the very corner-stone of the Hindu law of inheritance. This applies to all female heirs; and we are asked, in the absence of any positive text, to make a distinction between the widow and other female heirs, and to declare that she is to forfeit her estate if she fails to perform her duties, whilst they do not. But it has not been attempted to be shown that there is more reason for the widow to forfeit the estate on account of unchastity, and because her acts are thenceforward inefficacious for the repose of her husband's soul, than for an unmarried daughter to forfeit the estate upon the death of a childless husband, with whom, after her father's death, she may have intermarried, and by whose death childless, she ceases to be efficacious in bestowing benefit on her father's soul.

70. The widow, chaste at her husband's death, takes as "half her husband's body," and for performing works efficacious for his soul. The daughter, unmarried at her father's death, takes, because she is "as it were himself" (Dayabhaga, Ch. xi, s. 2, v. 1), and because she is, equally with the son, "a cause of perpetuating the race," and (v. 7)

"confers benefit on her father by means of her son." It is clear from v. 30 that the issueless widowed daughter, in whom as a spinster the estate had vested, would retain it until her death, although after her husband's death she would be wholly inefficacious to confer the benefits, for which she had been selected to take. If it be said that she may still continue of herself to perform certain acts efficacious for her father's soul, the answer is that those qualities are not the qualifications or conditions for her selection to take the estate. Had she been a childless widow at her father's death, she would have been passed over, notwithstanding the possession of such qualities. The reason for her taking the estate is, not the efficacy of her own acts, but the efficacy of the acts to be wrought through her son. It is then observed in the judgment that, if we were to guide ourselves solely and exclusively by the texts in the Mitakshara and Dayabhaga, it would have been extremely difficult to come to any satisfactory solution of the question one way or the other. In fact, as is said by the Judicial Committee of the Privy Council of the texts in the Mitakshara, they are wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. If the doctrine contended for has been received, it must have been originated by later commentators. I pass over the remarks upon the Full Bench decision [Gaurhari Gui Vs. Peari Dasi](#) ; but I think it would be very difficult to reconcile it with what we are now asked to declare to be the law. It has been so generally acted upon, that we must consider the decision to be the settled law, until the contrary is declared by a higher tribunal. The judgment then says:--"Such then being the nature of the estate inherited by a Hindu widow, every act done by her, the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it, operates as a cause of forfeiture;" and, after citing texts which show "that an unchaste woman not only causes "the loss of her husband's soul," but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever," it says, "as half the body of her deceased husband, she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfill her duties as such trustee, the trust property must be taken away from her as a matter of course."

71. I will consider these two propositions separately. The first assumes that the continuance of the estate in the widow is conditional upon her using it for the intended purpose. Otherwise the incapacity would not cause a forfeiture; for it is not said that the forfeiture is to be considered as a punishment, and no text has been produced to show that it can be regarded in that light. But, whether the estate is a conditional one, is the question we have to determine; and it is admitted that the texts, under which the widow takes the estate, are silent as to her disabilities, or the nature of the interest which she takes. In the Mitakshara, Ch. ii, s. 1, v. 6, the following texts are given:--"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain (his) entire share." Vridha Menu:--"The wealth of him who leaves no male issue goes to his wife; on failure of her it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother." Vrihad Vishnu:--"Let the widow succeed to her husband's

wealth, provided she be chaste; and in default of her the daughter inherits if unmarried." Catyayana:--"Chastity is declared to be the condition of her taking the estate;" but there is no condition declared as to her keeping it.

