PETITIONER:
ADDAGADA RAGHAVAMMA AND ANR.

Vs.

RESPONDENT:
ADDAGADA CHENCHAMMA AND ANR.

DATE OF JUDGMENT:
09/04/1963

BENCH:
SUBBARAO, K.
BENCH:
SUBBARAO, K.
DAYAL, RAGHUBAR
MUDHOLKAR, J.R.

CITATION:
1964 AIR 136 1964 SCR (2) 933
CITATOR INFO :

R	1965 SC 825	(6)
E	1968 SC1018	(4)
R	1970 SC1286	(7)
R	1976 SC 588	(5)
E&R	1978 SC1062	(13)
R	1978 SC1428	(13,14)
R	1980 SC1173	(18)
R	1983 SC 114	(19,31)

ACT:
Hindu Law-Partition-Adoption-Burden of proof and onus of proof-Distinction-Separation-Elements necessary to make it effective-Declaration and knowledge-Doctrine of relation back if affect vested right-Concurrent findings of fact, if and when can be interfered with-Certificate granted under Art. 133-Scope and limit-Constitution of India, Art. 133.

HEADNOTE:
The appellants and the respondents trace their interest and rights through their geneology to one Veeranna who died in 1906. One of his sons Pitchayya, predeceased him in 1905 and it is alleged that sometime before his death Pitchayya took Venkayya, the son of his brother Chimpirayya, in adoption. It is further alleged that a partition of the joint family properties between Veeranna and his four sons took place. Venkayya died in 1938 having a son Subbarao. Chimpirayya died in 1945 having executed a will whereunder he gave his properties in equal shares to Subbarao and Kamalamma, the daughter of his predeceased daughter. He also directed Raghavamma, the wife of his brother Pitchayya, to take possession of the entire property belonging to him, manage it and to hand over the same to his two grand children when they attained majority. Chimpirayya excluded his daughter-in-law Chenchamma from management as well as inheritance. But Raghavamma allowed Chenchamma to take possession of the property. Subbarao died in 1949. In 1930, Raghavamma filed a suit for possession of the property impleading Chenchamma as the first defendant, Kamalamma as the second defendant and Punnayya as the third defendant.
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Chenchamma, the first defendant and the present first

respondent, contended that Venkayya was not given in adoption and that there was no partition as alleged by the plaintiff. She averred that Chimpirayya died undivided from his grandson Subbarao and therefore, Subbarao became entitled to all the properties of the joint family by right of survivorship.

The trial Judge came to the conclusion that the plaintiff had not established adoption of Venkayya by her husband Pitchayya and that she also failed to prove that Chimpirayya and Pitchayya were divided from each other and in the result dismissed the suit. On appeal, the High. Court upheld the above two findings of the trial judge. A new pica was raised by the appellant before the High Court that the will executed by Chimpirayya contained a clear intention to divide and that this declaration constituted a severance in status enabling him to execute a will. The High Court rejected this contention also and in the result dismissed the appeal.

On appeal by certificate, the appellants contended that the findings of the High Court on adoption as well as on partition were vitiated by the High Court not drawing the relevant presumptions permissible in the case of old transactions, not appreciating the great evidentiary value of public documents, ignoring or at any rate nor giving weight to admissions made by parties and witnesses, adopting a mechanical instead of an intellectual approach and perspective and above all ignoring the consistent conduct of parties spread over a long period. inevitably leading to the conclusion that the adoption and the partition set up by the appellant were true. (2) On the assumption that there was no partition by metes and bounds, the court should have held on the basis of the entire evidence that there was a division in status between Chimpiravva and Pitchayya, conferring on Chimpirayya the right to , bequeath his divided share of the family property. (3) The will-itself contained recitals emphasizing the fact that he had all through been a divided member of the family and that on the date of execution of the will he continued to possess that character of a divided member so as to entitle him to execute the will in respect of his share and, therefore, the recitals in the will themselves constituted an unambiguous declaration of his intention to divide and the fact that the said manifestation of the intention was not communicated before his death to Subbarao or his guardian Chenchamma could not affect his status as a divided member. (4) Chenchamma, the guardian of Subbarao, was present at the time of execution of the will and, therefore, even if communication was

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necessary for bringing about a divided status, it was made in the present case.

The respondents raised a preliminary objection, that the certificate issued by the High Court did not contain any issue relating to adoption or partition. Hence, this Court should not allow the appellants to raise these questions. Secondly, it was contended that since the question, whether declaration in the will constituted a partition was raised in the High Court for the first time it should not be allowed to be raised. It war. further urged that on the issues of partition and adoption, there were concurrent findings of fact by the trial Court and the High Court and this Court should not interfere.

Held that a successful party can question the maintain-ability of the appeal on the ground that a certificate was wrongly issued by the High Court in contravention of Art. 133 of the Constitution, but if the certificate was good,

the provisions of that Article did not confine the scope of the appeal to the certificate.

This Court has the power to review the concurrent findings of fact arrived at by the lower courts in appropriate cases. But this Court ordinarily will not interfere with concurrent findings of fact except in exceptional cases, where the findings are such as "shocks the conscience of the Court or by disregard to the forms of legal process or some violation of some principles of natural justice or otherwise substantial and grave-, injustice has been done' . It is not possible nor advisable to define those circumstances. It must necessarily be left to the discretion of this Court having regard to the facts of a particular case. The present case is not one of those exceptional cases where a departure from the salutary practice adopted by this Court is justified.

Case Law referred to.

There is an essential distinction between burden or proof and onus of proof; burden of proof lies upon the person who has to prove a fact and it never shifts but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. The criticism levelled against the judgments of the lower courts, therefore, only pertain to the domain of appreciation of evidence.

It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. In the present case, the appellant has failed to discharge that burden.

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The burden is upon that person who sets up partition to prove that fact. The general principle is that a Hindu family is presumed to be joint unless the contrary is proved. The finding whether there was partition or not is a finding of fact. An interference in the concurrent findings of fact on this point by the courts below is not justified.

Bhagavati Prasad Shah v. Dulbi Rameshwari Juar, [1951] S. C. R. 603, referred to.

It is settled law that a member of a joint Hindu family can bring about his separation in status by a definite and un-equivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severality. One cannot declare or manifest his mental state in a vaccum. To declare is to make known, to assert to others. Others must necessarily be those affected by the said declaration. Therefore, a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate. A declaration to be effective should reach the person or persons affected by one process or other appropriate to a given situation.

Adujallath Kathusumma v. Adujalath Beechu, I.L.R. 1950 Mad. 502, Suraj Narain v. Iqbal Narain, (1912) I.L.R. 35 All.80 (P. C.), Ramalinga Annavi v. Narayanan Annavi, (1922) I. L. R. 45 Mad. 489 (P. C.), Sayed Kasam v. Jorawar Singh, (1922) I.L.R. 50 Cal. 84 (P. C.), Soundararayanl v. Arunachalam Chetty, (1915) I. L. R. 39 Mad. 159 (P.C.), Bal Krishna v. Ram Krishna, (1931) I. L. R. All. 300 (P. C.), Babu Ramasaray Prasad Choudhary v. Radhika Devi, (1935) 43 L. W. 172 (P.C.), Kamepalli Avilamma v. Manmen Venketaswamy, (1913) 33 M. L.J. 745, Rama Ayyar v. Meenakshi Ammal, (1930) 33 L. W. 384, Narayana Rao v. Purshothama Rao, I. L. R. 1938 Mad. 315 and Indira v. Sivaprasad Rao, I. L. R. 1953 Mad. 245, discussed .

