1864.
In re BA'LKRISHNA GANPATJI.

in order to obtain such inspection? We do not think we ought to do so. This court has been in the habit of exercising testamentary and intestate jurisdiction over the wills and estates of deceased Hindús and Muhammadans, and it is difficult to define the exact limits of that jurisdiction. We will order that Rámchandra Kerobá do deposit the testamentary documents, admitted to be in his possession, in the hands of the officer of the court, where the applicant is to have an opportunity of inspecting and taking a copy of them. After doing so he may take such further proceedings as he may be advised: we do not say anything about proving the Will or testamentary papers, or about their future custody. With this decision no case that has been cited conflicts. The case of the Will of *Tiruvalúr Kirustnappa Mudali*, cited from the Madras Reports, decides that that court will not compel a Hindú to bring in and prove an alleged Will. Our order only goes the length of ordering an alleged Will to be deposited in court to be inspected by a person who is next of kin of the alleged testator, and who has been refused inspection by the parties in possession of it.

ARNOULD, J., concurred.

Anstey applied for costs.

PER CURIAM:—Having regard to the lâches and delay of the party applying, the proper order to make will be that each party shall bear his own costs.

LATE SUPREME COURT, EQUITY SIDE.

1861.
March 28.

VINA'YAK ANANDRA'V, LAKSHUMAN ANANDRA'V, MA'DHAVRA'V ANANDRA'V, and VENKOBA' ANANDRA'V .....*Plaintiffs.*

LAKSHMIBA'I, widow and executrix of the last Will and Testament of BHAGVANTRA'V VENKA'JI, deceased, NA'NIBA'I, SUNDRA'BA'I, and SOKA'BA'I .....*Defendants.*

Hindu Law—Succession—Widow's Right to succeed to Son's Property—Sisters—Moveable and Immoveable Property—Parents—Brethren—Marriage of Sisters not Cause of Exclusion from Inheritance.

A Hindú, an inhabitant of Bombay, entitled to separately acquired moveable and immoveable property, died leaving a widow, an infant son, three daughters, and a brother. The son died in infancy, and without having married.

1861.
VINA'YAK ANANDRA'V *et al.* *v.* LAKSHMIBA'I *et al.*

Held, on demurrer, that the widow, as mother of the son, inherits his property, as to the moveables absolutely, as to the immoveables for life, with remainder to the sisters of the son as his heirs absolutely, and that as against the defendants (the widow and daughters) the plaintiffs (as sons of a separated brother) have by Hindú law no claim as heirs to any part of the property.

The word "parents," in the order of succession as laid down in the Mitákshará, includes father and mother, and in like manner "brethren" includes sisters as well as brothers.

Held, on appeal: In a separated family sisters take as heirs to an unmarried and intestate brother, in preference to relations of the father. Marriage does not exclude them from the inheritance.

THIS case came on for argument on the joint and several demurrer of the four defendants to the plaintiffs' bill, SAUSSE, C. J., and ARNOULD, J., 22nd February.

Anstey in support of the demurrer.

Westropp and *White* in support of the bill.

Cur. ad. vult.

The facts appear fully in the judgment of the Court allowing the demurrer. It was pronounced by Arnould, J., on the 28th of March, whilst the Chief Justice was holding the Criminal Sessions, and was forwarded to the Privy Council by the Chief Justice in the following terms:—

The case set up by the bill is as follows:—Bhagvantráv Venkáji (the deceased husband of the defendant Lakshmibái, and the deceased father of the three other defendants) and one Anandráv Venkáji (the deceased father of the plaintiffs) were brothers, and, as the bill alleges, "the sons and sole heirs and legal personal representatives, according to Hindú law, of one Venkobá Maṇkoji, who died intestate in the Christian year 1832." Bhagvantráv Venkáji died in May 1851, leaving, as the bill in the third paragraph alleges, his brother the said Anandráv Venkáji, the defendant Lakshmibái his widow, the defendants his three daughters, named Náníbái, Sundrábái, and Sokábái respectively, and one son named Gajánan, then an infant of the age of about three months, him surviving. He left considerable property both moveable and immoveable, and a Will, to be more particularly noticed presently. Anandráv Venkáji, the brother of the testator and the father of the plaintiffs, died in May 1853, having made a Will (not set out), and leaving the plaintiffs his sole heirs and legal personal representatives him surviving. Gajánan, the infant son of the testator, died in June 1853, leaving the defendant Lakshmibái his mother, the other defendants his sisters, and the plaintiffs his cousins, him surviving. The

1861.

