Abraham v Abraham [1863] 9 Moore Indian Appeals 199, 19 ER 716
Report Date: 1863

[9-Moore Indian Appeals-199] CHARLOTTE ABRAHAM and DANIEL VINCENT ABRAHAM, Appellants; FRANCIS ABRAHAM. Respondent * [Feb. 17, 18, 19, and 20, 1863].

On appeal from the Sudder, Dewanny Adawlut at Madras.

The status of Native Christians, known as " East Indians," and the law of inheritance and succession, as administered in the Mofussil Court in respect to their rights and property, considered. Mad. Reg. II. of 1802, sec. XVII. provides, that in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the Judges are to act according to justice, equity and good conscience; and Mad. Reg. III. of 1802, sec. XVI. cl. 1, prescribes the in suits before the Native Courts regarding succession, inheritance, caste, etc, the Hindoo law with respect to Hindoos, and the Mahomedan law with regard to Mahomedans are to be considered the general rules by which the Judges are to form their decision. Held, that the latter Regulation applied to Hindoos and Mahomedans, not by birth only but by religion [9 Moo. Ind. App. 243].

Held, also, in a case of succession to the estate of a deceased of pure Hindoo blood, who had married a European wife, professing, with his family, the Christian religion, and whose ancestors for generations had embraced Christianity, that such case was within the provisions of Mad. Reg. 11. of 1802, sec. XVIL, and was to be decided by reference to the usages of the class to which the deceased attached himself and the family to which he belonged.

Upon the conversion of a Hindoo to Christianity, the Hindoo law ceases to have any continuing obligatory force upon the convert [9 Moo. Ind. A p. 241, 242].

The convert may renounce the old law by which he was bound, as be renounced his old religion, or if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion. For though the profession of Christianity releases the convert from the trammels of the Hindoo law, yet it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interest in, and his power over, property. The convert, though not bound as to such matters, either by the Hindoo law, or by any other positive law, may by his course of conduct after his conversion, have shown by what law be intended his rights to be governed. He may do so either by attaching himself to a class which in this respect has adopted and acted upon soiree

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particular law, or by having himself observed some particular law, family usage, or custom [9 Moo. Ind. App. 243, 244].

The lex loci Act, No. XXI. of 1850, held not to apply where the parties have ceased to be Hindoos in religion.

The status of a member of an undivided Hindoo family who became a convert to Christianity, in reference to parcenership, considered. Such circumstance held to amount by the Hindoo law, to a severance of parceners hip.

Whenever an opinion of the Pundits is required by the Court, and there are many special circumstances which may bear upon the question to be submitted for their opinion, these special circumstances ought to be set forth by the Court in the case submitted to the Pundits.

The principal question involved in this appeal was as to the law which governed the succession to the property of the late Matthew Abraham, a Protestant native of India, resident in the Madras Presidency, and who died intestate in the year 1842. The ancestors of Matthew Abraham for several generations [9-Moore Indian Appeals-200] had been Christians; and Matthew Abraham, who had been baptised in infancy in the Roman Catholic faith, but afterwards became a convert to the Protestant religion, married a European wife in the year 1820, and with her and the children of the marriage conformed in all respects to the language, dress, manners, and habits of English persons up to the time of his death. The Sudder Court at Madras: held that the property should be distributed in accordance with the Hindoo law.

The circumstances of the case, were as follows:-

In the year 1812, Matthew Abraham, then a youth, [9-Moore Indian Appeals-201] was residing at Bellary with his father; and was at that time receiving religious instruction from a Protestant missionary, having become a convert from the Roman Catholic to the Protestant religion. The Respondent, another son of Matthew Abraham's father was born in the year 1813. About the year 1815, Matthew Abraham was appointed to a situation in the Arsenal at Bellary, upon a salary of Rs. 52-1 a month. His father died some time prior to the year 1820:, without leaving any property. In the last-mentioned year, Matthew Abraham married the Appellant, Charlotte Abraham, whose father was an Englishman and her mother a Portuguese. In the year 1823, he opened a shop on his own account at Bellary;-and in the year 1827, the Respondent, Francis Abraham, who was then of the age of fourteen,

was placed by Matthew Abraham as a writer and attendant in his shop, and on the 2nd of April, 1832, he and a Mr. Richardson were admitted as partners in the shop under a deed of partnership, whereby the then partners were to be entitled equally to the profits. No capital was contributed by the Respondent upon his admission to the partnership. Mr. Richardson retired from the partnership in or about the year 1836, but upon his retirement no new arrangement was made between Matthew Abraham and the Respondent, as to their shares in the shop. Matthew Abraham, besides being a shopkeeper, held a contract from Government for the supply of spirituous liquors to the troops in cantonment at Bellary, called " The Abkarry contract "; and in order to enable him properly to carry out that contract, he erected a large distillery in or near Bellary. The contract was first taken by Matthew Abraham in [9-Moore Indian Appeals-202] the year 1827, and the contract was taken by him from year to year, with the exception of the official year 1829-30, until his death in the year 1842, at which time the contract was still subsisting. The distillery business so carried on by Matthew Abraham was separate from the shop, and was carried on by him alone on his own account, and, as it appeared and was insisted by the Appellants, without any partner; but for some time previously to and at the time of the death of Matthew Abraham, the Respondent was employed as a clerk or manager in the distillery business, and during the frequent periods of absence of Matthew Abraham from Bellary, transacted the chief part of that business. On the 10th of July, 1842, Matthew Abraham died intestate, leaving his widow, the Appellant, Charlotte Abraham, and two sons, Charles Henry Abraham, who is since deceased, and the Appellant, Daniel Vincent Abraham, him surviving. At the time of the death of Matthew Abraham, the other son, Charles Henry Abraham, was of the age of twenty years, and was in England for purpose of his education, and the Appellant, Daniel Vincent Abraham, was of the age of nineteen years, and was residing with his mother at Bellary. The pro-

perty of Matthew Abraham consisted of the benefit of the Abkarry contract, which was still subsisting, and the sum held in deposit for the due fulfilment thereof; and of the distillery business; of the capital employed in the shop at Bellary, and his share of the profits thereof; of a business and property at Kurnoul; of certain houses and property at Bellary; of a policy of assurance on his life for Rs. 6400 in the Madras Equitable Assurance Society; and of ready money and outstanding debts, and money due to him on securities.

[9-Moore Indian Appeals-203] At the request of the Respondent, the Appellant, Charlotte Abraham, executed a power of attorney, appointing him her attorney to collect all the money, debts, goods, and effects due, owing, payable, or belonging to her as the widow of Matthew Abraham, and for all purposes therein mentioned; and she afterwards herself procured letters of administration of the effects of Matthew Abraham, which were granted to her by the Supreme Court at Madras, whereby she became the sole legal personal representative of Matthew Abraham in the Madras Presidency.

The Respondent, under the authority of the above power of attorney, took possession of the books, papers, money, and securities for money of Matthew Abraham, and collected and received the debts, money, stock, and all other property belonging and due to his estate. The Abkarry contract which was held by Matthew Abraham, and was subsisting at the time of his death, as before stated, expired in the month of April, 1843.

Immediately upon the death of Matthew Abraham, the Respondent obtained permission from the Commissary-General to carry on the business of the Abkarry contract, and accordingly he entered into written engagement, dated the 22nd of July, 1842, to discharge the obligation of the Abkarry contract bond executed by his brother, Matthew Abraham, in the year 1842. Upon the expiration of the contract in 1843, the Respondent obtained a renewal of the contract in his own name, and obtained further renewals thereof from year to year, up to the date of the suit hereinafter mentioned. The deposit which had been made by Matthew Abraham for the due fulfilment of his contract, and which remained lodged at the time of [9-Moore Indian Appeals-204] his death, continued as the deposit upon the renewals of the contract to the Respondent up to the year 1848, when he withdrew that deposit and lodged a Bengal promissory note for Co.'s Rs. 5000. The distillery business for the purpose of the Abkarry contract had, ever since the death of Matthew Abraham, been carried on upon the premises built by Matthew Abraham.

The Respondent, after the death of Matthew Abraham, continued to carry on the business of the shop in which he had been a partner with Matthew Abraham, employing the capital which was invested therein at the time of the death of Matthew Abraham. The Appellant, Daniel Vincent Abraham, was admitted for some time in the position of a partner, and drew some small share of the profits, but the Respondent, in the year 1851, kept the Appellant, Daniel Vincent Abraham, from the shop, and prevented him from receiving any share of the profits thereof; and since that year the Respondent had carried on the business of the shop alone, and possessed himself of all the profits arising therefrom.

From the correspondence between the Respondent and Charles Henry Abraham, and between the Respondent and the Appellant Charlotte Abraham, which formed part of the evidence in the case, it appeared, that the Respondent had assured the Appellant, Charlotte Abraham, and Charles Henry Abraham, that his sole wish and object was to labour for his deceased brother's family, and to further their interest to the utmost of his ability; and though the accounts of the distillery, and of the shop, and generally of Matthew Abraham's estate, were constantly demanded from the Respondent by the Appellant, [9-Moore Indian Appeals-205] Charlotte Abraham, the Respondent succeeded from time to time in evading her demands, and quieted the minds of the Appellants by supplying them with money as they required it, and by remitting to England the sums required by Charles Henry Abraham.

At length, in the year 1852, the Respondent denied that he had any accounts to furnish, and asserted that he was not liable to furnish any to the Appellant, Charlotte Abraham, or to her sons. He also persisted in refusing to allow the Appellant, Daniel Vincent Abraham, to have any share in the management of the distillery business and Abkarry contract, and claimed that he alone was absolutely entitled to that business and contract; and upon the return of Charles Henry Abraham from

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England to Madras, in June, 1853, the Respondent refused, to continue to make any further remittances to him.