Once the declaration is expressed and brought to the knowledge of the person affected, it relates back to the date of
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declaration or the expression of intention to separate. As the doctrine of relation back involves retroactivity, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate, the rights accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.
Applying the above principles to the present case it must be held that on the death of Chimpirayya his interest devolved on Subbarao since it has not been established that Subbarao or his guardian had knowledge of the contents of Chimpirayya's will before Chimpirayya died.

JUDGMENT:
CIVIL APPELLATE JURISDICTION: Civil Appeal No. 165 of 61.
Appeal from the judgment and decree dated December 20, 1955, of the former Andhra Pradesh High Court in Appeal Suit No. 716 of 1952.
D.Narsaraju, Advocate-General for -the State of Andhra Pradesh, and T. V. R. Tatachari, for the appellants.
K.Bhimsankaram, G. Jagapathi Rao and Satyanarayana, for the respondent No. 1.
K. R. Choudhry, for the respondent No. 2.
1963. April 9. The judgment of the Court was delivered by
SUBBA RAO J.-This appeal by certificate is preferred against the judgment and Decree of the High Court of Andhra confirming those of the Subordinate judge, Bapatla, dismissing the suit filed by the appellants for possession of the plaint schedule properties. The following genealogy will be useful
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in appreciating the facts and the contentions of the parties
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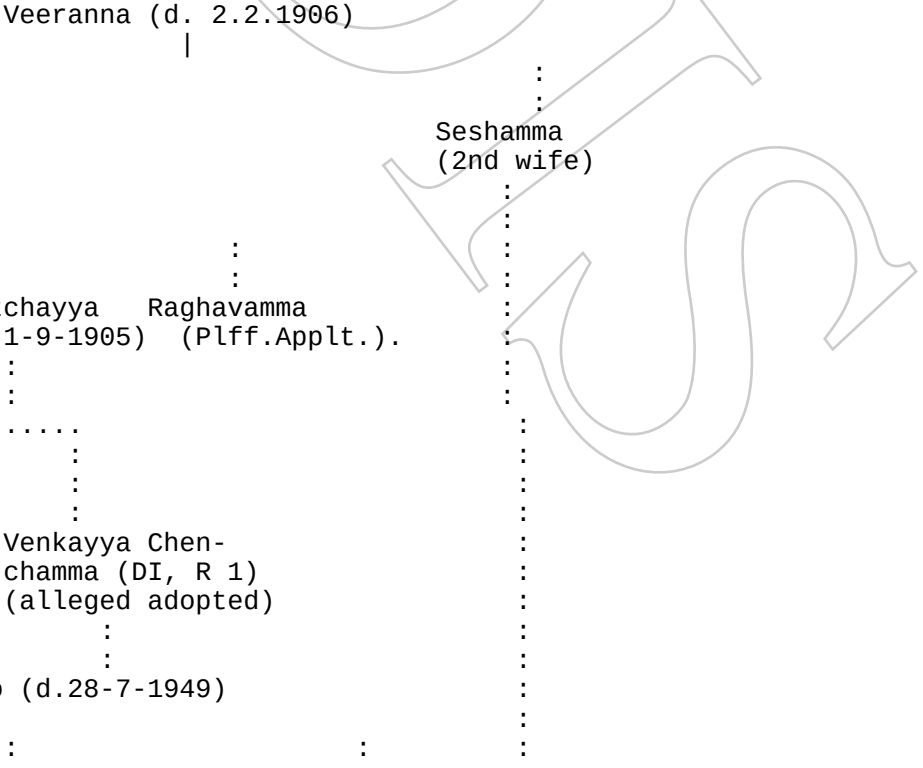

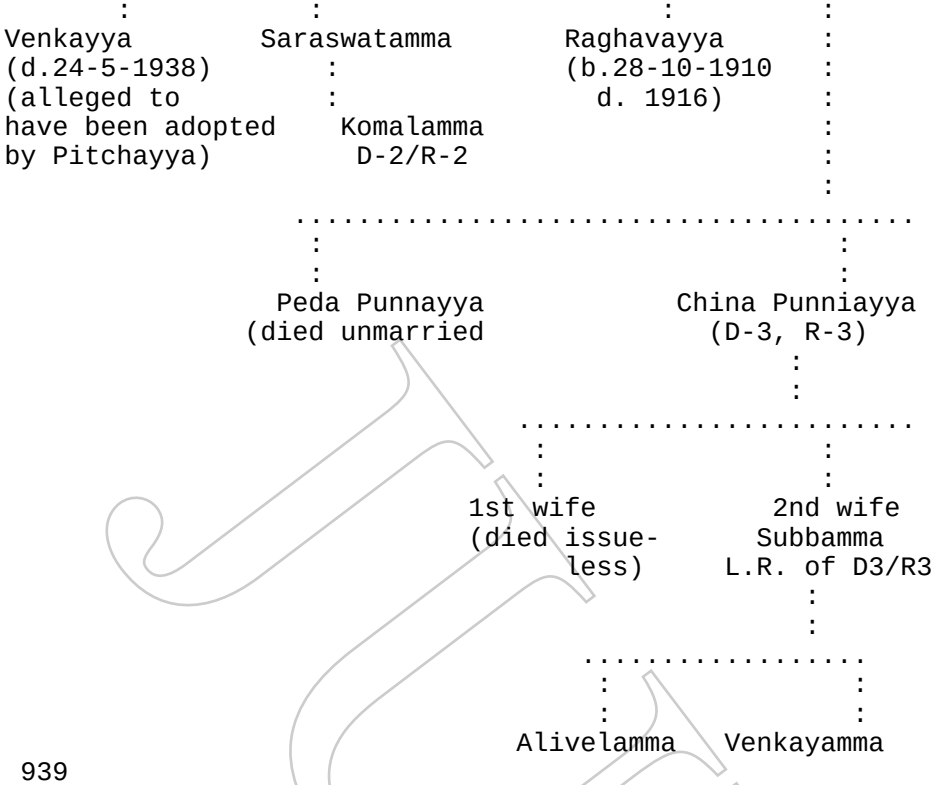

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It will be seen from the genealogy that Veeranna had two wives and that Chimpirayya and Pitchayya were his sons by the first wife and Peda Punnayya and China Punnayya were his sons by the second wife. Veeranna died in the year 1906 and his second son Pitchayya had predeceased him on 1-9-1905 leaving his widow Raghavamma. It is alleged that sometime before his death, Pitchayya took Venkayya, the son of his brother Chimpirayya in adoption; and it is also alleged that in or about the year 1895, there was a partition of the joint family properties between Veeranna and his four sons, Chimpirayya, Pitchayya, Peda Punnayya and China Punnayya, Veeranna taking only 4 acres of land and the rest of the property being divided between the four sons by metes and bounds. Venkayya died on May 24, 1938, leaving behind a son Subbarao. Chimpirayya died on May 5, 1945 having executed a will dated January 14, 1945 whereunder he gave his properties in equal shares to Subbarao and Kamalamma, the daughter of his pre-deceased daughter Saraswatamma; thereunder he also directed Raghavamma, the widow of his brother Pitchayya, to take possession of the entire property belonging to him, to manage the same, to spend the income therefrom at her discretion and to hand over the property to his two grandchildren after they attained majority and if either or both of them died before attaining majority, his or her share or the entire property, as the case may be, would go to Raghavamma. The point to be noticed is that his daughter-in-law, Chenchamma was excluded from management as well as from inheritance after the death of Chimpirayya. But Raghavamma allowed Chenchamma to manage the entire property and she accordingly came into possession of the entire property after the death of Chimpirayya. Subbarao died on July 28, 1949. Raghavamma filed a suit on October 12, 1950 in the Court of the Subordinate judge, Bapatlal, for possession of the plaint scheduled