VINA'YAK ANANDRA'V *et al.* v. LAKSHMIBA'I *et al.*

Will of Bhagvantráv Venkáji, which is very short, is set out in the 6th paragraph of the bill. By this instrument, after making provision for the due celebration, according to Hindú law and religion, of his funeral rites and ceremonies, he directs his wife to get his three daughters, Nánibái, Sundrábái, and Sokábái, married at reasonable charges, to collect outstandings and pay debts, and to defray the expenses of his funeral and other ceremonies during the first year after his death. He then devises as follows :—

"The remainder property, both moveable and immoveable, &c. I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son Gujanun, an infant, the joys, &c. I have made for my wife and children, they belonging themselves respectively" (he means, apparently, "they belong to them respectively"). "I do hereby constitute, make, and ordain Luxumeebaee sole executrix of this my last Will and Testament. She will manage the whole affairs of my estate and property, but by the advice and consent of my father-in-law, Bhasker Shamjee, until my little son Gujanun attain to his proper age, and good and honest conduct."

Such are the material portions of the Will. Lakshmibái, the bill alleges, immediately after her husband's death took possession of the whole of his moveable and immoveable estate, and in July 1851 obtained probate of his Will. It is admitted by the bill that she has paid all her deceased husband's debts and funeral expenses, has got his three daughters (her co-defendants) suitably married, and defrayed their marriage expenses out of his estate. The bill charges that Lakshmibái is not entitled, either under the Will or by Hindú law, to more than a life-estate in the estate and effects of her deceased husband; that the Will, if it purports to give her more than a life-estate, is void as against the plaintiffs, who, according to Hindú law, are the ultimate sole heirs and legal personal representatives of Bhagvantráv Venkáji and of his deceased son Gajánan, and that as such they are entitled on the decease of Lakshmibái to take and enjoy the whole estate of Bhagvantráv and his son in undivided shares, as and for an estate of inheritance. The bill then alleges against Lakshmibái, in her management of the estate, various acts and omissions in the nature of waste, and also charges her with attempting to adopt one of her brother's sons as the son and heir of her deceased husband. The bill prays (amongst other things)

that the plaintiffs may be declared entitled to the estate and effects of which the said Bhagvantráv Venkáji died possessed, or at least of so much thereof as consists of immoveable estate, as the ultimate heirs in remainder for an estate of inheritance, and that the defendant Lakshmibái may be restrained by injunction from selling or disposing of any part of the estate, from committing waste, and from adopting one of her brother's sons. It further prays for an account, and, if necessary, for a receiver.

To this bill the defendants have demurred, on the grounds that the plaintiffs have not shown themselves to be, according to Hindú law, heirs or legal personal representatives of Bhagvantráv Venkáji or his son Gajánan, or that they or any of them are or is entitled, on the decease of Lakshmibái, to take and enjoy the whole or any part of the estate of the said Bhagvantráv or his said son, in undivided shares or otherwise, as or for an estate of inheritance, or for any other estate, or that they or any of them are or is interested in the account, as prayed. There is a further ground of demurrer for want of parties, in respect of the non-joinder of the husbands of the three defendants the daughters, which, in the view the Court takes of the case, it will not be material to consider, for in our opinion the defendants are entitled to succeed upon the other grounds on which they have relied.

It was admitted that the property, which was the subject of Bhagvantráv's bequest and the present suit, must be taken upon the pleadings to have been (as in fact it was) property separately acquired by him. Although alleged in the bill, yet it was not contended before us in argument, that Bhagvantráv had not an absolute disposing power over his separate estate, and no question was in effect raised, as to Lakshmibái's right to take the moveable property absolutely.

It appears to us that the devise may be construed as giving to Lakshmibái and Gajánan, 1*st*, either a joint tenancy for life; or, 2*nd*, a tenancy in common for life; or, 3*rd*, a joint tenancy in *quasi* fee; or, 4*th*, a tenancy in common in *quasi* fee. If construction No. 1 be adopted, Lakshmibái would take a life-interest in the entire estate by survivorship, and the reversion would vest as an undisposed-of residue in Bhagvantráv's

1881.