In consequence, the Appellants, Charlotte Abraham and Daniel Vincent Abraham, together with Charles Henry Abraham, since deceased, in May, 1854, filed a plaint in the Civil Court of Bellary, against the Respondent, whereby, after stating the facts hereinbefore set forth, and that the property to which they were, entitled exceeded the sum of Rs. 3,00,000, they prayed that an account might be taken of what at the time of the death of Matthew Abraham was due to him in respect of the capital of the shop, and of the profits thereof, and that the Respondent might be decreed to pay what should be so found due; and that it might be ascertained what part of the est ate of Matthew Abraham had since his death been employed in the shop, and that an account might be taken of [9-Moore Indian Appeals-206] the profits thereof since his death; and that the Respondent might be decreed to pay the amount so ascertained and appearing by the account. That an account might be taken of all the capital employed in the distillery business, and of the profits thereof down to the death of Matthew Abraham, received by the Respondent, or to his use, and also of the profits of the distillery since the death of Matthew Abraham; and that the Respondent might be decreed to pay the amounts found due upon the last-mentioned account. That an account might be taken of the estate of Matthew Abraham, generally received by the Respondent, or to his use, and that the Respondent might be decreed to deliver up, or account for the same; and that the Plaintiffs might be put into possession of the distillery business, and the premises, and the benefit of the Abkarry contract; and that the Respondent might be decreed to deliver up to them all deeds, books, and writings, relating to the same respectively, the Plaintiffs offering to make a just allowance to the Respondent for his services in managing the distillery and generally.

The Respondent by his answer, admitted the general statements as to the family contained in the plaint, and for defence, in substance, insisted, that the Appellant, Charlotte Abraham, was only entitled to maintenance, and could not claim as co-plaintiff jointly with her sons. That the property claimed had not been specified in the plaint as required by sec. 3, Mad. Reg. III. of 1802. That Matthew Abraham and the Respondent were the children of natives of Hindoo origin, and members of an undivided family. That upon the death of their father, Matthew Abraham took possession of [9-Moore Indian Appeals-207] his property. That in 1823, Matthew Abraham and the Respondent jointly started the shop in Bellary, and that the business of the shop was from time to time carried on by moneys jointly borrowed by them, for which joint bonds were executed. That as Matthew Abraham and the Respondent were undivided Hindoo brothers, labouring for their joint interest, they had each an equal right to all the capital. That the deposit for the Abkarry contract was chiefly made up from sums received from the petty Arrack vendors, and, so far as the deposit was supplied by Matthew Abraham, the same was made out of family property, and that the distillery buildings were built, or enlarged, out of joint funds. That the Respondent was not employed either as clerk or manager of the distillery, but that though the distillery was a wholly separate concern from the shop; he possessed equal rights therein with Matthew Abraham, and his joint interest had been invariably recognized and admitted by Matthew Abraham. That the Abkarry contract for the official year 1836-37, was entered into in the joint names of the Respondent and Matthew Abraham. That the property which existed at Matthew Abraham's death, was the undivided property of the family. That the realization and management of the estate of Matthew Abraham was not entrusted to the Respondent by the Appellant, Charlotte Abraham, but that he assumed the same, and was entitled so to do, as being the bead of the family. That the letters of administration granted to the Appellant, Charlotte Abraham, were solely for the purpose of procuring payment of the money due upon a policy of assurance, and could not alter the law governing the case, which, he insisted, was the Hindoo law. That the Respondent did not [9-Moore Indian Appeals-208]

obtain successive renewals of the Abkarry contract held by Matthew Abraham, but that he purchased anew the Abkarry contract at public auction in 1843. That the Plaintiffs having no resources of their own had been supported by the Respondent from motives of charity. That no demands for accounts were made by the Appellant, Charlotte Abraham, of the Respondent as her agent. That the Respondent was solely entitled to the Abkarry contract, and that the Plaintiffs had no connection with or right to

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any share from the profits of the contract. That a large portion of the property existing at the time of Matthew Abraham's death was in the possession, of Plaintiffs; and finally submitted that, instead of the Plaintiffs being entitled to property exceeding Rs. 3,00,000, they were not entitled to anything from the Respondent.

The Plaintiffs in reply insisted, that the Plaintiffs were correctly joined together in the suit. That it was only in the power of the Respondent to set forth a description and particulars of the property claimed. That the Hindoo law could not apply to parties situated as the Plaintiffs and the Respondent were, and that the course of conduct pursued by the Respondent was inconsistent with the applicability of that law. That even if the case was to be governed by Hindoo law, Matthew Abraham inherited no property from his father, and the position in which the Respondent stood towards Matthew Abraham was such as to show that their interests were separate and distinct. That the Respondent did not become the head of the family on the death of Matthew' Abraham, but that the Respondent had actually acknowledged in writing that the Appellant, Charlotte Abraham, was the head of the family. That the Respondent, since the death of [9-Moore Indian Appeals-209] Matthew Abraham, acted as the agent of the Plaintiffs, and that the Abkarry contract in 1843 was taken by the Respondent after communication and with the consent and permission of the Appellant, Charlotte Abraham. That the Plaintiffs were not Hindoos or subject to Hindoo law, and they denied that they were regarded as Hindoos by law, That the Respondent had been in the habit of honouring drafts drawn by the Appellant, Charlotte Abraham, upon him as manager of the distillery, and had advanced moneys from the distillery to other persons at her request and against his own inclination, and that such conduct was inconsistent with the assertion that the Plaintiffs had been supported by him out of charity. That the Plaintiffs never opposed the Respondent with respect to the Abkarry contract, because for several years after Matthew Abraham's death they believed that the Respondent was acting and considered himself as acting as their agent in obtaining the contract, and that the Plaintiff, Charles Henry Abraham, was in total ignorance of the actual position of affairs until September, 1852, and he took proceedings in the suit immediately upon his return to India in June, 1853. That the Plaintiffs were not in possession of the property of Matthew Abraham, with the exception of a dwelling house, bungalow, furniture, plate, etc', and that their possession of any of the property was inconsistent with the Respondent's claim to be the sole head and representative of the family.

The rejoinder of the Respondent admitted that parties in his position had no status which fell under any particular law, and adduced several reasons with a view to show that the law which should govern the case was the Hindoo and not the English law.

[9-Moore Indian Appeals-210] On the 12th of March, 1855, the cause came on before Mr. Story, the then Civil Judge of Bellary, and he proceeded to adjudicate upon the two preliminary objections taken to the plaint by the Respondent in his answer; namely, that the Appellant, Charlotte Abraham, had been improperly made a co-Plaintiff, and that the property claimed had not been specified in the plaint in accordance with Mad. Reg. 111. of 1802; and upon both of theme objections the Civil Judge was in favour of the Respondent, and made a decree non-suiting the) Plaintiffs, with costs.

From this decree the Plaintiffs appealed to the Sudder Adawlut, and that Court, by an Order, dated the 20th of August, 1855, after stating, that the Civil Judge might have required the Plaintiffs to amend their plaint by stating the particulars of the property, directed the Civil Judge to proceed to dispose of the suit on its merits. The Sudder Court appended to the above order the following instructions to the Civil Judge:-" The Court have to notice that the Civil Judge has pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties are to be bound, without receiving any evidence whereby to govern, his judgment on the subject. Such a question can only be rightly pronounced upon, on consideration of the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindoo stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community. It will be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine [9-Moore Indian Appeals-211] whether it was the self-acquired estate of the

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deceased Matthew Abraham, or of ancestral origin, after which the rights of the parties thereto whether under English or Hindoo law, should be declared."

The suit accordingly came again before the Civil Court, and by an Order of that Court dated the 30th of November, 1855, the Plaintiffs were required to amend their plaint by stating the particulars of the property. This order the Plaintiffs were unable to comply with, as they were ignorant of the particulars, and the Civil Court dismissed the suit with costs by an Order dated the 11th of January, 1856.

Upon appeal to the Sudder Adawlut this Order was set aside, upon the ground that in a suit like the present, wherein the particulars of the property sued for were to be known only by information to be furnished by the Defendant, the proper course for the officiating Civil Judge to have taken would have been to seek this information at the Defendant's hands.

The suit was accordingly replaced on the file of the Civil Court, and the following points were recorded for proof by Mr. Irvine, the Civil Judge: General point. First, each party should prove the practice of families similarly situated to theirs, whether to adhere to the Hindoo law of inheritance, or to be governed by the law of England in that respect. Secondly, each party should also prove what has been the practice of their own family in this respect as shown by their acts.

The Plaintiffs to prove, first, that Defendant's father died insolvent, and that Matthew Abraham took charge of the Defendant then, a child, as stated in the [9-Moore Indian Appeals-212] plaint. Second, that a considerable sum of money was expended by Matthew Abraham on the Abkarry buildings. Third, the nature and extent of the property left by Matthew Abraham. Fourth, that the Defendant on Matthew Abraham's death was continued in the management of all his estate on the terms mentioned in the plaint, and that he took the renewal of the Abkarry contract for the remaining months of the year in which Matthew Abraham died and in subsequent years, as stated by them. Fifth, that the first Plaintiff lent money from the distillery funds against Defendant's inclination; and by a supplemental point, directed him to prove that Matthew Abraham kept regular accounts of the distillery business.

The Defendant to prove, first, that his father died possessed of property and that Matthew Abraham took possession of it. Second, that the shop was established as stated, and that he and Matthew Abraham raised capital for it by borrowing money jointly for it. Third, that the money deposited with the Government as security for the Abkarry rent was made up from the sums received from the petty renters, and that that money was used as stated in the answer. Fourth, that the first Plaintiff requested that the third Plaintiff should be admitted as a partner in the Abkarry contract. Fifth, that on Matthew Abraham's death the Defendant became the legal head of the family, and as such continued in possession of the estate. Sixth, that be obtained after Matthew Abraham's death the Abkarry contract for his own exclusive benefit, and that he was legally entitled so to do. Each party were to be at liberty to disprove the points given to the other.

Both parts entered into voluminous evidence, [9-Moore Indian Appeals-213] and a great many witnesses were examined on behalf both of the Plaintiff and the Defendant.

The documents adduced by the Plaintiffs consisted chiefly of correspondence between the Respondent and Matthew Abraham, generally during the life of Matthew Abraham; and the correspondence between the Respondent and others after the death of Matthew Abraham. From the correspondence during the life of Matthew Abraham, it appeared that he and the Respondent acted in all respects like English persons, being wholly inconsistent with the allegations of the Respondent, that there was a general unity of interest between him: and Matthew Abraham, and that they were undivided Hindoo, brothers. The correspondence after the death of Matthew Abraham included a long letter addressed by the Respondent to the late Charles Henry Abraham, dated the 19th of August, 1842, shortly after the death of Matthew Abraham, lamenting the great loss he had sustained, and the consequent alteration in his situation, and in which he set forth a statement of the affairs and general assets of the deceased, without making any claim, or allusion to a claim, on his own behalf to any interest therein, except as the general manager of the property, and soliciting the aid and interest of Charles Henry Abraham to procure from his mother (the Appellant) a continuance of his agency or some provision for his future sup-

port; the remainder regarded the power of attorney and letters of administration before stated, and the accounts between the Plaintiff and Respondent.