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properties; and to that suit, Chenchamma was made the first defendant; Kamalamma, the second defendant; and China Punnayya, the second son of Veeranna by his second wife, the

third defendant. The plaint consisted of A, B, C, D, D-1 and E schedules, which are alleged to be the properties of Chimpirayya. Raghavamma claimed possession of A, B and C Scheduled properties from the 1st defendant, for partition and delivery of half share in the properties covered by plaint-schedule D and D-1 which are alleged to belong to her and the 3rd defendant in common and a fourth share in the property covered by plaint-schedule E which are alleged to belong to her and the 1st and 3rd defendants in common. As Kamalamma was a minor on the date of the suit, Raghavamma claimed possession of the said properties under the will -half in her own right in respect of Subbarao's share, as he died before attaining majority, and the other half in the right of Kamalamma, as by then she had not attained majority, she was entitled to manage her share till she attained majority.

The first defendant denied that Venkayya was given in adoption to Pitchayya or that there was a partition in the family of Veeranna in the manner claimed by the plaintiff. She averred that Chimpirayya died undivided from his grandson Subbarao and, therefore, Subbarao became entitled to all the properties of the joint family by right of survivorship. She did not admit that Chimpirayya executed the will in a sound and disposing frame of mind. She also did not admit the correctness of the Schedules attached to the plaint. The second, defendant filed a statement supporting the plaintiff. The third defendant filed a statement denying the allegations in the plaint and disputing the correctness of the extent of some of the items in the plaint schedules. He also averred that some of the items belonged to him exclusively and that Chimpirayy a had no right to the mm.

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On the pleadings various issues were raised and the main issues, with which we are now concerned, are issues I and 2, and they are : (1) whether the adoption of Venkayya was true and valid ; and (2) whether Pitchayya and Chimpirayya were divided as alleged by the plaintiff. The learned Subordinate judge, after considering the entire oral and documentary evidence in the case, came to the conclusion that the plaintiff had not established the factum of adop- tion of Venkayya by her husband Pitchayya and that she also failed to prove that Chimpirayya and Pitchayya were divided from each other ; and in the result he dismissed the suit with costs.

On appeal, a division Bench of the Andhra High Court reviewed the entire evidence over again and affirmed the findings of the learned Subordinate judge on both the issues. Before the learned judges another point was raised, namely, that the recitals in the will disclose a clear and unambiguous declaration of the intention of Chimpirayya to divide, that the said declaration constituted a severance in status enabling him to execute a will. The learned judge rejected that plea on two grounds, namely, (1) that the will did not contain any such declaration ; and (2) that, if it did, the plaintiff should have claimed a division of the entire family property, that is, not only the property claimed by Chimpirayya but also the property alleged to have been given to Pitchayya and that the suit as framed would not be maintainable. In the result the appeal was dismissed with costs. The present appeal has been preferred by the plaintiff by certificate against the said judgment.

Learned Advocate-General of Andhra Pradesh, appearing for thE appellant, raises before us the following points : (1) The findings of the High Court on adoption as well as on

partition were vitiated by the High Court not drawing the relevant presumptions permissible in the case of old
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transactions, not appreciating the great evidentiary value of public documents, ignoring or at any rate not giving weight to admissions made by parties and witnesses adopting a mechanical instead of an intellectual approach and perspective and above all ignoring the consistent conduct of parties spread over a long period inevitably leading to the conclusion that the adoption and the partition set up by the appellant were true. (2) On the assumption that there was no partition by metes and bounds, the Court should have held on the basis of the entire evidence that there was a division in status between Chimpirayya and Pitchayya, conferring on Chimpirayya the right to bequeath his divided share of the family property. (3) The will itself contains recitals emphasizing the fact that he had all through been a divided member of the family and that on the date of execution of the will he continued to possess that character of a divided member so as to entitle him to execute the will in respect of his share and, therefore, the recitals in the will themselves constitute an unambiguous declaration of his intention to divide and the fact that the said manifestation of intention was not communicated before his death to Subbarao or his guardian Chenchamma could not affect his status as a divided member. And (4) Chenchamma, the guardian of Subbarao, was present at the time of execution of the will and, therefore, even if communication was necessary for bringing about a divided status, it was made in the present case.

Mr. Bhimasankaram, learned counsel for the contesting first respondent, raises a preliminary objection to the effect that the certificate given by the High Court was confined only to three questions which did not include the issues relating to adoption or partition and, therefore, the appellant could not question the correctness of those findings in respect of those issues and that the question whether the recitals in the
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will themselves constituted a partition in status could not be allowed to be raised, as that point was raised only for the first time in the High Court. He further contends that both the Courts below gave concurrent findings of fact on the question of adoption as well as on partition and this Court will not reconsider the evidence as a rule of practice and there are no exceptional circumstances to depart from that salutary practice in this appeal. He further seeks to sustain the findings of the High Court on the evidence adduced in the case.

> We shall take the preliminary objection first. The material part of the certificate issued by the High Court rears thus:
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> subject matter of the suit in the court of first instance is upwards Rs. 20,000/(Rupees twenty thousand) and the value of the subject matter in dispute on appeal to the Supreme Court of India is also of the value of upwards of Rs. 20,000/- (Rupees twenty thousand) and that the affirming decree appealed from involves the following substantial questions of law :-
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> 1. Whether a will executed by a member of a joint Hindu family would of itself be operative to effect a severance between him and the other members of the family by reason

of the disposition contained in the will.
2. Whether a will executed by a member of a joint family on the assumption not proved to be well founded or correct that as a result of an anterior partition in the family he, the testator, was solely entitled to the properties disposed of by the will, would be effective to
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create a severance between the testator and the other members as on the date of the will, and
3. Whether the aforesaid pleas could be raised for the first time on appeal without their having been raised in the pleadings or at any stage of the trial."
The said certificate was granted within the terms of Article 133 (1) of the Constitution. The material part of Article 133 (1) reads :
"An appeal shall lie to the Supreme Court from any judgment, decree or final order ..... if the High Court certifies-(a) that the amount or value of the subject matter of the dispute in the court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament ; (b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount of value ; or (c) that the case is a fit one for appeal to the Supreme Court ;
and where the judgment, decree or final order appealed from affirms the decision of the court immediately below in any case other than a case referred in sub-clause (c), if the High Court further certifies that the appeal involves some substantial question of law."
Mr. Bhimasankaram contends that the conditions laid down for issuing a certificate must also govern the scope of the appeal to the Supreme Court, for, otherwise, the argument proceeds, the said conditions would become otiose. He concedes that the Supreme Court can exercise an unrestricted power of reviewing the judgment of the High Court
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in the case of a certificate hedged in with conditions by resorting to its power under Art. 136 of the Constitution, but this is not a case where it can do so especially having regard to the fact that the appellant did not seek to invoke that power.
Under Art. 133 of the Constitution the certificate issued by the High Court in the manner prescribed therein is a precondition for the maintainability of an appeal to the Supreme Court. But the terms of the certificate do not circumscribe the scope of the appeal, that is to say, once a proper certificate is granted, the Supreme Court has undoubtedly the power, as a court of appeal, to consider the correctness of the decision appealed against from every standpoint, whether on questions of fact or law. A successful party no doubt can question the maintainability of the- appeal on the ground that the certificate was issued by the High -Court in contravention of the provisions of Art. 13 3 of the Constitution, but once the certificate was good, the provisions of Art. 133 did not confine the scope

of the appeal to the certificate. We, therefore, reject this preliminary objection.