72. The second proposition uses the word "trustee" and asserts that if a trustee is not in a position to fulfill his duties, the trust property must be taken from him. As a proposition of Hindu law, no authority is cited in support of it, and I am not aware of any. As a doctrine of Courts of Equity in England, it is not correct. The remedies for a breach of trust are stated in a work of high authority (Lewin on Trusts, Ch. xxvii), but the taking away the trust property is not among them; and it has been found necessary to provide for the disability of a trustee, by infancy or lunacy, by Acts of Parliament. There appears to me to be a fallacy in the proposition. The possession of the trust property is not essential to the performance of the duties. If the widow had sufficient property of her own to maintain herself, she might alienate the whole of her husband's property for her life, and still perform all her duties for the benefit of her husband's soul. In fact, there is no trust attached to the property. It is a personal obligation on the widow, and the proposition really is that, if she does not fulfill it, she shall be deprived of her estate. We must see whether that is a received doctrine in the Bengal school of Hindu law. It is then said that the conclusion, that the estate must be taken away from her as a matter of course, is not wanting an express authority to support it; and texts are cited which show that it is only a chaste widow, who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband. Also a text of Vyasa is cited which says:--"After the death of her husband, let the virtuous widow observe strictly the duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband;" and enumerates other duties. "It is clear," says the judgment, "that, according to the author of the Dayabhaga, there are two reasons for allowing the widow to succeed to the estate of her deceased husband, namely, first, because she can rescue him from hell by living in the mode prescribed by the Hindu shastras; and, secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence." Let this be granted. The reasons for allowing a person to succeed to an estate are not necessarily the conditions upon which he is to hold it. In the case of the male Hindu heir, it is admitted they are not. And the description of the person, who is qualified to succeed to an estate, has not the force of a condition by which the estate will be defeated if the qualification afterwards ceases; as is before shown in the case of a daughter becoming an issueless widow. The last text referred to is from Catyayana, cited in the Dayabhaga:--"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." This may, no doubt, be read as making the enjoyment conditional on keeping unsullied the bed of her lord; but it may also be only an injunction to do so, as in the text of Vyasa--"Let the virtuous widow observe strictly the duty of continence;" and the way in which it is used by the author of the Dayabhaga seems in favor of this. The passage, Ch. xi, s. 1, v. 56, begins:--"But the wife must only enjoy the husband's estate after his demise. She is not entitled to make a gift,

mortgage, or sale of it. Thus Catyayana says, &c." If Mr. Colebrooke had thought that the words of Vridha Menu and Catyayana were intended to make the enjoyment of the estate conditional, I think he would have made it clear in his translation that it was so. If the injunction is to have the force of a condition, and the violation of it is to cause a forfeiture of the estate, the Full Bench decision *Gobindmani Dasi v. Shamlal Bysak*, B.L.R., Sup. 48 cannot be supported, because the whole estate of the widow would be forfeited by an alienation, and the heirs would take it. I think this text cannot be considered as a declaration that the enjoyment of the estate is subject to the condition of remaining chaste. The decision of the Privy Council in *Cossinaut Bysack v. Hurroosoondry Dossee Sharna Churn's Vayavastha Darpana*, 97; S.C., Morl. Dig., 198, and *Clarke's Add. Ca.*, 91 does not appear to me to give any support to the opposite view. The next friend of the widow, an infant, sued to have the property belonging to her husband. She had removed from the protection of her husband's family, but it was not pretended that she had done so for unchaste purposes. The only question that could be put to the Pundits was whether, by ceasing to reside with the family of her husband, she forfeited her right of succession. They could put their opinions upon no other ground. If their answer implies that the estate would be forfeited by unchastity, they went beyond the question put to them. It is certainly settled by that decision that one part of the injunction in the text is not conditional; and it follows from the form of it, that the other part must receive the same construction. This applies also to the text from Vridha Menu. Some authorities current in the Bengal school are then cited. Of two of these, Sreekissen Turkolunkar and Rughoo Nundana, I need only say that it does not appear whether they are speaking of the right to inherit, or to keep the property after it has been inherited. A wife's right to inherit on the death of her husband may be said to cease on her becoming unchaste. Juggernath Turkopunchanun, the last authority cited, and one of the most modern of the Bengal school, is in favor of the doctrine that the interest of a widow is forfeited by unchastity. Of the texts which are then cited to prove that the Hindu law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her stridhan, or peculiar property, it may be said that, if they do not prove that, they do not assist the argument; and if they do, the forfeiture is declared by positive texts, which shows that they were thought to be necessary. Also, some of these texts seem rather to refer to acts in the husband's lifetime. As to the remark that, as an unchaste woman no longer remains half the body of her husband, her estate must necessarily come to an end, I think it may be said that the estate cannot be considered as still the husband's; otherwise a son would not take in preference to the widow. On the husband's death, the estate ceases to be his. The being half the body of her husband is the reason why the widow is preferred to a daughter.

73. The objection, which does not appear to me to be supported by authority, and has no weight in my opinion, that, according to the Hindu law, an estate once vested cannot afterwards be divested, is met, in the judgment, by the introduction again of the trust; but here it is said that the estate is in the nature of a trust estate, a change of expression which, I think, indicates some uncertainty in the minds of the learned Judges as to there

being a trust attached to the estate. It appears to me that this idea of a trust pervades the whole of the judgment; and I think I have shown, not only that there is no real trust, but that, if there were, forfeiture would not be the consequence of it.