In addition to the correspondence, documentary evidence was adduced by the Plaintiff s, showing the admission of the Respondent as a partner with [9-Moore Indian Appeals-214] Matthew Abraham in the shop, on the 2nd of April, 1832, with entries from the distillery cash book, showing drafts from the distillery funds according to the orders of the first Plaintiff, both before and after the death of Matthew Abraham. They put in evidence, also, translation of a bond executed by two persons

to Matthew Abraham, therein described as " Contractor of the entire Talook of Bellary," and an abstract of the distillery accounts, rendered to the first Plaintiff by the Respondent, together with the letters of administration before mentioned, and a receipt by the Appellant, the widow, as " Administratrix to the estate of the late Mr. M. Abraham," and by the Respondent, as her attorney, in respect of debts due to Matthew Abraham's estate. The Plaintiffs filed also a return of particulars respecting the Abkarry contract, showing the continuance of the same deposit after Matthew Abraham's death, all other matters as to the renewals by the Respondent; accounts of the distillery brought in by Respondent upon being called upon to do so-such Accounts showing the payments made to the Appellant, the widow, up to the institution of the suit. Two witnesses, Englishmen, and two native Christians who had been well acquainted with Matthew Abraham's father, and with Matthew Abraham when a youth, were examined by the Plaintiffs, who proved that Matthew Abraham's father was in a state of poverty up to the time of his death, and that Matthew Abraham had been appointed to a post in the Arsenal at Bellary, independently of any exertions of his father on his behalf, and had not come into possession of any property upon his father's death. Many other witnesses, who had been intimately acquainted with Matthew Abraham and the Respondent, [9-Moore Indian Appeals-215] proved that the Respondent was a dependent upon Matthew Abraham; that he had never been treated by him or other members of the family as if be were in the position of an undivided brother, and ultimately to become the head of the family; that his partnership with Matthew Abraham was limited to the shop; that Matthew Abraham and the Respondent never adhered to a single Hindoo custom or usage; that the usage and habits of Matthew Abraham and his family, and of the Respondent, were entirely opposed to Hindoo law or customs; and that there was no difference whatsoever between their mode of life and that of any English, or East Indian family, but that, on the contrary, they were always looked upon as members, and even leading members, of the East Indian community, and that they were associated with Englishmen and East Indians in all matters of religious, public, social, and private interest. It was further shown by the evidence of other witnesses, well acquainted with the religion and customs of the different classes, that the only class of persons whose stand position presented a clear analogy to that of Matthew Abraham, were the East Indians, who, strictly so called, were the descendants of a European and a native, or half-caste, and who, when adhering to English habits and customs, were governed by English law, and that that class had not hesitated to admit and recognize both Matthew Abraham and the Respondent as members thereof. It was also proved that, after the death of Matthew Abraham up to Christmas, 1853, the Arrack vendors came to the house of the first Appellant, Charlotte Abraham, every Christmas to pay their respects or do homage to her as the representative of Matthew Abraham, and as such at the [9-Moore Indian Appeals-216] head of the distillery, and that the Respondent was present on many such occasions. Four persons, who had been connected with the distillery during the lifetime of Matthew Abraham, deposed to the fact of Matthew Abraham having been solely entitled to the distillery-; that accounts were regularly made up for and kept by him, and that the Respondent had no power at the distillery or over the persons employed therein, save such as was delegated to him as manager by Matthew Abraham.

The Respondent was called as a witness for the Plaintiffs, and examined at great length. He stated, amongst other things, that he was admitted a partner in the shop in 1832, under a deed of partnership, which he could not produce; that he was never admitted by Matthew Abraham as partner in the distillery business by any deed, but he alleged that Matthew Abraham had acknowledged that he and the Respondent were joint proprietors of the distillery business; he admitted that he did not, upon Matthew Abraham's death, close accounts or pay over to the

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Plaintiffs Matthew Abraham's interest in the distillery; that he made no valuation for the transfer to him of the distillery business; that he continued to work the distillery business with the stock and funds that were invested in it at the time of Matthew Abraham's death; that he did not on Matthew Abraham's death give the Plaintiffs intimation that he would carry on the Abkarry contract business for his own exclusive benefit; that Matthew Abraham and the Respondent had not an equal interest in the distillery business as to shares; that Matthew Abraham was the sole contractor, and the Respondent contributed his labour; that he kept no regular account of the property [9-Moore Indian Appeals-217] which was in his possession at the death of Matthew Abraham; that he considered that, during the life of Matthew Abraham, he had a proprietary interest in all his property; that he laboured jointly with Matthew Abraham in the contracts for several years previous to his death, and did nearly all the business for several years, and, therefore, claimed a share in it; that the Appellant, the widow, had made several demands for accounts from the Respondent in different years; that be did not furnish any capital for the Abkarry business after Matthew Abraham's death; that he had removed the records of the distillery and had destroyed some since June, 1853; that he had destroyed all the records of the distillery up to May, 1854; and that he claimed the distillery as his own since Matthew Abraham's death, but did not produce

any account of the business from the period. The Appellant, Charlotte Abraham, and the Appellant, Daniel Vincent Abraham, were examined as witnesses, and their evidence was in the main corroborative of the facts and circumstances above stated.

The documentary evidence adduced by the Respondent consisted of correspondence and other documents. The correspondence during the life of Matthew Abraham was relied on by the Respondent as showing that there was a general unity of interest between him and Matthew Abraham, and that such general unity was recognized by the family. Some of the letters contained among other matters the following expressions in allusion to the Abkarry contract:-" We have nothing else to depend upon," and " We shall have the benefit of it;" and again " We asked for the renewal of it;" and " We have a legal right to it."

The correspondence after the death of Matthew [9-Moore Indian Appeals-218] Abraham, consisted of letters from the deceased, Charles Henry Abraham, respecting his father's death and other matters, and from the Appellant the widow to the Respondent, with respect to the funds to meet the expenses of her son in England being supplied out of his father's estate. The Respondents also put in evidence a decree of the Auxiliary Court at Guntoor in a suit for maintenance; the translation of four awards of arbitrators upon divisions of ancestral property; a translation of a power of attorney in Persian signed by the Respondent and the Plaintiff, Daniel Vincent Abraham, authorizing a Vakeel to act for them in certain suits, in which was contained a recital that the Respondent and the third Plaintiff" are the heirs " of Matthew Abraham. Daniel Vincent Abraham, however, in reply to this stated in his examination, that he was about nineteen years of age when the above document was signed, and that he had but slight, if any, knowledge of the Persian language, and did not make himself acquainted with the contents of the document, but having full confidence in the Respondent, signed it. various instruments dealing with the Abkarry and other property of the late Matthew Abraham, executed both before and after his death by the Respondent, together with the pleadings and decree in a suit instituted jointly by the late Daniel Vincent Abraham, the son, and the Respondent, respecting the a lairs of his father, Matthew Abraham, and testimonials, contract bonds, etc, in relation to the Abkarry contract, showing the Respondent as holder of the Abkarry contract since the death of Matthew Abraham, were also put in evidence.

The Respondent's witnesses were examined, chiefly [9-Moore Indian Appeals-219] with reference to the law by which native Christians were governed. Several of the witnesses who were East Indians, and considered themselves competent to give an opinion, gave it as their opinion that native Christians, were such Christians as were born in the country, and who have not changed their customs and habits, and that persons who like Matthew Abraham, did not in any way differ from Englishmen, save in native origin, were to be classed with East Indians, and ought, like that class, to be subject to English law. Mr. Ross, one of the Respondent's witnesses, who had been well acquainted with the family, confirmed the fact of Matthew Abraham and the Re-

spondent having been leading members of the East Indian community, and stated that none of the East Indians ever made any distinction between themselves and Matthew Abraham on account of his birth, and of the native dress he had once worn.

Mr. Irvine, the Civil Judge of Bellary, gave judgment in the suit on the 1st, of June, 1858, and, as to the law of inheritance in respect of native Christians, rejected all the evidence of East Indians, as not being similarly situated with the Abrahams; but he considered that the documentary evidence of awards and deeds of division between native Christians and the evidence, of the native Christians proved that the general state of native Christians was to remain divided, and that the undivided state was the exception. He held that the Respondent and his brother were not undivided in fact; that they were partners in the shop in equal shares; that the Respondent was the agent of his brother, and of the Plaintiffs after his death as to the Abkarry contract, and also agent under the administration and power of attorney; and he decreed accounts to [9-Moore Indian Appeals-220] be taken in a certain manner (see Order set out in the judgment, post [9 Moo. Ind. App.], 233) with an allowance, to the Respondent, and directing him to pay the costs.

From this decree the Respondent appealed to the Sudder Dewanny Adawlut at Madras.

When the appeal came before the Sudder Court, questions (see these questions stated in the judgment, post [9 Moo. Ind. App.], p. 235) were put to the Pundits of that Court, and answers to the following effect given: that property not ancestral, but acquired by all brothers jointly, by means of agriculture, trade, etc, was equally divisible among all of them; that the fact of the elder brother acquiring some property before the younger attained the age of discretion made no difference, especially where, during the latter years of the elder brother's life, the labour fell chiefly upon the younger; that under these circumstances the property should be divided into two shares, and one of them given to the sons of the elder brother and the other to the younger one; that the ignorance of the

brothers of their respective rights in law would not affect such rights; and that the absence of intention on the part of the elder brother did not affect the rights of the younger.