His next objection is that both the learned Subordinate Judge and, on appeal, the learned judges of the High Court gave concurrent findings of fact on adoption as well as on partition and it is the usual practice of this Court not to interfere with such findings, except in exceptional circumstances and there are no such circumstances in the present case,

Article 133 of the Constitution does not in any way limit the scope of an appeal, provided a proper and valid certificate is issued by the High Court thereunder. This Court has undoubtedly the power to review the concurrent findings of fact arrived at by the lower Courts in appropriate cases. But it has

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been a long standing practice of the Privy Council not to interfere with such findings based upon relevant evidence, except under extraordinary and exceptional circumstances : Vide Rani v. Khagendrar (1); Fatima Bibi v. Ahmed Bakshi(2), Harendra v. Haridasi (3); and Bibhabati v. Ramendra (4); The same practice has been adopted and followed by this Court since its inception : see Nanalal v. Bombay Life , Assurance Co. (5): Firm Srinivas Ram v. Mahabir Prasad (6) Trojan & Co. v. Naganna (7); Rajinder Chand v. Mst. Sukhi (8); Bhikka v. Charan Singh (9); M.M.B. Catholicos v. P. Paulo Avira (10) and Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinanyak Gosavi (11). .

The reason for the practice is stated to be that when facts have been fairly tried by two Courts and the same conclusion has been reached by both, it is not in the public interest that the facts should be again examined by the ultimate court of appeal. Whatever may be the reason for the rule, the practice ha% become fairly crystallized and this Court ordinarily will not interfere with concurrent findings of fact except in exceptional cases, where the findings are such that it "sbocks the conscience of the Court or by disregard to the forms of legal process or some violation of some principles of natural justice or otherwise substantial and grave injustice has been done." It is not possible nor advisable to define those circumstances. It must necessarily be left to the discretion of this Court having regard to the facts of a particular case. We have beard learned counsel on merits and we do not think it is one of those exceptional cases where we should depart from the salutary practice adopted by this Court.

Learned Advocate-General contends that the learned Subordinate judge as well as the High Court did not draw the appropriate presumptions arising from the fact that the transactions were old ones,

(1) (1904) I.L R. 31 Cal. 871. (2) (1903) S.L.R. 35 Cal. 271.

(3) (1914) A.I.R. 41 Cal. 972, 988.(4) (1946) 51 C.W.N 98.

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(5) A.I.R. 1950 S.C. 172.(6) A I R. 1951 S. C. 177.

(7) A.I.R. 1953 S.C. 235.(8) A.I.R. S.C. 286.

(9) [1959] Supp 2 S.C.R. 798(10) A.I.R 1959 S.C. 31,

(11) [1960] 1 S.C.R. 773

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nor did they give sufficient weight to the entries in the revenue records, the admissions made by the parties and to the conduct of the parties and such other important circumstances and, therefore, their findings are, liable to be questioned in this appeal. This argument in effect and substance means that the Courts below have not given due

weight to particular pieces of evidence. There is an essential distinction between burden of proof and onus of proof, burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence. The criticism levelled against the judgments of the lower Courts, therefore, only pertain to the domain of appreciation of evidence. We shall, therefore. broadly consider the evidence not for the purpose of revaluation, but to see whether the treatment of the case by the Courts below is such that it falls in the category of exceptional cases where this Court, in the interest of justice, should depart from its usual practice.

We shall first take the question of adoption.

It is well settled that a person who seeks to displace the natural succession to property by alleging an adoption must discharge the burden that lies upon him by proof of the factum of adoption and its validity. Here, the appellant alleges in the plaint that Venkayya: the son of Chimpirayya, was taken in adoption by her husband, Pitchayya. The first defendant, the widow of Venkayya, denies in her written-statement that her husband was adopted

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by Pitchayya. On the said pleadings the following issue was framed : "Whether the adoption of Venkayya is true and valid." On the pleading the burden of proof has rightly been placed on the plaintiff. The adoption is alleged to have taken place in the year 1905. The circumstances obtaining at that time were as follows : Chimpirayya was about 40 years old; he had only one son, Venkayya, who was aged about 2 years Pitchayya was about 25 years old and, therefore, ordinarily he had every prospect of having children of his own; it is, therefore highly improbable, unless there are special circumstances, that an only son of an elder brother was taken in adoption by his younger brother; though there is no legal prohibition, it is well known that ordinarily an only son is neither given nor taken in adoption'. P.W.I. admits that Addagada family is a prominent and affluent family in the village. But curiously no document of adoption was executed, no invitations were sent to relatives and village officers, and no expenditure incurred in connection with the adoption was entered in the accounts. Unless there were compelling and extraordinary circumstances which necessitated dispensing with all formalities, it is unthinkable that in a village there could have been an adoption made in such an affluent family without pomp and show. P. Ws. 1 and 2 speak to the adoption. P. W. I is the cousin of the appellant and P.W. 2 is appellant herself. P. W. I says that Pitchayya adopted his brother's son Venkayya and he lived for one month thereafter. The reason for the adoption, according to her, was that he was sick and was afraid that he would die. She graphically describes that Alivelamma, the wife of Chimpirayya, gave her son in adoption to the accompaniment of "mantrams and tantrams", that one Subbayya of Upputur was the prohit who officiated in the ceremony. In the cross-examination she says that Pitchayya did not die suddenly of an attack of fever but was suffering from dropsy

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for about a month and also even earlier; she admits that for important functions like marriage and adoption in their family they would invite the village officers and other important people of the village, but no such officers or important people were invited when Venakayya was taken in adoption. This witness was 60 years old in 1961 and therefore she would have been about 15 years at the time of the alleged adoption. Assuming for a moment that Pitchayya was suffering from dropsy, there is no reason why no important persons were invited for the function. If her evidence were true, Pitchayya took part in the alleged ceremony and it cannot therefore be suggested that he was so ill that all the formalities had to be dispensed with. Indeed, if he was ill and if the adoption was made without inviting the important people, that should have been the very reason why the village officers would have been invited and a document to evidence it executed. P. W. 2 is the appellant Raghavamma. She says that there was a ceremony of adoption officiated by the prohit Subbayya and that her brother-in-law and his wife gave the boy to her and her husband in adoption. She also deposes that her father and his brothers were present at the adoption. In the cross-examination she says that her husband lived for about 3 months after the adoption. She admits that no document was executed and that though there were accounts, no entries relating to the expenses of the adoption were entered therein. While P.W. I says that Pitchayya lived for one month after the adoption, P. W. 2 says that he lived for about 3 months thereafter. Neither in the pleadings nor in the evidence the date of adoption is given. The evidence of P. W. I is vague and appears to be improvised and the evidence of P. W. 2 discloses the improbabilities inherent in such an adoption. They also contradict each other on material circumstances. The Courts below have disbelieved their evidence.