74. The judgment then discusses the decisions of Courts of law and the opinions of European writers on Hindu law. The first case mentioned is in 2 Macnaghten's Hindu Law, p. 20. It is stated that a person died, leaving a widow and a brother of the half-blood, and, subsequently to his death, the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion; and the question is put, which of the two is entitled to succeed to the property of the deceased. The answer is:--"It is the general doctrine, that, the virtuous widow of a man who dies leaving no heir down to the great-grandson, succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession; consequently the widow in such case would be excluded by her husband's half-brother." The words "she has no right of succession" must, with reference to the facts stated, be taken to mean that she loses or forfeits the estate; but it is open to the remark that the texts cited do not directly support the opinion. It is the deduction of the Pundit from them. The next case is at p. 21 of the same volume. In the question it is uncertain whether the widow had become a prostitute, and had violated her husband's bed, before or after his death, and the answer is;--"If it be proved that the widow in fact did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from his house." It is doubtful whether this is an authority upon the question now before us. The next case is at p. 112, where it is stated that the woman became pregnant after the death of her husband, the fruit of an adulterous intercourse. The answer is:--"A virtuous widow of a person who leaves no male heir down to the great-grandson succeeds her husband; and if she violate his bed, she becomes degraded. Consequently the widow described has no light to her husband's heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence." The texts of Vyasa and Catyayana enjoining that a widow shall remain chaste are cited as the authorities. It is to be observed that it is said that she becomes degraded, and consequently has no right to her husband's heritage; and it seems to be considered that the loss or forfeiture of the estate is caused by the degradation or loss of caste. Indeed, it is possible that it was assumed in the other cases that there had been loss of caste. In the case of *Maharanee Bussunt Koomaree v. Maharanee Kummul Koomaree* 7 Sel. Rep., 144 a widow was held to have forfeited her claim to maintenance by eloping with a paramour. There was no question as to the forfeiture of an estate inherited from her husband, for there was an adopted son.

75. In the case of *Rajkoonwaree Dassee v. Golabee Dassee* S.D.A., 1858, 1891 the wife had eloped in the lifetime of her husband, and there is no doubt that the right of succession is forfeited by that.

76. The case of *Doe d. Radamoney Raur v. Neelmoney Doss Montriou*'s H.L. Ca., 314 is an express decision by four Judges of the Supreme Court, that a Hindu widow forfeits her

right to her husband's estate by incontinence after her husband's death. The report is very brief, and appears to have been taken from the notes of Chambers, C.J. It was decided in 1792, and is mentioned in the note to Doe d. Saummoney Dossee v. Nemychurn Doss 2 T. & B., 300 Mr. Montriou's Reports not having then been published. The decision of Sir Lawrence Peel in the latter case seems to be founded on the assumption that the forfeiture was consequent on loss of caste, as he applies Act XXI of 1850 to it. It seems probable that the opinion of Sir Thomas Strange was then the received doctrine in the Supreme Court. Mr. Colebrooke's opinion in 2 Strange, p. 272, is, no doubt, open to the remark made in the referring judgment that it was given in a case which originated in Trichinopoly; nor does it appear that it was given with any reference to the authorities current in the Bengal school. But the case in 2 Macnaghten, p. 112, is a Bengal case, and the opinion there agrees with Colebrooke's.