The Sudder Court (consisting of Messrs. H. Frere and LT Strange) made their decree in the cause on the 5th of November, 1859, reversing the judgment of the Civil Court. This decree, in its main features, was to the following effect: As to the law of inheritance, the Sudder Court considered that the Civil Judge, whilst deciding on the fact of division or undivision, had failed to pronounce any opinion upon the rule of law; the Court came to the conclusion that there was in India no lex loci, but that the rule of law must be according to the customs and usages of the class to [9-Moore Indian Appeals-221] which the parties belonged, and the usage in each particular family, to be ascertained by evidence. The Court founded its judgment on the report of the Indian law Commissioners, And the opinion of the Judges of the Supreme Court at Calcutta, that the English law was not in force in India, except so far as it was introduced by the Charters. The Court said that in seeking a law to apply to parties circumstanced as those in the suit, they were cast upon the rule laid down in section XVIL, Reg. II of 1802, that " in cases for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience." That the Sudder Court, in a case similar to the present in regard to East Indians, who had no Code of law of their own, pointed out, under date the 14th of July, 1828, that the rule of law must be according to the customs and usages of the class to which the parties belonged, which was to be ascertained by evidence; and that on the 25th January, 1836, and the 3rd September, 1844, they gave effect to the same instructions. The Court agreed with the Civil Judge in rejecting the evidence of East Indians, but considered that the change of dress and manners could not alter the law of inheritance, or any local law or usage. The Court considered, that the evidence as to the usages in law of Christian converts from Hindooism was universal; that the Hindoo law as to rights in property, was the rule observed by the class in question, from generation to generation. The Court held that the acts of the family were in accordance with Hindoo law, referring to the suits in regard to the Kurnoul debts by Respondent and his nephew, as, joint heirs of Matthew Abraham. In applying the Hindoo law, the Court adopted the opinion of the Pundits, con-

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sidering that the dealings of the brothers [9-Moore Indian Appeals-222] brought them within that law, and held that, according to it, the Respondent was entitled to an equal share in the estate. The Court came also, to the conclusion that the Respondent was not a salaried agent, or an agent at all, and that the evidence of the first Plaintiff and her relatives, the first two witnesses in this respect, was unworthy of credit, and that as the Plaintiffs were not justified in bringing the suit, the Court condemned them in all the costs that had been incurred.

The present appeal was from this decree.

The Solicitor-General (Sir R. Palmer) and Mr. W. H. Melvill, for the Appellants. This decree cannot be sustained. It is wrong in law in declaring that the rights of the parties in this appeal are to be governed by the rules and principles of the Hindoo law. It is of the utmost importance to ascertain the status of persons in the position of Matthew Abraham, and the law by which the succession to their property is to be governed. In India the status of religion as regards natives, is the status of law; the law is the religion both of Hindoos and Mahomedans. The Hindoo law, therefore, being a law of religion, cannot be applicable to persons who are not Hindoos, that are Christians, and as in this case, as well by descent, as profession, and whose ancestors for several generations have in every respect repudiated the tenets and principles of the Hindoo religion. Our contention is that the law applicable in this case must be the) law appertaining to that class of which the parties become members, or so much of it as is applicable to their peculiar Situation. The English law of descent and succession, therefore, in the case of native East Indians, professing the Christian religion, must be the governing law in regard to the rights and possession of their property. This is apparent [9-Moore Indian Appeals-223] as well from all sound and legal principles as from the laws enacted in India.

First, by Mad. Reg. 11. of 1802, sec. XV. it is provided, that the Court shall proceed to try suits under the same rules and regulations as were prescribed for the trial of suits between individuals; and by section XVII. of the same Regulation it is enacted, that " in cases coming within the jurisdiction of the Zillah Courts, for which no specific rule may exist, the Judges are to act according to justice, and equity, and good conscience." Section XVI. cl. 1, of Mad. Reg. III. of 1802, further provides that, in suits regarding succession, inheritance, marriage, and caste, etc, the Mahomedan laws with respect to Mahomedans, and the Hindoo law with regard to Hindoos, are to be considered as the general rules by which the Judges are to form their decisions. Mad. Reg. v of 1829, which was passed to modify the provisions of Reg. III. of 1802, as regarding the testamentary dispositions of Hindoos, recognizes the validity of Wills made by Hindoos, if made in conformity with the Hindoo law. Previous to the passing of the Act, No. XXI. of 1850, the lex loci" Act, in the case of apostasy, the change of religion on the part of a Hindoo, deprived him of his right of inheritance W. H. Macnaghten's " Hindu Law," vol. II. p. 131; but

by that Act it is declared, that notwithstanding a Hindoo becomes a Christian, his rights of inheritance to property as a Hindoo shall not be thereby affected. But the Act, No. XXI. of 1850, never had or can have any application to this case. The Abrahams never were Hindoos in religion; they never professed or acknowledged the religious tenets upon which alone the Hindoo law is founded and by which it is governed. They were, therefore, not as Hindoos [9-Moore Indian Appeals-224] within the pale of that law. The Sudder Court has held that there is no lex loci in India, and that the law to govern the case is to be sought in the usage of the class to which the deceased, Matthew Abraham, belonged. As to there being a lex loci or not in India, out of the jurisdiction of the Supreme Court Charters, the Report of the Indian Law Commissioners of October 31st, 1840, shows clearly, first, that the Commissioners considered that Hindoo law cannot apply to Christian converts; and, secondly, they thought that the English law must in such cases apply, but they seem to have given up that opinion in deference to the opinions of the Judges of the Supreme Court, who laid it down, that the English law was only introduced by Supreme Court Charters, and was coextensive only with their jurisdiction. The doctrine that there is no lex loci in India is capable of a reductio ad absurdum. Persons who have ceased to be Hindoos have a law, or they have not. If they have not, no Court of Justice can adjudicate. If they have a law, it must be either the lex loci, or the law of usage. But a law of usage implies a continuance, and must have had a beginning; therefore, if there is

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no class similar to themselves, there can be no law of usage; and if there be a class, that class must for some time have been without a law. The Sudder Court has dealt with the case as due to be determined by usage of persons similarly situated with the deceased Matthew Abraham. The persons similarly situated are Christian converts from Hindooism, and the Judges of the Sudder Court have by their decree held that such native Christians are to be governed, as to their property, by the usage of Hindoo law, and that from the evidence in this case such usage is not inconsistent with the practice of the family. Now, both [9-Moore Indian Appeals-225] Courts rejected the evidence of East Indians, persons of mixed European and native blood, whose evidence we insist was strictly pertinent and ought to have been admitted. The class called " East Indians " are generally illegitimate children of a native woman, the father being European. But in such a case the application of Hindoo law depends, upon the co-existence with the Hindoo status and that is the Hindoo religion, Myna Boyee v Ootarram, (8 Moore's Ind. App. Cases, 400). The real question here is what was the usage of this family? The evidence rejected shows that their usages were in every respect those of English East Indians. They conducted themselves as Englishmen in dress, habits, manners, and customs, and, moreover, field and conformed to the tenets of the Christian religion. Surely, this was evidence of their not being Hindoos; and if they were not Hindoos, then the Hindoo law of inheritance could not apply to them, for such law is part and parcel of the Hindoo religion, and cannot be separated from it. The whole evidence, which is very voluminous, proves most completely that there are, -four classes of persons belonging to the Christian community in India, namely, first, European Protestants; second, European Roman Catholics; third, East Indian Protestants, or Catholics, being either partially or wholly of native blood, and, as the family of the Abrahams are in this case, Christians by birth and parentage; and, lastly, there are native converts, either Protestants or Roman Catholics. Now, all these parties must have, some status and some law to govern their rights, and if the Hindoo law is to apply to them, then they can have no rights of property whatever. This appears from an opinion of the Pundits, in a former suit, which was called for by the Appellants, and in which they stated that in [9-Moore Indian Appeals-226] the case of East Indians, the law to be applied depended upon the religion which they professed.

But, secondly, there was no ancestral property in this case, and, therefore, even if the Hindoo law could be shown to be applicable as between the parties, the consequences which the Sudder Court has deduced therefrom would not follow, and the decree on that ground cannot be sustained. The facts are, wholly opposed to the conclusion that Matthew Abraham and the Respondent were just and undivided in estate, or that the Respondent had any interest in any part of the property in question, except that which belonged to him by contract, as the partner of Matthew Abraham under the deed of April, 1832; and the fact of Matthew Abraham having admitted the Respondent into partnership in the shop in 1832, under a deed of partnership, is conclusive against the claim which the Respondent now sets up to a general joint interest with Matthew Abraham, which, if it existed at all, must have existed prior to the partnership in 1832. Now, in all cases, within the application of the Hindoo law, where there has been property to start with, which property formed the nucleus of subsequently acquired property, though such is self-acquired property, yet the presumption in law is that the whole property is in coparcenary, Dhurm Dass Pandey v Mussumat Shama Soondri Dibiah (3 Moore's Ind. App. Cases, 240). The very theory of an undivided family is founded upon the existence of paternal property. But our contention is that Matthew Abraham and the' Respondent did not constitute what the Hindoo law regards as an undivided family, and that the Respondent is not entitled to that special and peculiar right

which the Hindoo law regards as attaching to the accretion [9-Moore Indian Appeals-227] of property held in coparcenary. One way of testing the Respondent's claim is to consider whether a claim by him for a general partition during Matthew Abraham's life could have been maintained, which the authorities clearly show could not, Strange's " Hindu Law," vol. 1. pp. 195, 198-9, 203, 208, 213, 219, 221, 226-7; Ib. vol. II, pp. 346 357 365, 370, 371, 375; Inst. of Menu (by Haughten) Ch IX, sec. 204, p. 319; W. H. Macnaghten's " Hindu: Law," pp. 43, 51. The Mitacshara, ch. 1. sec. 3. From the evidence in the cause it is apparent that this claim of the Respondent was an after-

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thought. At the time of Matthew Abraham's death, as well as for some time after, he led the Appellants to believe that the Abkarry contract was held after Matthew Abraham's death precisely as it was before.