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The appellant and the first respondent relied upon the conduct of the parties subsequent to the alleged adoption and filed a number of documents to support their respective cases. Documentary evidence considered [omitted].

So far as the documentary evidence goes, the position is as follows: Till 1911 there was no document recording the fact that Venkayya was the adopted son of Pitchayya, and that after 1911 there had been contradictory recitals in the documents. Broadly speaking whenever Venkayya executed a document he described himself as the son of Chimpirayya, and whenever third parties executed documents, he was described as the adopted son of Pitchayya. He filed suits, sometimes as the son of Chimpirayya and sometimes as the adopted son of Pitchayya. His name was entered in the accounts relating to Paruchur, but not in the accounts relating to Upputur; he gave evidence declaring himself as the son of Chimpirayya and also insured-his life as such he operated on the accounts of third parties as the son of Chimpirayya; while in the will executed by Chimpirayya, he was described as the adopted son of Pitchayya on the death of Venkayya the appellant herself, who under the will was entitled to continue in possession and management, handed over the entire management to the first respondent indicating thereby that the will was not really intended to take effect. In this state of evidence it is not possible to say that there had been a consistent pattern of conduct from which a Court should draw the inference that the adoption must have taken place.

Attempt is made to reconcile these contra. dictory

descriptions in the documents by developing different theories. Learned Advocate-General suggests that there was no reason why Chimpirayya should have put forward Venkayya falsely as the

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adopted son of Pitchayya as early as 1911 when he should not have gained any advantage thereby, for without the aid of adoption the entire property of Pitchayya would have come to him by survivorship. Mr. Bhimasankaram surmises that Chimpirayya put forward the adoption without the knowledge of Raghavamma to safeguard his family interests against the possible adoption later on by Raghavamma of a stranger and that subsequently both joined together with a view to put pressure upon the first respondent to marry her son Subbarao to Kamalamma. He also suggests that Chimpirayya began to put forward his son Venkayya as the adopted son of Pitchayya only after the birth of his second son in 1910 and that after the death of that son in 1916, his only interest was to see that his grand son by his son Venkayya was married to his grand-daughter by his daughter and that the will was executed only to put pressure upon the first respondent. That the will was executed only for this limited purpose, learned counsel argues, is clearly demonstrated by the fact that Raghavamma, though she was entitled to be put in possession of the entire property, handed over the management of the same to the first respondent after the death of Chimpirayya. The said suggestions made by learned counsel on both sides are only based on surmises. and they cannot be made the basis for a court's conclusion. In this state of evidence when both the Courts found, on a careful consideration of oral and documentary evidence and the probabilities arising therefrom that the appellant on whom the burden of proof lay to establish that Venkayya was adopted to Pitchayya has failed to discharge it,. we cannot say that the -finding was vitiated by such errors that we should review the entire evidence over again and come to a conclusion of our own. We therefore, accept the concurrent finding of fact that there was no adoption. The next question is whether the concurrent finding of fact arrived at by the Courts below on the

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question of partition calls for our interference. In the plaint neither the details of the partition nor the date of partition are given. In the written statement the first respondent states that Chimpirayya died undivided from his son's son Subbarao and so Subbarao got the entire property by survivorship. The second issue framed was whether Chimpirayya and Pitchayya were divided as alleged by the plaintiff. The partition is alleged to have taken place in or about the year 1895; but no partition deed was executed to evidence the same. The burden is certainly on the appellant who sets up partition to prove the said fact. P.W. 1, though she says that Veeranna was alive when his sons effected the partition, admits that she was not present at the time of Partition, but only heard about it. P.W. 2, the appellant, deposes that her husband and his brothers effected partition after she went to live with him; she adds that in that partition her father-in-law took about 4 acres of land described as Bangala Chenu subject to the condition that after his death it should be taken by his four sons, that at the time of partition they drew up partition lists and recited that each should enjoy what was allotted to him and that the lists were written by one Manchella Narasinhayya; she also admits that the lists are in existence, but she has not taken any steps to have them

produced in Court. She says that each of the brothers got pattas according to the partition, and that the pattas got for Pitchayya's share are in his house; yet she does not produce them. She says that she paid kist for the lands allotted to Pitchayya's share and obtained receipts; but the receipts are not filed. She admits that she has the account books; but they have not been filed in Court. On her own showing there is reliable evidence, such as accounts, pattas, receipts, partition lists and that they are available; but they are not placed before the Court. Her interested evidence cannot obviously be acted upon when all the relevent evidence has been suppressed.

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Strong reliance is placed upon the alleged admissions made by D.W.8 and D. W. 10. D.W. 8 is the karnam of Paruchur for over 30 years. He says in his evidence that Veeranna took 3 acres and 63 cents. of land with a condition that it should go to his sons in equal shares and the rest of the lands were divided into two shares, one taken by Chimpiryya and Pitchayya and the other by Peda Punnayya and China Punnayya. He explains that some lands, where the soil is partly good and partly bad, were divided into four parts and one good and one bad went to each sharer. This evidence does not contain any admission that there was a partition inter se between the four brothers; indeed it only supports the case that there was a partition between the children of Veeranna by his two wives. The division in four plots in respect of certain lands was only for an equitable distribution of the said lands between the sons of two wives. D.M. 10 in his evidence says that he does not know in what year the partition took place; that it went on for two months; that some of the lands were divided into four plots. His evidence is also consistent with the evidence of D.W. 8. There is no admission by defendants' witnesses that the division was between the four brothers. The oral evidence therefore, does not support the case of the appellant that there was a division inter se between Chimpirayya and Pitchayya.

Now coming to the documentary evidence, as we have already indicated, all the relevant documents admitted to have been in existence have not been placed before the Court and an adverse inference has, therefore, to be drawn against the appellant. Even the documentary evidence filed in the case does not help the appellant. The family property is situate in three villages, Paruchur, Upputur and Podapadu. If there was a partition inter se between the 4 -brothers, in the ryotwari settlement

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effected in 1906 the names of the brothers should have been entered separately in the revenue accounts but the relevant register pertaining to that settlement has not been filed. Even in the later accounts of the year 1918 the name of Venkayya was entered only in respect of some lands in village Paruchur, but no such entries are found in respect of the other villages. Those entries were made on a representation made by Chimpirayya and no one was interested to object to the entries. Even these accounts show that in the earlier register Pitchayya's name was not entered. Though they have some probative value of possession, they do not show that the said lands shown against Venkayya fell to the share of Pitchayya at the partition in the year 1895. In Benyala Chenu alleged to have been given to Veeranna with a condition that after his death the four sons should take it in equal shares, Venkayya did not get his share as he should if Pitchayya was divided from Chimpirayya and if he

was adopted to Pitchayya. P. W. 2 admits that Chimpirayya had two acres in Bengala Chenu and Punnayya had the other two acres. This admission belies the statement that there was a partition inter se among the four brothers, for if the said partition was true, one acre should have fallen to Pitchayya's branch. P. W. 3 also says that Chimpirayya was in enjoyment of the said two acres.