77. Elberling, pp. 73 and 75, and West & Buhler, p. 99, are cited as supporting the opinion of the referring Judges. Elberling at p. 73 says:--"The enjoyment of the property is given her (the widow) upon two conditions--1st, that she remains chaste; 2nd, that she does not make waste;" and at p. 75:--"A widow is to reside in her husband's family, yet as she forfeits her right to the property only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property if it be not done for unchaste purposes." And he cites the text of Catyayana:--"Let the childless widow, &c." If Elberling be correct that the enjoyment of the property is conditional, it must be forfeited as well by the breach of one condition as of the other; and upon an act of waste the estate of the widow would be determined, and the property would pass to the heirs of the husband. This I believe has never been held to be the law. In West & Buhler, p. 99, it is said that a widow having married herself to another husband by the pat ceremony had forfeited her right of heirship; but at p. 299 the question is put:--"A woman of the Dorik caste having lost her husband, became the mistress of a man of (another) sudra caste, and had a daughter by him. Can she claim to be the heir of her husband?" The answer is:--"A woman who was chaste at the death of her husband becomes his heir." The "remark" by the authors upon this is:--"According to Strange's Elementary Hindu Law, adultery divests the right of a widow to inherit after it has vested. On the other hand, the Shastri's opinion seems to be supported by the Viramitrodaya, where it is said, f. 221, p. 2, l. 8, and these persons (those disabled to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made, a resumption of the divided property does not take place, because there is no authority (enjoining such a proceeding);" and, noticing the opinion of Colebrooke, they say the authorities quoted by him "do not support the view that any forfeiture of property necessarily attends expulsion from caste." In the next page there is an opinion that "a widow who remarries cannot be considered a faithful wife. She cannot therefore claim the property of her first husband." It is difficult to reconcile these opinions.

78. Another authority, cited in the argument before us for the respondent, is Colebrooke's Digest, Bk. v, v. 484, which, read with the previous verse, says that a woman who takes delight in being faithless to the bed of her husband is held unworthy of property which has been promised to her by him as her exclusive property; and it was argued that a fortiori she would be of property inherited from her husband. There is a material difference between the two cases. Allowing that the word translated "wife" means also widow, the not giving that which has been only promised is different from taking away what the widow has actually succeeded to by virtue of the law of succession, and is in the enjoyment of. Mr. Burnell's translation from the Vyavahara Kanda of the Madhaviya, p. 31, was cited. The passage appears to refer to the succession of the wife on her husband's death, and not to her subsequent enjoyment. The judgment of the Privy Council in *Cossinaut Bysack v. Hurroosoondry Dossee Shama Churn*'s "Vyavastha Darpana, 97; S.C., Morl. Dig., 198, and Clarke's Add. Ca., 91 was relied upon as showing that the decision in Montriou's Reports was considered as law; but the question of forfeiture by unchastity did not, as I have already remarked, arise in the case; and it was sufficient for the Judicial Committee to say that the widow did not forfeit her right of succession by removing from the brothers of her late husband.

79. In the case of *Parvatikom Dhondiram v. Bhikuhom Dhondiram* 4 Bom. H.C. Rep., A.C., 25, the Court held that, if the inheritance be once vested in the widow, it is not, by Hindu law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance, and unredeemed by atonement," citing 1 Strange's Hindu Law, and adopting the words in p. 136, and referring to Mr. Sutherland's opinion, vol. 2, p. 269, that the degradation is the cause of exclusion from inheritance. It was argued that, as maintenance is forfeited, the estate of the widow should be also. But the text of Narada is:--"Let the brothers allow maintenance to his (deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they behave otherwise, the brethren may resume that allowance"--Vyavastha Darpana, 29. And in Mr. Burnell's work, page 30, a text of Narada is given:--"If any one among brothers dies or renounces worldly affairs (i.e., becomes a religious mendicant) and leaves no issue, the rest may share his property, except the stridhan, and let them support his wives as long as they live, if they preserve undefiled the bed of their husband; but from others they may resume it (the stridhan)." Thus we have in this case an express text authorizing the resumption. The absence of any text authorizing the heirs of the husband to resume the estate after the widow has succeeded to her deceased husband's property, is relied upon as showing that it cannot be divested. And this argument is strengthened by the fact that in another case there is an express text.

80. Besides, the argument drawn from these texts is founded on an alleged but false analogy between a widow's estate and a widow's maintenance. In the former case, the estate is given to her by express words, and is now here expressly taken away, and whilst hers it is independent of other ownership, her enjoyment being only according to the texts, subject to the advice or, control of her male relatives. But maintenance is not so