VINA'YAK ANANDRA'V *et al.* v. LAKSHMIBA'I *et al.*

heir, who was Gajánan, and upon the death of the latter would go to his (Gajánan's) next heir. On construction No. 2 Lakshmibái would take her moiety for life, and Gajánan's share would, with the reversion in Lakshmibái's moiety, upon his death descend upon his next heir. On construction No. 3 Lakshmibái would take under the Will an absolute interest by survivorship in the residue. On construction No. 4 (that of a tenancy in common in *quasi* fee) Lakshmibái's share vested in her absolutely, and on Gajánan's death his moiety descended upon his next heir.

The substantial question for decision upon the pleadings as they stand is, in whom is the absolute interest in the property of Bhagvantráv Venkáji now vested. According to all the authorities recognised at this side of India, Lakshmibái, as mother of Gajánan, became his heir, and if she were to take an absolute estate in the property, the plaintiff could have no title. The *quantum* of estate which she is allowed to take in the character of heir to her son, is not free from doubt; although in the category of those who take as heirs to a separated brother, there is no distinction or difference made, between the *quantum* of estate taken by a mother, from that taken by a son, a father, a brother, or any other relative who admittedly takes in such an inheritance the most absolute estate known to Hindú law.* Where the *quantum* of estate has been cut down to a life-interest when the inheritance descends upon a female, the restriction must be ascribed to the influence of usage, as it is not to be found in the early canons of inheritance. In Devkúvarbái's case† this court held that the widow of an intestate, childless, and separated brother takes the moveable property absolutely, and the immoveable for life only, with remainder to the heirs of the intestate. That decision was very much based upon the principle of allowing the law of usage to control the letter of that portion of the written law which was in favour of the widow. In the Mitákshará on Inheritance, Ch. II., Sec. 1., entitled "Right of the widow to inherit the estate of one who leaves no male issue," the commentator, after declaring the order of succession (see para. 2) in words quoted from Yajnavalkya, and after discussing various interpretations and opinions, states the conclusion (para. 39),

* Manu, Ch. IX., Secs. 185, 217; Mitákshará, on Inheritance, Ch. II. Sec. 3; Vyavahára Mayúkha, Ch. IV., Sec. 8, p. 14.

† The case here referred to is reported in the present volume, p. 130.

as follows :—"Therefore, it is a settled rule that a wedded wife, being chaste, takes *the whole estate* of a man who being separated from his co-heirs, and not subsequently reunited with them, dies leaving no male issue."

However, in the view which we take of this case, and for the purposes of this demurrer, it will not be necessary to decide whether a mother takes by inheritance from her son the absolute interest, or an estate for life only; that she is entitled to the latter may be taken to be conceded upon the pleadings, and there cannot be, in our opinion, any doubt upon that point at this side of India. Supposing, then, Lakshmibái to take a life-estate only in the descended inheritance, the reversion vests in the next heir of Gajánan, and, upon the best authorities recognised in this presidency, that heir is his sisters, who are defendants in this suit.

In the Vyavahára Mayúkha, Ch. IV., Sec. 8, the commentator, after enumerating the mother (in paras. 14 and 15), the uterine brother and his sons (paras. 16 and 17), the paternal grandmother (para. 18), (and no paternal grandmother of Gajánan is shown to be in existence on the face of this bill), proceeds thus, in para. 19 :—

" In default of her (the paternal grandmother) comes the sister under this text of Manu, 'To the nearest sapinda (male or female) after him (or her) in the third degree, the inheritance next belongs;' and this of Brihaspati, 'where many claim the inheritance of a childless man, whether they be paternal or maternal relations (sakulya), or more distant kinsmen (bándhava), he who is the nearest of them shall take the estate.' And (the next rank is) hers (sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship (gotrajatva): it does not particularly specify *the same* gentile kindred; neither is she mentioned in the texts as the occasion of taking the wealth [but as next of kin she succeeds]."

Considering the high authority of the Mayúkha on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but according to certain commentators on the Mitákshará the sister comes next in

1861.