Exs. B-52, B-53, B-54, B-55, B-56 and B-57 established that the original mortgage of 1900 executed in favour of Veeranna was later on renewed only by Chimpirayya and Punnayya, that after the alleged partition separate mortgages were executed for portions of the debt in favour of Chimpirayya and Putinayya, that the property which was the subject matter of the mortgages was sold in favour of Chimpirayya and Punnayya, and thereafter, under Exs. B-61, B-62 and B-63, Chimpirayya and Punnayya sold the said land to

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third parties. These series of documents support the case that there was no partition inter se between Chimpirayya and Pitchayya. So too, another land obtained by Veeranna under an oral sale in 1886 was formally sold by a registered sale in favour of Chimpirayya and Punnayya under Ex. B-60 in 1911. If Pitchayya had a share, Venkayya should have been one of the vendses. Exs. B-67 and B-68 are the assessment orders of the year 1933 and Chimpirayya was assessed as representing a Hindu -undivided family. At the time of assessment if Venkayya was not a member of the Hindu joint family, there was no other mate member in the family. The assessment could only be explained on the basis that Venkayya and Chimpirayya were members of a Joint Hindu family. Both the Courts, on the basis of the said evidence and other evidence, came to the conclusion that it has not been established that in the partition of 1895 there was a division inter se between Chimpirayya and Pitchayya.

Some argument is made on the question of burden of proof in the context of separation in a family. The legal position is now very well settled. This Court in Bhagwati Prasad Sah v. Dulhin Rameshwari Juer (1), stated the law thus :

> "The general principle undoubtedly is that a .Hindu family is presumed to be joint unless the contrary is proved, but where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. There is no presumption on the other side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the
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> (1) [1951] S. C. R. 603, 607.
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> 956
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> evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief."

Whether there is a partition in a Hindu joint family is, therefore, a question of fact; notwithstanding the fact that one or more of the members of the joint family were separated from the rest, the plaintiff who seeks to get a

specified extent of land on the ground that it fell to the share of the testator has to prove that the said extent of land fell to his share; but when evidence has been adduced on both sides, the burden of proof ceases to have any practical importance. On the evidence adduced in this case, both the Courts below found that there was no partition between Chimpirayya and Pitchayya as alleged by the appellant. The finding is one of fact. We have broadly considered the evidence only for the purpose of ascertaining whether the said concurrent finding of fact is supported by evidence or whether it is in any way vitiated by errors of law. We find that there is ample evidence for the finding and it is not vitiated by any error of law.

Even so, learned Advocate-General contends that we should hold on the evidence that there was a division in status between Chimpirayya and the other member of the joint Hindu family i. e.. Subbarao, before Chimpirayya executed the will, or at any rate on the date when he executed it.

It is settled law that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severality. Omitting the will, the

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earlier documents filed in the case do not disclose any such clear intention. We have already held that there was no partition between Chimpirayya and Pitchayya. The register of changes on which reliance is placed does not indicate any such intention. The statement of Chimpirayya that his younger brother's son is a sharer in some lands and, therefore, his name should be included in the register, does not ex facie or by necessary implication indicate his unambiguous declaration to get divided in status from him. The conflicting descriptions in various documents introduce ambiguity rather than clarity in the matter of any such declaration of intention. Be it as it may, we cannot therefore hold that there is any such clear and unambiguous declaration of intention made by Chimpirayya to divide himself from Venkayya.

Now we shall proceed to deal with the will, Ex. A-2 (a), on which strong reliance is placed by the learned Advocate-General in support of his contention that on January 14, 1945, that is, the date when the will was executed, Chimpirayya must be deemed to have been divided in status from his grandson Subbarao. A Will speaks only from the date of death of the testator. A member of an undivided coparcenary has the legal capacity to execute a will; but he cannot validly bequeath his undivided interest the joint family property. If he died an undivided member of the family, his interest survives to the other members of the family and, therefore. the will cannot operate on the interest of the joint family property. But if he was separated from the family before his death, the bequest would take effect. So, the important question that arises is whether the testator in the present case became separated from the joint family before his death.

The learned Advocate-General raises before us the following contentions in the alternatives : (1) Under

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the Hindu law a manifested fixed intention as con-tradistinguished from an undeclared intention unilaterally expressed by a member to separate himself from the joint family is enough to constitute a division in status and the publication of such a settled intention is only a proof thereof. (2) Even if such an intention is to be manifested

to the knowledge of the persons affected, their knowledge dates back to the date of the declaration, that is to say, the said member is deemed to have been separated in status not on the date when the other members have knowledge of it but from the date when he declared his intention. The learned Advocate-General develops his argument in the following steps (1) the Will, Ex. A-2 (a), contains an unambiguous intention on the part of Chimpirayya to separate himself from Subbarao, (2) he manifested his declaration of fixed intention to divide by executing the will and that the Will itself was a proof of such an intention; (3) when the Will was executed, the first respondent the guardian of Subba Rao was present and, therefore, she must be deemed to have had knowledge of the said declaration'; (4) even if she had no such knowledge and even if she had knowledge of it only after the death of Chimpirayya, her knowledge dated back to the date when the Will was executed, 'and, therefore, when Chimpirayya died he must be deemed to have died separated from the family with the result that the Will would operate on his separate interest.

The main question of law that arises is whether a member of a joint Hindu family becomes separated from the other members of the family by a mere declaration of his unequivocal intention to divide from the family without bringing the same to the knowledge of the other member of the family. In this context a reference to Hindu law texts would be appropriate, for they are the sources from which

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the Courts evolved the doctrine by a pragmatic approach to the problems that arose from time to time. The evolution of the doctrine can be studied in two parts, namely, (1) the declaration of the intention, and (2) the communication of it to others affected thereby. On the first part the following texts would throw considerable light. They are collated and translated by Viswanatha Sastri J., who has a deep and abiding knowledge of the sources of Hindu Law in Adivalath Katheesumme v. Adiyalath Beechu (1) ; and we accept his translations as correct and indeed learned counsel on both sides proceeded on that basis. Yajnavalkya Ch. 11, 6. 121. "In land, corrody (annuity, etc.), or wealth received from the grandfather, the ownership of the father and the son is only equal." Vijnaneswara commenting on the said sloka says :

> "..... And thus though the mother is having menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place." (Setlur's Mitaksbara, pp. 646-648.)
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> Saraswati Vilasa, placitum 28 : "From this it is known that without any speech (or explanation) even by means of a determination (or resolution) only, partition is effected, just as an appointed daughter is constituted by mere intention without speech."
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> Viramitrodaya of Mitra Misra : (Ch. 11. pl. 23) "Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener).

(1) I.L.R. 1950, Mad. 502.

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Vyavahara Mayukha of Nilakantabhatta: (Ch. IV, S. iii)

"Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration "I am separate from thee" because severance is a particular state(or condition) of the mind and the declaration is merely a manifestation of this mental state or condition)."

The Sanskrit expressions "sankalpa" (resolution) in Saraswati Vilas, "ekechchaya (will of a single coparcener) in Viramitrodaya, "budhivisesha" (particular state or condition of the mind) in Vyavahara Mayukha, bring out the idea that the severance of joint status is a matter of individual discretion, The Hindu law texts, therefore support the proposition that severance in status is brought about by unilateral exercise of discretion.