much a right in the estate of another as a duty of that other to be performed towards all those who but for the intermediate existence of himself might be entitled to the estate. Let them allow a maintenance assigns a duty to the owner rather than a right to the widow, although such duty may be enforceable by a widow who is without reproach. Moreover, the verses in Mitakshara, Ch. ii, s. 1, v. 37, and Mayukha, Ch. iv, s. 8, v. 2, would seem to show that even the incontinent widow of one who has actually possessed the estate is entitled to maintenance for her life. It was argued that, in the Benares school, property inherited by a woman from her husband is classed among stridhan, and therefore these texts would apply to it; and that it is the same in the Mithila school. Whether this be so according to the Mitakshara is at least doubtful. The contrary has been held by the High Courts both at Madras and Bombay in the cases of Sengamalathammal v. Valaynda Mudali 3 Mad. H.C. Rep., 312; see also Kamavadhani Venkata Subbaiya v. Joysa Narasingappa Id., 116 and Jamiyatram v. Bai Jamna 2 Bom. H.C. Rep., 10 and apparently in the Privy Council also in the case of Bhugwandeem Doobey vs. Myna Baee . It is certainly not so in the Bengal school, by the law of which we are to be governed in this case. I think I have now noticed all the arguments and authorities produced on the part of the respondents, and most of those for the appellant, the argument for whom was rested mainly upon the absence of any text that the estate of the widow should be divested if she became unchaste; and also upon this that, although by the Hindu law there are various causes of exclusion from inheritance (Dayabhagra, Ch. v), when the estate is once vested, it is not forfeited by the subsequent existence of any of them. In the case of Mussamut Balgovinda v. Lal Buhadoor S.D.A., 1854, 244, it was held that a person who has once succeeded to property is not to be dispossessed of it if he subsequently becomes insane. It was urged by the respondent's pleader that there being no positive text governing the case, we must look to the principles of the law to guide us in determining it; and that the five texts afforded ample analogy, quoting the words of the Judicial Committee in the case of Katama Natchiar vs. Srimut Rajah Moottoo Vijaya . There the question was how the property descended, and it was absolutely necessary to determine it. Here the estate is by positive texts vested in the widow, and there is no necessity to determine that it shall be taken away from her, or to go beyond what has been declared by the texts to be the law. I think we are not at liberty to declare a doctrine, which is not shown to have been received and sanctioned by usage, to be the law, because it may seem to be analogous to a doctrine that has been received. Giving all the effect they deserve to the arguments founded upon the status of women under the Hindu law, and the peculiar character of a widow's estate, I still am of opinion that the estate, once inherited, is not forfeited simply by unchastity. I therefore answer the first question in the negative, and it is unnecessary to answer the second.

Phoolabutte Kooer (Plaintiff) v. Gopal Mundur (Defendant) and Another (Intervenor).*

The 26th June 1868.

Act X of 1859 s. 77--Suit for Rent--Variance between Pleading and Proof--Admission.

Baboos Chunder Madhub Ghose and Sib Chunder Chatterjee for the appellant.

Baboos Hem Chunder Banerjee and Anundo Gopal Palit for the respondents.

The judgment of the Court was delivered by

Jackson, J.--This was a suit for arrears of rent. The plaintiff, alleging himself to be the proprietor of an 8-anna share of Mauza Gedwah, sued one of the ryots in the village for rent. A third party intervened and alleged that he had been in possession and enjoyment of the rents of 4 annas out of the 8 annas which the plaintiff had claimed. The ryot supported the intervenor. The Judge on appeal has found that the plaintiff has not proved his possession and enjoyment of the rents of the 4 annas, and he goes on also to state that he is of opinion that the intervenor has not proved his possession and enjoyment of that 4 annas of the rent.

On these two findings the Judge has dismissed the plaintiff's suit.

On behalf of the special appellant it is said that the question that the Judge had to try was as to the actual receipt and enjoyment of the rents by the intervenor, and that the Judge having found that the intervenor was not in receipt and enjoyment of the rents, the Judge should then, in accordance with s. 77 of Act X of 1859, have decided the suit according to the result of such inquiry. It is said that by the words of that section the Judge was bound under his finding to give a decree in favor of the plaintiff. The words of the law, we think, support this contention of the special appellant, and that, as between the claim of the plaintiff and that of the intervenor, the Judge having found against the intervenor, was bound to decree for the plaintiff.

We therefore reverse the decision of the Judge and decree this appeal with costs.

As between the ryot and the plaintiff, we observe that there is also a point in dispute as to rates of rent. The document under which the plaintiff claims a higher rate than the defendant admits, namely, a sharhnama, had been held not to have been proved. The decree in favor of the plaintiff will therefore be only to the extent and at the rate admitted by the ryot.

* Special Appeal No. 3413 of 1867, from a decree of the Officiating Judge of Zilla Tirhoot, dated the 19th August 1867, affirming a decree of the Assistant Collector of that district, dated the 28th December 1866.

Kishen Mohun Mookerjee (Plaintiff) V. Rajoo Dey and Others (Defendants).*

The 1st March 1873.