Then, lastly, we submit, that the Sudder Court was not justified in refusing an account, and that the decree proceeded on an erroneous basis in calculating the sums to be paid to the Respondent, and, under no circumstances, could the case warrant the imposition of the whole costs of the suit upon the Appellants,

Sir Hugh Cairns, Q.C. and Mr. W. W. Mackeson, for the Respondent. There is no lex loci in India. Among Christian native Hindoo families the rule of property and inheritance is regulated by usage among the class. According to the usage as proved in this case, the Hindoo law is followed by all classes of native Christians. As to the rule of law by which native Christians are regulated, that question is elaborately investigated in the Report of the Indian law Commissioners of the [9-Moore Indian Appeals-228] 31st of October, 1840, and after a critical examination of all the decided cases, whether they related to Armenian, Portuguese, French, or native Christians in India, the conclusion arrived at by the Commissioners is that the English law is confined within the limits of the Charters of Justice, and that there is no lex loco' there, but that each class must be regulated by the customs and usage of the class, and each family thereof, and that this result must be arrived at in each case by evidence. In Freeman v Fairlie (1 Moore's Ind. App. Cases, 324) the Master reported, that the Supreme Court at Calcutta, created by the Statute, 21st Geo. III, c. 70, decided cases according to Hindoo or Mahomedan law, which could not be applied to the government of Christian people, and that there was no uniform lex loci to regulate inheritance, succession, etc. Mad. Reg. II of 1802, secs. 3 and 4, applies to natives and other persons not British subjects; so Mad. Reg. VIL of 1827. It is true that Ben. Reg. IV. of 1793, section 15, applies only to Hindoos, or Mahomedans, but as the Mofussil Courts are Courts of conscience, they determine questions respecting the law of Foreigners, that is not Hindoo or Mahomedans but British subjects. Thus in Durand v Boilard (5 Ben. Sud. Dew. Rep. 176) the succession was governed by French law. Joanna Fernandez v Domingo de Silva, (2 Ben. Sud. Dew. Rep. 227) was a case of Portuguese law, and the cases of Avielick Ter Stafanoos v Khaja, Michael Aratoon (3 Ben. Sud. Dew. Rep. 9) Humrus v Humrus (2 Borr. Bom. Rep. 496) Aratoon. v Aratoon, (7 Ben. Sud. Dew. Rep. 52). Gregory 7, Cockrane (8 Moore's Ind. App. Cases, 275) related to Armenian Christians, So with [9-Moore Indian Appeals-229] Parees, Mihirwanjee, Noushirwanjee v Awan Baee (2 Borr. Bom. Rep. 209) Modee Kaikhooscrow Hormusjee v Cooverbhaee (6 Moore's Ind. App. Cases, 448); likewise Sheik law, Doe d. Kissenchunder Shaw v Baidam Beebee (2 Morley Dig, 22); also among members of the Sheeah sect of Mahomedans, Raja Deedar Hossein v Ranee Zohoor-oon-Nissa (2 Moore's Ind. App. Cases, 441) and by the English law, Hoo v Peter Marquis (4 Ben. Sud. Dew. Rep. 243). This view of the law, that the Mofussil Courts adjudicate according to the law of parties not being Hindoos or Mahomedans, is strengthened by the Act of the Indian Legislature, No. XXI. of 1850, by which it is declared that, notwithstanding a Hindoo becomes a Christian, his rights of inheritance or property as a Hindoo shall not be thereby affected. We insist that with respect to the customs and usages applicable to native Christians, the evidence here clearly establishes that the law of their ancestors, namely, the Hindoo law, was the only guide; that birth and blood must decide, and the adoption of English dress and manners does not and cannot alter the rule of law or change the status of the parties as to the acquisition and transmission of property.

Secondly, according to Hindoo law, the Respondent was entitled to an equal share with his brother, and, after his death, with his family, in all the property, which was joint property. The Hindoo law applicable to the joint acquisition of property by two brothers, although not undivided, is clear, Koshul Chukurwutty v Radhanath Chukurwutty (1 Ben. Sud. Dew. Rep. 335) F. Macnaghten's " Hindoo Law," pp. 15, 66; Strange's " Hindu Law," vol. I, p. 213, and cases collected in [9-Moore Indian Appeals-230] Morley's Dig tit. " Partition," vol. I, p. 480. The legal result is that the brothers had an equal interest in the joint acquisitions, even although ignorant of the law, and admitting no intention of creating a joint interest existed. As to the joint acquisition of property by the Respondent and his brother, Matthew by their joint labour, we submit that the evidence is sufficient, independently of Hindoo law,

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to create a joint and equal interest between the brothers. This is shown by the confidential and unreserved mode of dealing between them, their living together, their joint purchases and mortgages, and the constant and invariable course of joint and common interest for twelve years succeeding the death of Matthew, without account or claim.

Then with respect to the accounts. If the interest of the brothers is held to be joint, which we insist it was, then Rs. 3,00,000 is to be taken as a basis of calculation, and the amount received by the Appellants added to it, and then the total of the two amounts should form the valuation of the joint property, and this is the made of taking the account which was finally agreed to by the several parties before the Sudder Court. This proposal was made to avoid the expense and delay of taking accounts generally, and the Court acted upon it, and we contend, that, assuming the interest is held to be joint, both parties are bound to have the account settled on that footing, and have thereby waived general accounts.

Lastly, in case of there being no joint interest, the Respondent is entitled to the whole of the Abkarry contract, and the profits thereof, from the 20th of April, 1843, as his exclusive property, he being ready [9-Moore Indian Appeals-231] in such case to allow a fair sum for the distillery, plant, and premises.

Their Lordships' judgment was postponed, and was now delivered by

The Right Hon. Lord Kingsdown (June 13, 1863). The Appellants in this case are Charlotte Abraham, the widow, and Daniel Vincent Abraham, the only surviving child of Matthew Abraham. The Respondent, Francis Abraham, was the only brother of the late Matthew Abraham. Matthew Abraham and the Respondent were by birth Hindoos of pure native blood, being descended from a family of Hindoos. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, originally it appears Roman Catholics, afterwards Protestant Dissenters, and subsequently members of the Church of England. They were of the class known in India as "native Christians." Matthew Abraham was by far the elder of the two, brothers; for in early life, when the Respondent was only about two or three years old, he was employed as a clerk in the arsenal at Bellary. In the year 1820, he married the Appellant, Charlotte Abraham. This lady and her father and mother were also Christians; the father an Englishman and the mother a Portuguese. They were of the class known in India as East Indians. There was issue of this marriage the Appellant, Daniel Vincent Abraham, and another son, Charles Henry Abraham, who survived his father, Matthew Abraham, but died pending the proceedings brought before us by this appeal. In the year 1823, Matthew Abraham established a shop at Bellary, the business of which was continued to be carried on up to the [9-Moore Indian Appeals-232] time of his decease. Throughout these proceedings it is called the shop-business. In the year 1827, Matthew Abraham entered into a contract with Government for the supply of liquors to the troops at Bellary, and erected a distillery for the purposes of this contract. The contract was renewable annually, and was annually renewed to. Matthew Abraham up to the time of his decease, except in one year when it fell into other hands. Throughout these proceedings it is called the Abkarry contract. In the year 1832, Matthew Abraham took Mr. Richardson and the Respondent, his brother, into partnership with him in the shop business, each party taking a third of the profits. This partnership was dissolved in the year 1837, and the business was thenceforth, until the death of Matthew Abraham, continued by him and the Respondent, his brother, without any new arrangement having been come to between them. The Respondent, some time before the death of Matthew Abraham, also married a Christian lady of the class known as " East Indians." In the year 1842, Matthew Abraham died, leaving the Appellants and Charles Henry Abraham, his widow and children. After his death the Respondent continued to carry on the shop-business, and he also procured the Abkarry contract to be annually renewed in his name, and carried on the business of that contract, and the distillery connected with it. In the year 1854, the Appellants and Charles Henry Abraham instituted against the Respondent the suit out of which this appeal has arisen, estimating the property to be recovered in the suit at Rs. 3,00,000.

By their plaint in the suit they alleged, that the whole of the capital in the shop business was supplied [9-Moore Indian Appeals-233] by the late Matthew Abraham; that the distillery

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business was carried on by him alone and with his own capital, and that the Respondent was his clerk, agent, or manager, in this business at a salary; that on the death of Matthew Abraham, the duty of collecting his estate devolved on the Appellant, Charlotte Abraham, and she intrusted the collection, realization, and management of it to the Respondent, and gave him a power of attorney for that purpose, and that the Respondent had carried on both the shop-business and the distillery business by means of the late Matthew Abraham's capital; that he had made payments to and, on account of the Plaintiffs, and for the debts of Matthew Abraham, but not nearly to the amount which he had received; and the Plaintiffs accordingly by their plaint, prayed for an account of the late Matthew Abraham's estate received by the Respondent, including the profits of the shop-business and of the distillery,

subsequently to his decease, offering to make the Respondent a just and sufficient allowance for his services in managing the distillery business since the death of Matthew Abraham.

The Respondent, by his answer to the plaint, insisted, that the Appellant, Charlotte Abraham, being the widow of the late Matthew Abraham, could not claim jointly with her sons, the other Plaintiffs; that she was entitled only to maintenance, and must seek it from her sons. He said that Matthew Abraham's situation, in the arsenal was procured for him by his father; that the father demised when he, the Defendant, was about two or three years of age, and that the late Matthew Abraham took charge of him, the Defendant, as his guardian, and took charge also of all the property left by their father; that the shop business [9-Moore Indian Appeals-234] had been conducted by him both in the lifetime, and since the decease of Matthew Abraham, but that as the deceased Matthew Abraham and he (the Defendant) were possessed of very little property, they had jointly borrowed money at interest on their joint bonds to carry on their business, and that it was by these means the capital of the business had been raised; and he urged that the late, Matthew Abraham and he (the Defendant) were brothers of an undivided native Hindoo family, jointly labouring together for their common welfare borrowing money on interest for their business upon their joint bonds and security, and mortgaging all their joint property of every description as security for, the same: and consequently that the late Matthew Abraham and he, (the Defendant) had an equal right to all the capital, and not the elder brother, Matthew Abraham, alone. He said that the Plaintiffs, Charles Henry Abraham and Daniel Vincent Abraham, were merely junior members of an undivided Hindoo family, and that he (the Defendant) by the death of Matthew Abraham had become the head of the family, and he insisted that the fact of himself and his father and family being Christians could not and did not make them subject to the English law. That their religion was an accident, and that in fact they were Hindoos and undivided and must of necessity, and according to all practice and precedent, be subject to the Hindoo law and no other. He denied that the Abkarry contract was the property of Matthew Abraham alone, and alleged that he (the Defendant) had purchased the contract after the death of the late Matthew Abraham on his own responsibility.