Though in the beginning there appeared to be a conflict of views, the later decisions correctly interpreted the Hindu law texts. This aspect has been considered and the law pertaining thereto precisely laid down by the Privy Council in a series of decisions; see Suraj Narain v. Iqbal Narain (1); Girija Bai v. Sadashiv Dhundiraj (2); Kawal Nain v. Budh Singh (3); and Ramalinga Annavi v. Narayana Annavi (4). In Syed Kasam v. Jorawar Singh (5); the judicial Committee, after reviewing its earlier decision laid the settled law on the subject thus :

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitaksbara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to bold his share separately, even though no actual division takes place ... ."

(1) (1912) I.L.R. 35 All. 80 (P.C.)
(2) (1916) I.L.R. 43 Cal. 1031 (PC.).
(3) (1917) I.L.R. 39 All. 496 (P.C.)
(4) (1922) I.L.R. 45 Mod. 489 (P.C.)
(5) (1922) I.L.R. 50 Cal. 84 (P.C.)

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So far, therefore, the law is well settled, namely, that a severance in estate is a matter of individual discretion and that to bring about that state there should be an unambiguous declaration to that effect are propositions laid down by the Hindu law texts and sanctioned by authoritative decisions of Courts. But the difficult question is whether the knowledge of such a manifested intention on the part of the other affected members of the family is a necessary condition for constituting a division in status. Hindu law texts do not directly help us much in this regard except that the pregnant expressions used therein suggest a line of thought which was pursued by Courts to evolve concepts to meet the requirements of a changing society. The following statement in Vyavahara Mayukha is helpful in this context :

declaration" "I am separate from thee" because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this marital state (or condition). "

One cannot declare or manifest his mental state in a vacuum. To declare is to make known, to assert to others. "Others" must necessarily be those affected by the said declaration. Therefore a member of a joint Hindu family seeking to separate himself from others will have to make known his

intention to the other members of the family from whom he seeks to separate. The process of manifestation may vary with circumstances. This idea was expressed by learned judges by adopting different terminology, but they presumably found it as implicit in the concept of declaration. Sadasivalyerj.,in Soundarajan v. Arunachalam Chetty (1), said that the expression "clearly expressed" used by the Privy Council in Suraj Narain v. Iqbal Narain (2), meant "clearly expressed to the definite knowledge of the other coparceners."

(1) (1915) I.L.R. 39 Mad. 159 (P.C.)
(2) (1912) I.L.R. 35 All. 80 (P.C.)

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In Girja Bai v. Sadashiv Dhundiraj (1), the Judicial Committee observed that the manifested intention must be "clearly intimated" to the other coparceners. Sir George Lowndes in Balkrishna v. Ram krishna (2), took it as settled law that a separation may be effected by clear and unequivocal declaration on the part of one member of a joint Hindu family to his coparceners of his desire to separate himself from the joint family'. Sir John Wallis in Babu Ramasray Prasad Choudhary v. Radhika Devi (3), again accepted as settled law the proposition that "a member of a joint Hindu family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declaration of a fixed intention to become separate..... Sir John Wallis C. T., and Kumaraswami Sastri J. in Kamepalli Avilam v. Mannem Venkataswamy (4), were emphatic when they stated that if a coparcener did not communicate, during his life time, his intention to become divided to the other coparcener or coparceners, the mere declaration of his intention, though expressed or manifested, did not effect a severance in status. These decisions authoritatively laid down the proposition that the knowledge of the members of the family of the manifested intention of one of them to separate from them is a necessary condition for bringing about that member's severance from the family. But it is said that two decisions of the Madras High Court registered a departure from the said rule. The first of them is the decision of Madhavan Nair J. in Rama Ayyar v. Meenakshi Ammal (5). There, the learned judge held that severance of status related back to the date when the communication was sent. The learned judge deduced this proposition from the accepted principle that the other coparceners had no choice or option in the matter. But the important circumstance in that case was that the testator lived till after the date of the service of the notice. If that was so that decision on the facts was correct. We shall deal with the doctrine

(1) (1916) I.L.R. 43 Cal. 1031 (P.C.)
(2) (1931) I.L.R. 33 All. 300 (P.C)
(3) (1935) 43 L.W. 172 (P.C.)
(4) (1917) 13 M.L.J. 746,
(5) (1930) 33 L W.

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of relating back at a later stage. The second decision is that of a Division Bench of the Madras High Court, consisting of Varadachariar and King, JJ., it) Narayana Rao v. Purushotama Rao (1). There, a testator executed a will disposing of his share in the joint family property in favour of a stranger and died on August 5, 1926. The notice sent by the testator to his son on August 3, 1926 was in fact received by the latter on August 9, 1926. It was contended that division in status was effected only on August 9, 1926, when the son received the notice and as the testator had died on August 5, 1926 and the estate had

passed by survivorship to the son on that date the receipt of the notice on August 9, 1926 could not divest the son of the estate so vested in him and the will was therefore, not valid. Varadachariar J., delivering the judgment of the Bench observed thus :

> "It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners."
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> After pointing out the various anomalies that might arise in accepting the contention advanced before them, the learned judge proceeded to state :
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> "It may be that if the law is authoritatively settled, it is not open to us to refuse to give effect to it merely on the ground that it may lead to anomalous consequences but when the law has not been so stated in any decision of authority and such a view is not necessitated or justified by the reason of the rules, we see no reason to interpret the reference to "'communication" in the various cases as implying that the severance does not arise until notice has
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> (1) I.L.R. 1968 Mad. 315, 318,
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> 964
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> actually been received by the addressee or addressees."

We regret our inability to accept this view. Firstly, because, as we have pointed out earlier, the law has been well settled by the decisions of the judicial Committee that the manifested intention should be made known to the other members of the family affected thereby ; secondly, because there would be anomalies on the acceptation of either of the views. Thirdly it is implicit in the doctrine of declaration of an intention that it should be declared to somebody and who can that somebody be except the one that is affected thereby.

There is yet another decision of the Madras High Court, which is of Rajamannar C. J. and Venkataramma Ayyar, J. in Indira v. Sivaprasada Rao (1). There, the testator despatched a telegram addressed to his undivided brother on August 4, evening. In the ordinary course it must have been delivered on August 5. The testator died on August 6 morning. Learned counsel appearing for the brother contended that it had not been established that the telegram reached his client before the testator died and, therefore, the will did not operate on the testator's interest in the joint family property. The learned judges rejected that contention on the basis of the judgment of Varadachariar and King JJ. in Narayana Rao v. Purushothama Rao (2). As a division Bench they were bound by the decision of another Division Bench; but the real basis of the decision is found at p. 256:

"In the case before us, the telegram was despatched on the 4th evening and in the ordinary course it must have been delivered on the 5th and the testator died only on the 6th morning."

(1) I. L. R. 1953 Mad. 245, 2 56.

(2) I.L.R. 1938 Mad. 315, 318.

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It appears that in the circumstances of the case the learned

judges presumed that the telegram must have reached the testator's brother before the testator died. The conclusion arrived at by the learned judges would certainly be right on the said facts. But we cannot agree with the view in so far as they agreed with that expressed by Varadachariar and King, JJ.