Variance between Pleading and Proof--Suit for Rent--Failure to prove Kabuliat.

This was a suit to recover Rs. 185-7-3, being the value, in money, of arrears of rent for the years 1275 to 1277 B.S. (1868 to 1870), which the plaintiff alleged to be payable in produce at the rate of 17 maps of paddy per year under a kabuliat executed by the defendants' father. The defendants denied that rent was payable in produce. They stated that the kabuliat had been set aside some years before the present suit, and a subsequent arrangement made between the parties, by which the annual rent payable by them was fixed at Rs. 29-11-5, and that the plaintiff had sued them on a previous occasion for rent in money, and not in grain, and had obtained a decree at that rate; and further that they had paid a portion of their arrears to the plaintiff's landlord. The Munsif disbelieved this last statement, and, finding against the defendants on the other facts, gave the plaintiff a decree. The defendants appealed to the Judge against the Munsif's decree, but not against the finding as to the alleged payment to the plaintiff's landlord. The Judge reversed the Munsif's decision, holding that the facts alleged by the defendants were fully made out, but he said nothing as to the alleged payment of a portion of the arrears by the defendants. The Judge accordingly dismissed the plaintiff's suit observing, "the plaintiff having brought a false claim, is not entitled to any decree."

The plaintiff then preferred a special appeal to the High Court.

Baboo Nil Madhub Sen for the appellant.

Baboo Kali Kishen Sen for the respondents.

The judgment of the Court was delivered by

Mitter, J.--In this case we are not in a position to interfere with the finding of the lower Appellate Court that the rent of the defendants' tenure was payable in cash, and not in kind, as alleged by the plaintiff. But accepting that finding as far as it goes, we see no reason whatever why the plaintiff should not obtain a decree at the rate fixed by the former decree as the proper rate of rent demandable from the defendants. The learned Judge says in his judgment that the plaintiff is not entitled to obtain a decree at that rate, because he, the plaintiff, has brought this suit upon a false ground. But whatever responsibility the plaintiff's might have incurred by instituting an action upon a false ground, we do not see any reason why he should lose his civil rights, particularly when it is clear that any future suit brought by him for the arrears of the period involved in this suit would be certainly liable to be dismissed under the provisions of s. 2, Act VIII of 1859.

The defendants, in their written statement, pleaded that they had paid a portion of the rent due from them to the plaintiff's landlord. The Munsif, who tried the case in the first instance, came to the conclusion that this allegation was not proved, and he further held that the alleged payment by the defendants to the plaintiff's landlord without the plaintiff's permission or authority was not binding against the plaintiff. The defendants did not appeal to the Judge against either of these findings, and it is therefore clear that the plaintiff is entitled to obtain a decree for arrears of rent at the full rate of Rs. 29-11-5 per

annum, the defendants" plea of payment having fallen to the ground. A decree will therefore be entered for the plaintiff for the sum of Rs. 89-10-3, that being the amount due for the three years for which this suit was brought.

We think that, under the circumstances of this case, each party ought to bear his own costs both in this Court and in the Courts below.

* Special Appeal No. 868 of 1872, from a decree of the Judge of Zilla West Burdwan, dated the 16th August 1872, reversing a decision of the Munsif of Bissenpore, dated the 31st January 1872.

Rookhini Kant Roy and Another (Plaintiffs) V. Sharikatussisa Bibee and Another (Defendants).*

The 15th May 1873.

Variance between Pleading and Proof--Suit for Rent--Failure to prove Kabuliati--Admission.

Baboo Kasi Kant Sen for the appellant.

Baboo Rash Behari Ghose for the respondents.

The judgment of the Court was delivered by

Couch, C.J.--This suit was brought to recover arrears of rent from 1274 to 1276 (1867 to 1869); the plaintiffs claiming a balance of Rs. 222-7 for principal and Rs. 70-9 for interest, making a total of Rs. 293.

The judgment of the Subordinate Judge, which is appealed from, is not altogether clear, and it might at first sight appear that he had held that, because a part of the land had been washed away, and it could not be shown what the quantity was, the plaintiffs were entitled to receive the rent which was admitted by the defendants; but his decision was really founded upon the plaintiffs having failed to prove the kabuliati which fixed the amount of rent, and he has stated that there was no evidence on the part of the plaintiffs which would show that they were entitled to the amount at the rate they had estimated it at. Under those circumstances the Judge was right in taking the amount which was admitted by the defendants to be due as rent.