The Plaintiff a by their replication submitted, that [9-Moore Indian Appeals-235] by whatever law the case was to be decided, they had all a common interest against the Defendant, and that no final decision could be come to in the absence of any of them. They relied upon the family having been Christians for several generations as putting an end to the Defendant's assertion that the case, ought to be decided according to the Hindoo law; and after referring to the class of East Indiana having always been considered to be governed by the same laws as Englishmen as to their rights of descent and inheritance, and to authorities by which, as they contended, it was shown that in suits between parties who were neither Hindoos nor Mahomedans in religion, the usages of the particular class to which they belonged formed the guide of the Court, and that even in cases to which Hindoo law was applicable, the usages of the family were to be the rule of guidance when they were opposed to the law, they submitted that the Court, before coming to a decision in the case, ought to consult the usages of the class to which the parties in the suit belonged, and ascertain what had been the usages of the family in which they had been reared. They further insisted, that even if the case was to be governed by the Hindoo law, the Defendant had no right to any portion of the late Matthew Abraham's estate. They denied that Matthew

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Abraham inherited any Property whatever from his father, and said that the father died an insolvent and ruined man, and that Matthew Abraham had taken charge, of the Defendant and reared him from generosity, and had begun the affair under litigation when the Defendant was a boy at school, and unable, to assist him in them. They insisted that Matthew Abraham and the Defendant were not members of an, undivided, family in the [9-Moore Indian Appeals-236] light alleged by the Defendant, and that even if Matthew Abraham obtained his original appointment, under Government through the instrumentality of his father, it would confer no right on a younger brother, but the salary attached to the appointment would, even under the Hindoo law, be considered a separate acquisition.

The Defendant, by his rejoinder, adopted the view insisted upon by the replication as to the principles which ought to determine the law by which the case should be decided, submitting that the Plaintiffs had laid down the correct principle, namely, that the customs and usages of the class to which both parties belonged must be sought for and searched, and, further, that the usages of the particular family to which the parties belonged must be looked to in order to ascertain what law was to govern their relations to each other.

It appears from the record of proceedings before us that in this stage of the suit the Plaintiffs were non-suited by a decree of the Civil Court of Bellary upon the grounds, first, that the Plaintiff, Charlotte Abraham, the widow, could not take part in the suit, she having no right of inheritance as the family stood; and secondly, that no sufficient description or specification of the value of the property sued for had been given in the plaint: but upon an appeal to the Sudder Adawlut, this non-suit was set

aside, and the Civil Judge was directed to dispose of the case on the merits, the Court observing, that the Civil Judge had pronounced upon a point material to the issue of the suit, namely, the law of inheritance, by which the parties were to be bound, without receiving any evidence whereby to govern his judgment on the [9-Moore Indian Appeals-237] subject, and that such a judgment could only be rightly pronounced upon a consideration of the usages of persons situated as the parties were, being Christians whose ancestors were of Hindoo stock, and of the usages in their particular family, as indicated by the acts of the parties and their predecessors in respect of their property since they had belonged to the Christian community, and that it would be necessary further to ascertain by whom and under what circumstances the property in issue was acquired, so as to determine whether it was the estate of the deceased, 'Matthew Abraham, acquired by himself, or of Ancestral origin, after which the rights of the parties thereto whether under the English or Hindoo law, should be declared.

The case was accordingly remitted to the Civil Court of Bellary, and the points stated in the pleadings (ante [9 Moo. Ind. App.], p. 207) were recorded for proof. A vast mass of evidence upon the points recorded was adduced, both on the part of the Plaintiff s and on the part of the Defendant. Their Lordships do not find it necessary to enter into the details, of this evidence. It will be sufficient for them, in disposing of the several points of the case, to state the conclusions at which they have arrived as to the result of the evidence bearing on these points.

By the decree made upon the hearing of the cause by the Civil Court of Bellary, the Court ordered as follows: That an account be taken of the capital employed in the shop-business and of the profits thereof, both prior and subsequent to Matthew Abraham's death, and that the [9-Moore Indian Appeals-238] Defendant do pay to the Plaintiffs one-half of the capital and profits found due. That an account be taken of all the capital employed in the distillery business and of the profits, down to the time of the death of Matthew Abraham, and also of the profits of the distillery business arisen since his death, and that the Defendant do pay to the Plaintiffs the amount of the capital and profits found due. That an account be taken of all other the moneys, goods, debts and property of Matthew Abraham which have been collected or received by, or come into the possession of, the Defendant, or any person by his order or for his use, and that the Defendant do deliver up to the Plaintiffs all such portions thereof as consist in kind or specie, and do pay to the Plaintiffs all such portions thereof as consist of money, and do pay such portions thereof as have been converted into money since the death of Matthew Abraham. That so long as the present contract endures, and so long as the Defendant carries on the business in the Plaintiff's distillery buildings,

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etc. and with their capital, stock, etc, he must and shall be considered as their agent, and as-such accountable to them for all the profits arising from the said business, and that he shall deliver up to the Plaintiffs all deeds, books, Securities, documents, papers, and writings in his possession or power, relating to the said contract or to the said distillery business, or otherwise relating to the property, estate, or effects of Matthew Abraham, deceased; the Plaintiffs being bound, in taking the aforesaid several accounts, to make to the Defendant a just and sufficient allowance for his services in managing the said distillery business, and also for his services in collecting and managing all other the property, estate, [9-Moore Indian Appeals-239] and effects of Matthew Abraham, and that the Defendant do pay to the Plaintiffs the costs of the suit.

From this decree the Defendant appealed to the Sudder Court.

The Sudder Court, upon the case being brought before it, submitted a question to their Pundits in these terms:-" Two brothers, governed by Hindoo law, inherit no ancestral property. They live together. The elder acquires some property. The younger brother, as he comes to years of discretion, is subsequently admitted by the elder to take part in the administration of his business. They jointly borrow money for the uses of the business, and both give their labour thereto. The elder of those brothers has demised. During the latter years of the deceased brother the labour fell chiefly on the younger one. Since the demise it has fallen exclusively on him. The elder brother has left two sons. Are the said uncle and nephews to be considered co-sharers; and, if so, in what proportions? "

And the Court afterwards submitted this further question to the same Pundits:

Supposing the said two brothers and the sons of the deceased brother to be ignorant of their respective rights in law over the said property, would this interfere with the title of one party or the other to recover such right when disputes and consequent litigation occurred between them?"

The opinion given by the Pundits upon these questions having been, that the property ought to be divided into two, shares, and one, of them given to the sons of the elder brother and the other to the younger one, and that the rights acquired by the sons [9-Moore Indian Appeals-240] could not be affected by their ignorance of those rights, the Court as to the legal rights of the parties held that they stood as representing two branches of a family governed, as to rights in property, by Hindoo law, and with equal shares; and having arrived at this conclusion, the Court adopted the estimate of the value, of

the property made by the Plaintiffs for the purposes of their suit, that it was of the value of Rs. 3,00,000, added to that amount the sums which had been paid to the Plaintiffs and to creditors, and the value of some part of the property in the Plaintiffs' possession, thus bringing up the entire value of the property to Rs. 4,71,114 10a. 5p, and taking one-half of that amount as the Plaintiffs' share, and deducting from it the sums: which had been paid to them, and one-half of the debts, found the balance due to the Plaintiffs to be the sum of Rs. 71,492. 10a. 91p, which the Court ordered the Defendant to pay to the Plaintiffs in discharge of all obligations due by him up to the date of the suit. The Court was also of opinion that the Plaintiffs were not justified in having recourse to the suit, and accordingly imposed upon them all the costs which had been incurred by it.

It is from this decree of the Sudder Court that the present appeal has been brought.

The first and most important question raised by this appeal is by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause. Laying out of considerations the objection raised by the answer, that the Plaintiff, Charlotte Abraham, as widow, could not sue jointly with the other Plaintiffs, her sons, an [9-Moore Indian Appeals-241] objection of misjoinder of parties which, in their Lordships' opinion, was properly answered by the replication, and properly disposed of by the Sudder Court when the case was first brought before, it by appeal, the true question at issue in this case is not who was the heir of the late Matthew Abraham, but whether he and the Respondent formed an undivided family in the sense which those words bear in the Hindoo law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parcenership, and not of heirship. Heirship may be governed by the Hindoo law, or by any other law to which the ancestor may be subject; but parcenership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations

9 Moore Indian Appeals 242, 19 ER p732

growing out of the status of an undivided family, is the creature of, and must be governed by the Hindoo law. Considering the case then with reference to parcenership, what is the position of a member of a Hindoo family who has become a convert to Christianity? He becomes, as their Lordships, apprehend, at once severed from the family, and regarded by them as an outcast. The tie which bound the family together is so far as he is concerned, not only loosened, but dissolved. The obligations consequent upon and connected with the tie must, as it seems to their-Lordships, be dissolved with it. Parcenership may be put an end to by a severance effected by partition; it must, as their Lordships think, equally be put an end to by severance which the Hindoo law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindoo to Christianity the Hindoo law ceases to have any [9-Moore Indian Appeals-242] continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or, if he thinks fit, he may abide by the old law, notwithstanding he, has renounced the old religion.

It appears, indeed, both from the pleadings and from the points before referred to that neither side contended for the continuing obligatory force of Hindoo law on a convert to Christianity from that persuasion. The custom and usages of families are alone appealed to with a reference, also to the usages of this: particular family; a reference which implies that the general custom of a class is not imperatively obligatory on new converts to Christianity. The conclusion at which their Lordships have arrived on this point, appears also to be, supported by authority; for the opinion expressed as to the Hindoo law by the Judge of the Civil Court at Bellary seems to coincide entirely with the opinions of Pundits reported, in W. H. Macnaghten's " Hindu Law," vol. II. pp. 131-2. It is there stated, that on the death of an apostate from the Hindoo faith his heirs, according to Hindoo, law, will take all the property which he had at the time of his conversion; and the marginal note, states, that his subsequently acquired property would be governed as to its devolution by the law of his new religion. The religion embraced in that case was the Mahomedan, which regulated the devolution of property. The Pundits, therefore, in their reply, naturally connected religion with the rules of descent of property as an adjunct, but the important point which they declare is the separation of the convert from the binding force of Hindoo law, as to his subsequent acquisitions.