Viswanatha Sastri, J., in Adiyalath Katheesumma v. Adiyalath Beechu (1), elaborately and exhaustively considered the question that is now posed before us. There, a member of a tarwad served a notice of his unambiguous intention to separate from the other members of the family on the Karnavan of the tarwad. The question was whether the communication of his intention to the Karnavan was sufficient. The appeal first came up before Satyanarayana Rao and Panchapagesa Sastri JJ. Satyanarayana Rao J. held that the notice was not sufficient to constitute a severance, as it was not served on all the other members of the tarwad; and Panchapagesa Sastri,J., held that the service on the Karnavan or the manager of the joint family was sufficient as he was representative of the family. As there was difference of view between the two learned judges, the matter was placed before Viswanatha Sastri.J. and the learned judge agreed with Panchapagesa Sastri.J. But in the course of the judgment, the learned judge went further and held that a unilateral declaration of an intention to become divided on the part of a member of a joint Hindu Family effects severance, in status and therefore the dispatch to, or receipt by, the other members of the family of the communication or notice announcing the intention to divide on the part of one member of the family is not essential or its absence fatal to a severance in status. The conclusions of the learned judge on the question now raised before us are expressed in two places and they are at pp. 543 and 549:

(1) I. L. R. 1953 Mad. 245,256.

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> "The only reasonable rule that can be deduced from the texts and the several decisions of the Judicial Committee is that the declaration of an intention to divide on the part of a member of the family should be clear and unequivocal and should be indicated, manifested, or published in such a manner as is appropriate in the circumstance,-, of the case. One method, but not the only method, of such manifestation or publication is by delivering a notice containing a declaration of intention to become divided to the other members of the family."
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> At p. 549 it is stated:
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> "There must be some manifestation, indication, intimation or expression of that intention to become divided, , so as to serve as authentic evidence in case of doubt or dispute. What from that manifestation, expression, or intimation of intention should take would depend upon the circumstances of each case, there being no fixed rule or right formula. The dispatch to or receipt by the other members of the family of a communication or notice announcing the intention to divide on the part of one member of the family is not essential nor its absence fatal to a severance in status."

We agree with the learned judge in so far as he held that there should be an intimation, indication or expression of

the intention to become divided and that what from that manifestation should take would depend upon the circumstances of each case. But if the learned judge meant that the said declaration without it being brought to the knowledge of the other members of the family in one way or other constitutes a severance in status, we find it difficult to accept it. In our view, it is implicit in the expression "declaration'.' that it should be to the
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knowledge of the person affected thereby. An uncommunicated declaration is no better than a mere formation or harbouring of an intention to separate. It becomes effective as a declaration only after its communication to the person or persons who would be affected thereby.
It is, therefore, clear that Hindu Law texts suggested and Courts evolved, by a process of reasoning as well as by a pragmatic approach, that such a declaration to be effective should reach the person or persons affected by one process or other appropriate to a given situation.
This view does not finally solve the problem. There is yet another difficulty. Granting that a declaration will be effective only when it is brought to the knowledge of the other members affected, three questions arise, namely, (i) how should the intention be conveyed to the other member or members; (ii) when it should be deemed to have been brought to the notice of the other member or members; and (iii) when it was brought to their notice, would it be the date of the expression of the intention or that of knowledge that would be crucial to fix the date of severance. The questions posed raise difficult problems in a fast changing society. What was adequate in a village polity when the doctrine was conceived and evolved can no longer meet the demands of a modern society. Difficult questions, such as the mode of service and its sufficiency, whether service on a manager would be enough, whether service on the major members or a substantial body of them would suffice, whether notice should go to each one of them, how to give notice to minor members of the family, may arise for consideration. But we need not express our opinion on the said questions, as nothing turns upon them, for in this appeal there are only two members in the joint family and it is not suggested that
Subba Rao
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did not have the knowledge of the terms of the will after the death of Chimpirayya.
The third question falls to be decided in this appeal, is this : what is the date from which severance in status is deemed to have taken place ? Is it the date of expression of intention or the date when it is brought to the knowledge of the other members? If it is the latter date, is it the date when one of the members first acquired the said knowledge or the date when the last of them acquired knowledge or the different dates on which each of the members of the family got knowledge of the intention so far as he is concerned ? If the last alternative be accepted, the dividing member will be deemed to have been separated from each of the members on different dates. The acceptance of the said principle would inevitably lead to confusion. If the first alternative be accepted, it would be doing lip service to the doctrine of knowledge, for the member who gets knowledge of the intention first may in no sense of the term be a representative of the family. The second alternative may put off indefinitely the date of severance, as the whereabouts of one of the members may not be known at all or may be known after many years. The Hindu law texts

do not provide any solution to meet these contingencies. The decided cases also do not suggest a way out. It is, therefore, open to this Court to evolve a reasonable and equitable solution without doing violence to the principles of Hindu law. The doctrine of relation back has already been recognised by Hindu Law as developed by Courts and applied in that branch of the law pertaining for adoption. There are two ingredients of a declaration of a member's intention to separate. One is the expression of the intention and the other is bringing that expression to the knowledge of the person or persons affected. When once that knowledge is brought home-that depends upon the facts of each case it relates back

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to the date when the intention is formed and expressed. But between the two dates, the person expressing the intention may lose his interest in the family property; he may withdraw his intention to divide; he may die before his intention to divide is conveyed to the other members of the family: with the result, his interest survives to the other members. A manager of a joint Hindu family may sell away the entire family property for debts binding on the family. There may be similar other instances. If the doctrine of relation back is invoked without any limitation thereon, vested rights so created will be affected and settled titles may be disturbed. Principles of equity require and common sense demands that a limitation which avoids the confusion of titles must be placed on it. What would be more equitable and reasonable than to suggest that the doctrine should not affect vested rights ? By imposing such a limitation we are not curtailing the scope of any well established Hindu law doctrine, but we are invoking only a principle by analogy subject to a limitation to meet a contingency. Further, the principle of retroactivity, unless a legislative intention is clearly to the contrary, saves vested rights: . As the doctrine of relation back involves retroactivity by parity of reasoning, it cannot affect vested rights. It would follow that, though the date of severance is that of manifestation of the intention to separate, the rights accrued to others in the joint family property between the said manifestation and the knowledge of it by the other members would be saved.

Applying the said principles to the present case, it will have to be held that on the death of Chimpirayya his interest devolved on Subbarao and, therefore, his will, even if it could be relied upon for ascertaining his intention to separate from the family, could not convey his interest in the family property, as it has not been established that Subbarao or his

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guardian had knowledge of the contents of the said will before Chimpirayya died.

It is contended that the first respondent, as the guardian of Subbarao, had knowledge of the contents of the Will and, therefore, the Will operates on the interest of Chimpirayya. Reliance is placed upon the evidence of P. W. 11, one Komanduri Singaracharyulu. He deposed that be was present at the time the Will was executed by Chimpiryya and that he signed it as an identifying witness. In the cross-examination he said that at the time of the execution of the Will the first defendant-respondent was inside the house. This evidence is worthless. The fact that she was inside the house cannot in itself impute to her the knowledge of contents of the Will or even the fact that the Will was registered that day. D. W. 4 is the first respondent

herself. She says in her evidence that she did not know whether the Sub-Registrar came to register the Will of Chimpirayya, and that she came to know of the Will only after the suit was filed. In that state of evidence it is not possible to hold that the first respondent, as guardian of Subbarao, had knowledge of the contents, of the Will.

In this view, it is not necessary to consider the further question whether the Will contained a clear and unambiguous declaration of intention on the part of the testator to divide himself from the members of the joint family.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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