I must say I do not concur in those cases, if, as is said, there are any such, which have decided that, where a man sues for arrears of rent as due under a kabuliati, and the defendant denies the kabuliati, but admits that a certain amount of rent is due to the plaintiff, if the plaintiff fails to satisfy the Court that the kabuliati is a genuine one, the suit is to be dismissed altogether, and that the plaintiff is to be obliged to bring a fresh suit to recover the balance of the rent admitted to be due. I think it would be unreasonable to

hold that, because he has been guilty of setting up a forged kabuliat, he should be obliged to bring a fresh suit to recover an admitted balance of rent. I think in this case the plaintiffs are entitled to recover the balance which was admitted.

Then what sum was admitted to be due? The defendants' admission was that Rs. 123-8 remained due from them to the plaintiffs, but in making that the balance, they took credit for Rs. 100 which they said they had paid. It is found that they had not paid the Rs. 100, and therefore, if their admission be taken with this, they are really shown to be indebted to the plaintiffs for rent in the sum of Rs. 223-8. That is the sum for which a decree ought to have been given by the lower Appellate Court. The decree must be altered accordingly. Each party must pay their own costs of this appeal.

* Special Appeal No. 945 of 1872, against a decree of the Subordinate Judge of Zilla Backergunge, dated the 12th February 1872, modifying a decree of the Munsiff of Burrisal, dated the 31st July 1871.

Bonomalee Churn Mytee (Plaintiff) v. Sheikh Hafizuddeen (Defendant).*

The 18th August 1869.

Admission--Variance between Pleading and Proof--Remand--Act VIII of 1859, s. 162--Neglect to obey Summons.

Baboos Hem Chunder Banerjee and Bhoyrub Chunder Banerjee for the appellant.

Baboo Beepin Behary Dutt for the respondents.

The judgment of the Court was delivered by

Markby, J. (Kemp, J., concurring).--It will perhaps be most convenient in this case to dispose of the fifth ground of appeal first; the plaintiff sues to recover rent for several years for 13 bigas and 4 katas at Rs. 29-11-15 a year; he says that the defendant holds under an instrument, which he calls a jamabandi, which he says was signed by all the ryots on the estate when he came into possession; he therefore sues, in fact, upon that jamabandi as his cause of action.

The defendant denies the jamabandi, or at any rate he denies that he was a party to it; he admits that he holds some land of the plaintiff, but he says that it only amounts to 3 bigas and a fraction, with an annual rent of RS. 4-13, and that the only balance due by him to the plaintiff is Rs. 5-15. The fifth ground taken before us is that, even supposing the lower Appellate Court was right in finding that the jamabandi was not established, the plaintiff was entitled not only to a decree for Rs. 5-15, the balance admitted to be due by the defendant, but that he was entitled to a decree for all the years which he claimed at the full admitted rent of Rs. 4-13 per annum, subject only to such deductions as the defendant was able to establish. Now I think it is quite clear that this contention is

erroneous; had the defendant admitted the jamabandi and pleaded payment, it of course would have been incumbent upon him to prove those payments, but here the plaintiff has altogether failed to prove his cause of action as alleged by him in his plaint, and the only thing left him is the relation of landlord and tenant which is admitted to exist between him and the defendant. Now I am by no means sure that the first Court, under such circumstances, would not have been justified in dismissing the suit altogether, but I am quite clear that the utmost to which the lower Courts could go would be to give the plaintiff a decree for the sum which was admitted to be due by the defendant. That sum was due on a different cause of action than that set forth in the plaint; the cause of action set up by the plaintiff arose upon a special agreement to pay rent at a certain rate, while this was due on a totally different agreement, the nature of which is not disclosed, or simply for use and occupation. Therefore, as the plaintiff relies entirely upon the admission of the defendant both as to the amount due and for proof of his cause of action, he must accept this admission as a whole, and can only have a decree upon it for the balance admitted to be due.