[9-Moore Indian Appeals-243] Such, then, being the state of the case, so far as the Hindoo law is concerned, we must next consider whether there, is any other law which determines the lights over the property of a Hindoo becoming a convert to Christianity. The lex loci Act clearly does not apply, the parties having ceased to be Hindoo, in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindoo law shall be applied to Hindoos and the Mahomedan law to Mahomedans, they must be, understood to refer to Hindoos and Mahomedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulation which prescribes that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have

been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages, of the class to which the convert, may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels, of the Hindoo law, but it does not of necessity involve any change of the rights or relations of the convert in Matters With Which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindoo law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by [9-Moore Indian Appeals-244] attaching himself to a class which as to the-se matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by the law which he has adopted, or the rules which he has observed.

Their Lordships have thought it right thus to state their opinion on this point,

9 Moore Indian Appeals 245, 19 ER p733

as this is the first case in which the question has been brought under their consideration. They consider the decision referred to in the judgment of the Sudder Dewanny Adawlut in the case of a succession to one of the class of East Indians to be an instance of a just and proper exercise of the discretion entrusted to these Courts. The English law, as such, is not the law of those Courts. They have, properly speaking, no obligatory law of the forum, as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of movables was applied by the Courts in the Mofussil to the succession of the property of this class.

Such, then being their Lordships' opinion as to the law by which they ought to be guided in the decision of this case, it becomes necessary to see how the case stands upon the evidence.

Their Lordships collect from the evidence that the class known in India as native Christians," using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate [9-Moore Indian Appeals-245] divisions forming against distinct classes, of which some adhere to the Hindoo customs and usages as to property; others retain those customs and usages in a modified form; and others again have wholly abandoned those customs and usages, and adopted different rules and laws as to their property.

Of this latter class are the " East Indians," a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

Reverting again to the evidence, their Lordships think that it is to be collected from it that the family from which both the late Matthew Abraham and the Respondent descended was of that class of native Christians which commonly retains native usages and customs, and they consider it probable, therefore, that had the family possessed property they would, so long as those usages and customs were retained, have enjoyed it in common according to Hindoo custom; but their Lordships are perfectly satisfied upon the evidence that the late Matthew Abraham and the Respondent had no ancestral property, and that the property which the late Matthew Abraham had was acquired by him by his own sole unaided exertions, and without any use whatever of any common stock. They fully concur in the finding of both the Courts in India upon this point. They are also quite satisfied upon the evidence that [9-Moore Indian Appeals-246] from the time of the late Matthew Abraham's marriage he and the Appellant, Charlotte, his wife, and their children adhered in all respects to the religion, manners, and habits of the East Indians, the class to which the Appellant, Charlotte Abraham, belonged.

Previously to the marriage some doubt appears to have been entertained whether the East Indians, the class to which the lady belonged, would receive Matthew Abraham into their society and treat him as one of themselves. The evidence on this point of the Appellant, Charlotte Abraham, the first Plaintiff, is corroborated by that of a very respectable witness, on whose veracity no doubt can rest. Before this time Mr. Matthew Abraham had assumed the English dress, and had outwardly conformed to all the habits of the English. Assurances were given that the East Indians of Bellary would recognize her husband as one of their body, and the marriage took place. On one important public occasion when a jury was summoned of East Indians, Matthew sat as one of them, and acted as their foreman.

The evidence on this part of the case appears to their Lordships to be clear beyond all doubt. They proceed, then, to consider its effect. That it is not competent to parties to create, as to property, any new law to regulate the succession to it ab intestato their Lordships entertain no doubt; but that is

not the question on which this case depends. The question is whether, when there are different laws as to property applying to different classes, parties ought not be considered to have adopted the law as to property, whether in respect of succession ab intestato or in

9 Moore Indian Appeals 247, 19 ER p734
other respects, of the class to which they [9-Moore Indian Appeals-247] belong. In this particular case the question is whether the property was bound by the Hindoo law of parcenership. Now, Matthew Abraham acquired the nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no, rule as to such use and enjoyment, which the ancestors may voluntarily have, imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. If a Hindoo in an undivided family may keep his own sole acquisitions separate, as he undoubtedly may, a fortiori, a Christian may do the same. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. It was well observed by Mr. Melvill, that custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent an the changeful inclinations, feelings, and obligations of successive generations of men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors: adhered, must the abandoned usages be treated by a sort of fictio juris as still the enduring customs of the family? If it be not so as to things which belong to the jurisdiction of conscience, is it so, as to things of Convenience or [9-Moore Indian Appeals-248] interest? Surely, in things indifferent in themselves the Tribunals which have, a discretion and have no, positive lex fori imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage, is not.

The law has not, sol far as their Lordships can see, prohibited a Christian convert from changing his class. The inconvenience resulting from a change of succession consequent on a. change of class is no greater than that which often results from a change of domicile. The argumentum ab inconvenieniti cannot, therefore, be used against the legality of such a change. If such change takes place in fact, why should it be regarded as non-existing, in law? Their Lordships, are of opinion, that it was competent to Matthew Abraham, though himself both by origin and actually in his youth a " Native Christian," following the Hindoo laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderate step, taken up on a whim, and to be as, lightly laid aside. We. find in the evidence that there was on one side an exhibition of preliminary caution. The change was deliberate, it was, publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before-mentioned is unknown. How, then, can it be, imposed on that family of which Matthew Abraham formed the head as [9-Moore Indian Appeals-249]father. Not by consent for there was none; not by force of obligatory law, for there was none; not by adoption, for they had not adopted any Hindoo customs, but, on the contrary, had rejected them all. It could only be imposed, as it seems to their Lordships, by passing over the actual family springing from the marriage, and by absorbing all its members, in the original family of which the two brothers were members; by passing over all actual usages, customs and ways of living; and by supposing, contrary to fact, the prevalence of Hindoo customs, which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the Defendant relies in his answer did not exist in any sense, which is material to or assists the decision of the case.

There being then, in their Lordships' opinion, no such undivided family, and the case not being, in their judgment, governed by the Hindoo law, it is unnecessary to discuss the opinion given by the Pundits upon the operation of that law, or to enter into the question, so much discussed at the Bar, whether the late Matthew Abraham's acquisitions ought, or ought not, according to that law, to have, been deemed to be his separate estate. It is sufficient, with reference to the opinion of the Pundits, to say, that the case stated for their opinion proceeds upon an assumption which, in their Lordships' judgment, was not warranted by the facts. Their Lord-

9 Moore Indian Appeals 250, 19 ER p735
ships, however, think it right to add, for the guidance of the Courts in India in future cases, that whenever the opinion of Pundits is required, and there are any special-circumstances which may bear upon the question to be submitted for their opinion, those [9-Moore Indian Appeals-250] special

circumstances ought to be set forth in the case submitted to them. Their Lordships make this observation with reference, to the broad and general statements contained in the case which, in this instance, was laid before the Pundits; " that the brothers lived together, and that the eldest acquired some property," unaccompanied as those statements were by any specification of the mode in which, and the circumstances under which, the brothers so lived, and the property was, so acquired - circumstances which, to say the least, were important to be, considered in forming an opinion upon the point submitted for consideration.

Having thus considered the case so far as respects the law to be applied in determining it, their Lordships will now proceed to consider how the case stands upon the evidence with reference to the point whether the Defendant was entitled to share in the property in question by agreement, or consent amounting to agreement, between him and the late Matthew Abraham; a point which, though not distinctly pleaded on the part of the Respondent, must, as their Lordships, think, upon a fair view of all the pleadings in the case, be considered to be open.

In considering the weight of the evidence upon this point, the first thing to be determined is upon whom does the burthen of proof rest? Their Lordships are of opinion, that it lies on the Defendant. It must be so, even under the Hindoo law, as the nucleus of acquired property was in this case separate, unaided acquisition, unaided either by funds or labour of the claimant. Their Lordships do not propose to enter into a minute examination and consideration in detail of every part of the evidence relied upon, nor [9-Moore Indian Appeals-251] of every observation made and argument urged upon it by either side: that course would extend their observations to an unnecessary and unprofitable length. They propose to deal with the presumptions insisted on, on either side, as arising from the conduct of the parties, and to contrast and weigh those presumptions. The case was rightly stated by Mr. Mackeson to be, not a one sided one; on the contrary, it presents evidence embarrassing to deal with, both in the conflict of positive testimony and of opposing presumptions. For the Appellants, the presumptions from conduct principally relied on are those which arise from what appears upon the evidence as to the following matters; first, the habits of life of the families both of Matthew Abraham and the Respondent, as inconsistent with the nature of the existence of an undivided Hindoo, family, Hindoos by origin, but not Hindoos by religion. Secondly, the establishment by Matthew Abraham of a business under his sole name; his introduction into it of his brother and Richardson as partners with himself; his formal public notification of that fact to the world by a notice stating that he had introduced them into his firm; the payment of rent for the shop, both during the continuance of that firm and by the succeeding firm, which then consisted of himself and his brother only; and the consistency of that payment with the joint property in the building and premises. Thirdly, the signatures on several occasions of Francis Abraham as agent; his dissatisfaction with the business at Kurnoul; and his language regarding it as inconsistent with a joint ownership and-corresponding voice. Fourthly, after the death of Matthew Abraham, the inconsistency of the Defendant's whole conduct [9-Moore Indian Appeals-252] for a time, with any notion in his mind that he had a joint legal interest in the whole property of the family. Much stress was laid on the inconsistency of the statements in the Respondent's letter to Charles Henry Abraham, of the 19th of August, 1842, in which, giving an account of all the property of Matthew Abraham, he states that, it was in the bracketed item or items alone he had a half share, the item or items, So bracketed not including the distillery, which is afterwards mentioned as a part of the property of Matthew Abraham; on the Respondent's fears expressed in the same letter of being left to seek his fortune; on his expression that he had hoped that his brother would have provided for him; and on the request to Charles Henry Abraham, to intercede with his mother to carry out the presumed intentions of his father. Fifthly, the treatment by the Defendant of Mrs. Charlotte Abraham, as the head of the family; the inconsistency of that treatment with her condition of a widow in a family adopting or retaining Hindoo customs and law in part and by choice; the administration taken out in her name; and his taking a power of attorney from her.