Then upon the other points in the case it seems that when this suit was before the first Court (and I take this from the finding of the lower Appellate Court when it made the order of remand), that a request was made by the defendant that his landlord should be summoned and examined upon the question of the making of the jamabandi, and the first Court did not then pass any order upon that application. When the case came before the lower Appellate Court upon the appeal of the defendant, and this omission on the part of the first Court was brought to its notice, the Judge directed the first Court to entertain that application and consider whether or no it ought to be granted, and if it ought to be granted, then to summon the plaintiff into Court and record his evidence. The first Court failed in its attempt to cause the attendance of the plaintiff, but apparently thought that it was an application which ought to be granted, for it issued a summons to bring the plaintiff into Court. The Deputy Collector then informed the lower Appellate Court of the issue of the summons and the failure to serve it.

Now the first complaint made before us in special appeal is that that was wrong in point of procedure. It has been argued before as not precisely upon the first ground taken in special appeal, but upon one which in substance comes within it, namely, that the Judge ought himself to have disposed of the application, to examine the plaintiff, and himself to have summoned the plaintiff, if he thought it was a case in which that application ought to be granted. Now there is not possibly in the CPC any exact provision applicable to this case; for I do not think it was a case in which the lower Appellate Court intended to act under the provisions of s. 351, or of s. 354, which relate to remands, or under s. 355, which relates to the taking of fresh evidence; but I take it that the view which the lower Appellate Court took of this matter was this, that the application brought to its notice being one entirely undisposed of by the first Court, the lower Appellate Court thought, and in my opinion properly thought, that the best course to take was to refer that point back to the first Court for disposal, for there are many cases, and this may well have been one of

them, in which the first Court is in the best position to decide whether or no it is actually necessary to summon the plaintiff. I see nothing irregular in taking this course, although there is nothing which provides specially for it in the Code of Civil Procedure. It seems to me that an Appellate Court, when it finds an application of this nature wholly undisposed of by the Court of first instance, may, if it thinks it desirable to do so, send back the case and order the first Court to dispose of that application instead of disposing of it itself. It seems to me, therefore, that the proceeding of the Judge was perfectly regular so far as concerns his sending back this application to be disposed of by the first Court. As to the other part of this ground of special appeal, it has not been relied on before us, and in fact it has been admitted that it was competent for the Judge, when once it was decided that the plaintiff ought to be examined, either to direct the first Court to examine him, or to summon and examine him himself under the provisions of s. 356.

The next ground taken is the fourth, namely, that there was no proper application made to the first Court under s. 162. The application made was probably one which we find inserted with some incongruity together with some objections taken to the report made by an Ameen; but I do not think that s. 162 requires that any special formalities shall be observed in making the application; it simply directs that an application shall be made, and points out the proper manner of disposing of that application. The lower Appellate Court has found on this point that there was a request, and that that request has not been disposed of, and I think we ought to act upon that finding. If the application had been objected to as informal, the Court might have accepted a fresh one: and at all events it is now too late to make any objections to its informality.

The next ground argued was that no legal summons was served upon the plaintiff, and that, therefore, no inference ought to have been drawn against him from his non-appearance by the lower Appellate Court. The lower Appellate Court says, "that after the failure on the part of the first Court to serve the summons personally on the plaintiff", and as the summons had actually not been served, the case could not be decided against the plaintiff under the provisions of s. 170 of Act VIII of 1859: although the fact of his absenting himself when he was summoned must, to some extent, add strength to the defendant's case; for considering the processes that have been issued, it must be presumed that the talookdar was aware of the issue of the summons." I do not think there can be any doubt as to what the Judge meant to say, though there is a very slight discrepancy in the language. I think it is quite clear that he means to say that as a legal summons has not been served upon the plaintiff, he cannot take advantage of the provisions of s. 170, and, on the ground of that party's non-attendance alone, dismiss the suit against him; but he says, nevertheless, I am satisfied that he must have known that his attendance in Court was desired, and I am perfectly justified to take the circumstance of his neglect to attend into consideration when deciding the case upon the facts. I think that the lower Appellate Court was perfectly justified in taking that course and drawing the inferences which it has drawn; for although the law provides most necessary and proper precautions to protect parties from being summoned wantonly and for purely vexatious

purposes, the Courts have full discretion in a matter of this kind to decide whether or no the parties are making use of that protection which the law affords them for the purpose of evading the giving of evidence which might be fatal to their case; in the latter view any Court is perfectly justified in using the absence of the party most strongly against him. As therefore all the grounds taken in special appeal fail, the appeal ought to be dismissed with costs.

* Special Appeal No. 1251 of 1869, against a decree of the Judge of Zilla Midanpore dated the 17th March 1869, reversing a decree of the Deputy Collector of that District, dated the 5th September 1868.