9 Moore Indian Appeals 253, 19 ER p736

These were treated as inconsistent with the Respondent's position in the family on his hypothesis.

On the other side, the nature of the original family to which the Defendant and his brother belonged; the customs of the Christian class within which that family was included; and the ordinary enjoyment of their property by such families according to the customs of their Hindoo progenitors, were relied on to show that the family dealt with the property, as an undivided one.

The dealings of the Defendant in the management [9-Moore Indian Appeals-253] of his brother's affairs; the absence of any satisfactory proof that he had received any salary or emolument as agent or clerk; the consistency of all that he did with the ordinary course of dealing in an undivided Hindoo family; the presumed continuance of a state proved to have existed ana not in terms proved to have been interrupted; the execution of the bonds and conveyances referred to in the Respondent's case; and the inconsistency of those instruments with the ordinary dealing of a mere clerk or agent,-

were pressed with much force on the attention of their Lordships. The statement of ownership in Francis Abraham contained in his mortgage deed, and the admissions derived from the acts of the third Plaintiff, Daniel Vincent Abraham, in the suits and proceedings relating to the Kurnoul affairs, also referred to in the case of the Respondents, were urged as additional grounds in support of the case of the Defendant, which it was, argued the language, of a large portion of the correspondences strengthened.

Their Lordships will first consider the evidence on these points, and the presumptions to be drawn from it with reference to the Hindoo, law. In this point of view much, if not the whole, of what is urged on the part of the Respondent as to the nature of the original family to which he and Matthew Abraham belonged, and as to the dealings of such families, is sufficiently answered by what has been already said as to the right of Matthew Abraham to change, and as to the fact of his having changed, the class of Christians to which he was attached. As to the absence of proof that the Respondent received any salary or emolument as agent or clerk, independently of the absence and destruction of books and accounts, which cannot [9-Moore Indian Appeals-254] but weigh heavily against the Respondent, it is to be observed that there is an equal absence of proof that the Respondent ever received any share of profits as, parceners

The arguments from the dealings of the brothers, so forcibly urged by Sir Hugh Cairns, are certainly as forcible to prove an ordinary partnership as to prove that kind of parcenary which obtains under the Hindoo law. These brothers, when they established a partnership in the shop, established a- rid maintained it on the ordinary commercial basis in shares, as well when they were the only partners as when Richardson was associated with them. On what ground, then, should a. Court conclude, if it thought that a conjoint interest existed in the Abkarry contract, that it was founded on Hindoo family union, rather than on the model of the shop business? This presumption could only be made by assuming the Hindoo law to govern the case.

As to the bonds and conveyances, it is to be observed, that these instrument, are wholly unexplained by the evidence, and that the fact of the Appellant, Charlotte Abraham, having been made a party to some on one of them, renders it very difficult to deduce from any of them the inference for which the Respondent has contended; but, what is perhaps, of still greater importance is this that there is no proof of the application of any of the moneys raised by these instruments to any other purposes than the purposes of the shop, and that the Respondent by his answer refers to these moneys having been raised for the purposes of the shop business. With respect to the correspondence, their Lordships feel no doubt as to the conclusion to be drawn from it. After carefully [9-Moore Indian Appeals-255] perusing it, they have been unable to find anything at variance with the statement contained in the letter of the 19th of August, 1842, to which they have above referred. They find much, both in the correspondence and in the other documents, in proof in the cause which tends to confirm what is stated in that letter.

The Respondent, by that letter insists on no right. He merely suggests a similar remuneration to that which he had hoped to receive by way of testamentary gift from his deceased brother. Their Lordships are totally unable to reconcile this letter with the existence of the right since insisted on. After giving due weight

9 Moore Indian Appeals 256, 19 ER p737

to the arguments on both sides on its construction and meaning, they are unable to adopt that reading of it on which the Counsel for the Respondent have insisted. That construction is not, in their opinion, consistent with either the spirit of the composition, viewed as a whole, or with its language.

Then as to the admission contended to have been made by the Appellant, Daniel Vincent Abraham. Neither the Appellant, Charlotte Abraham, nor the late Plaintiff, Charles Henry Abraham, is in any way proved to have been privy to or cognizant of, this admission; the late Plaintiff, Charles Henry Abraham, was absent in England at the time, and he never in any way adopted it. It is no doubt, evidence against all the Plaintiff s, but, in their Lordships' opinion, undue weight has been ascribed to it in the judgment of the Sudder Court. Whence, had this young man of nineteen his knowledge that the family was undivided? It is a mixed and complex proposition of fact and law; and it supposes a status concerning which the Respondent himself seems to have been [9-Moore Indian Appeals-256] long uncertain. Had be so understood his position at the time when he wrote, the letter of the 19th of August, 1842; had he then considered that he was a half sharer in the whole property, he) could scarcely have expressed himself as he did in that letter. Yet to this admission of a. youth, ignorant alike of law and business, a binding effect is given against all the Plaintiffs on the record.

Their Lordships are not prepared to follow the Sudder Court in the weight which they have given to this admission. Looking at the whole case, with reference to the Hindoo, law, they are of opinion, that the claim of the Respondent to a share of the property in dispute by virtue of that law cannot be supported, and they are not less satisfied that if the case be looked at with reference to the

English law-a point of view, however, which, so fax as the Respondent is concerned, seems to them to be excluded by the pleadings in the cause, the evidence on the part of the Respondent is insufficient, when weighed against the evidence on the other side, to establish a partnership according to that law. Their Lordships, therefore, have come to the conclusion, that the decree of the Sudder Court cannot be maintained; but, on the other hand, they are not prepared to go, to the full length to which the Judge of the Civil Court of Bellary has gone, by his decree. The Respondent no doubt stood in a fiduciary position; though he may have been unconscious of the duty arising from his acts, he had, in effect, attorned to the Appellant, Charlotte Abraham, by accepting a power of attorney from her. That character, and the acquisitions under it, should have, been renounced before the Respondent asserted an interest adverse to that of his constituent; such [9-Moore Indian Appeals-257] an assertion in one acting as agent is not prohibited on grounds of policy alone. It is in itself an unconscientious breach of duty to a principal. The Letters of administration were, indeed, taken out for a special object only; they were not strictly necessary, a certificate, would have sufficed. But they were not of a limited character. There were assets in the local jurisdiction, and all parties concerned in interest were either consenting to or subsequently ratified, the authority delegated by the letters of administration. The administration related back to the death of Matthew Abraham; the possession of the whole property, therefore, from the time of his death must be ascribed to the first Plaintiff, as the Defendant acting under his power could not claim adversely.

Their Lordships are by no means disposed to infringe upon the wise, and salutary rules which have been laid down as to the conduct of persons standing in confidential positions; but, on the other hand, they entirely agree with the Sudder Dewanny Adawlut in their estimate of the value of the Respondent's services. The property in the Abkarry contract way, by reason of its special character, be said to have been in a great degree preserved to the family by him. The evidence shows that none of the Plaintiffs were competent to the management of the concern. In all probability, but for the Respondent, the contract would have been lost to the family. It is represented to have been the chief source of their income. It differs materially from an ordinary trading partnership. The selection of the contractor is influenced by considerations which might probably have caused the Respondent to be named as the successor to his brother in the contract. The relationship of the [9-Moore Indian Appeals-258] Respondent to the family, the devotion of his time and labour to the augmentation of its wealth, the creation, as it were, of the profits of the Abkarry business, establish a great difference between this and the case of any ordinary agency.

9 Moore Indian Appeals 259, 19 ER p738

In ordinary cases and under ordinary circumstances these services on the part of the Respondent would, no doubt, be sufficiently compensated by the provision in that behalf contained in the decree of the Civil Court, but in this case, their Lordships find it proved by the Plaintiff's first witness, that the Respondent on Matthew Abraham's death declared to him that he had worked like a slave in the Abkarry business, and was merely paid for his labour; but that for the future he would not do so unless he received an equal share with the others, meaning his brother's widow and two sons; and the witness says that he soon afterwards mentioned this conversation to the widow. If the widow dissented from this view, she ought, as their Lordships think, to have communicated such dissent to the Respondent, but she never did so. After her having so long availed herself of the Respondent's services, which she knew to be rendered on the faith of his receiving one-half the profits as a remuneration for those services, she and the other parties interested in the estate could not, in their Lordships' opinion, be justly entitled to dispute the right of the Respondent to be remunerated to that extent. Their Lordships, therefore, think, that it ought to have been declared by the decree that the Respondent was entitled to an equal share of the profits of the Abkarry contract accrued after the death of Matthew Abraham as a remuneration for his services in the execution of that contract. Their Lordships [9-Moore Indian Appeals-259] think also that, having regard to the evidence to which they have last alluded, and to the Respondent having been permitted for so many years to carry on the Abkarry contracts without any dissent having been expressed to the terms stipulated for by him, the decree of the Civil Court has not dealt properly with the question of costs. They are of opinion that, under the circumstances of the case, the costs, up to the hearing, ought not to have been given against the Respondent by the decree, but ought to have been reserved until the accounts were taken. The benefit which may result to the estate may form a material ingredient in considering what ought ultimately to be done as to the costs, and the mode in which the Respondent may account under the decree may also influence that question. The decree of the Civil Court having thus, in their Lordships' opinion, gone too far, their Lordships think that there should be no costs of the appeal to the Sudder Court or of this appeal.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the decree of the Sudder Court, and to restore the decree of the Civil Court of Bellary, modified as above pointed out (see Varden Seth Sam v Luckpathy Royjee Lallah, post [9 Moo. Ind. App.], 303).

[See Jowala Buksh v Dharum Singh, 1866, 10 Moo. Ind. App. 511; Barlow v Orde, 1870, 13 Moo. Ind. App. 308; Sri Gajapathi Radhika Patta Maha Devi Garu v Sri Gajapathi Nilamani Patta Maha, Devi Garu, 1870, 13 Moo. Ind. App. 5 13 Juttendromohun Tagore v Ganendromohun Tagore, 1872, LR Ind. App. Sup vol. 56,]