VINA'YAK ANANDRA'V *et al.* *v.* LAKSHMIBA'I *et al.*

order of inheritance after the brother. The passage in the Mitákshará is contained in the first paragraph of Ch. II., Sec. 4: "On failure of the father, *brethren* share the estate." Nanda Pandita and Bálam-Bhatta, says Mr. Colebrooke in his note to this passage, consider that as including "brothers and sisters," in the same manner in which "parents" have been explained "mother and father," and conformably with an express rule of grammar. They observe that the brother inherits first, and in his default the sister. This opinion, Mr. Colebrooke states, is controverted by Kamalákara and by the author of the Vyavahára Mayúkha. It certainly is so in para. 16 of Ch. IV., Sec. 8, of the Mayúkha, but it should be observed that in para. 15 of the same chapter and section the doctrine of the Mitákshará, now generally regarded as established, as to the words "parents" including both "mother and father," is controverted, and on precisely the same grammatical grounds. Sir Thomas Strange,* after stating generally that the sister is excluded from succession, adds, "such appears to be the law of the Bengal provinces, but is not to be taken as universal, opinions existing that the term 'brethren,' in the enumeration of heirs in the Mitákshará, includes sisters (as 'parents' have been seen to do 'father and mother'), but," observes Sir Thomas Strange, "they stand controverted." For this position he refers to the appendix in his 2nd vol. to Ch. VI., pp. 243, 244, and especially to the remark of Mr. Colebrooke there printed. In the passage thus referred to, Mr. Colebrooke observes, "commentators on the Mitákshará allow the sister to come in on failure of brothers. This opinion, however, is controverted," and, to show that that is so, Mr. Colebrooke refers to the very passage already cited from the Mitákshará, from Mr. Colebrooke's note to which it appears that one of the two authorities cited as controverting the position is the Mayúkha. It further appears that the opinion as to the generic word "brethren" including "sisters" is controverted there, on precisely the same grammatical grounds on which the same authority had controverted the opinion that the generic word "parents" includes the mother, which latter opinion Sir Thomas Strange regarded as well established. The expression, therefore, in Sir T. Strange's first volume, that the opinion in question stands controverted (if by such an expression be meant is conclusively or finally

* Hindú Law, Vol. I., p. 146.

controverted) must be regarded as too strong. A similar construction should apparently be given to the words "parents" and "brethren." He no doubt adds, on the authority of Mr. Colebrooke, that Jagganátha observes it is nowhere seen that sisters inherit the property of their brothers; but Jagganátha, whatever the case may be on the other side of India, is not of binding authority on this.

It would on the whole appear a safe proposition to lay down that in this part of India, even if the opinion be not established that the term "brethren" includes "sisters," and, therefore, if sisters do not inherit on failure of brothers or brothers' sons, yet at all events that the doctrine of the Mayúkha must be held to prevail, and that sisters come next in succession to the paternal grandmother. Either doctrine, however, will entitle the sisters here to succeed to the inheritance of Gajánan upon the death of Lakshmibái.

As to the mode in which sisters take, it would appear by analogy that they take as daughters. In a passage from the commentary of Nandá Pandita, cited by Mr. Colebrooke in his annotations to para. 5 of Sec. 5 of the second chapter of the Mitákshará, occur these words: "The daughters of the father and other ancestors must be admitted like the daughters of the man himself, and for the same reason," but the daughters of the man himself take *absolutely*, and so, therefore, do the sisters.

In Devkúvarbái's case* this court, in 1859, after lengthened consideration of all the accessible authorities, and after consulting the Shástris both in Puṇá and in the Ṣadr Adálat of Bombay, held that daughters on this side of India taking by inheritance take the estate absolutely. This doctrine was mainly based on the authority of the Mayúkha,† and the passage is as follows:—

"In default of the wife the daughter succeeds. Even as Manu says, 'the son of a man is even as himself, and the daughter is equal to the son: how then can any other inherit his property but a daughter, who is as it were himself.'" In the case of Devkúvarbái, each Shástri rested his opinion as to the inheritability of the daughters on this same passage of the Mayúkha, referring to it as a work of high and gener-

* *Vide infrà*, p. 130. † Ch. IV., Sec. VIII., para. 10.

1861.

VINA'YAK ANANDRA'V *et al.* *v.* LAKSHMIBA'I *et al.*

ally received authority, not only in Gujarát, but in Bombay and the Dakhan, that is to say, over the larger and more important portion of this Presidency. Of the general authority of the Mitákshará on this side of India, there cannot be, and in fact, never has been, any doubt, and on this point the Mitákshará is not less clear and explicit than the treatise already cited. The text of the Mitákshará already referred to is in Ch. II., Sec. 2, intituled "Right of the daughters and daughters' sons." In para. 1 of that section it is laid down "on failure of her (*i.e.*, the widow) the daughters inherit." Para. 2 is as follows :—"Thus Kátyáyana says, 'Let the widow succeed to her husband's wealth, provided she be chaste, and in default of her let the daughter inherit if unmarried.' Also Brihaspati: 'the wife is pronounced successor to the wealth of her husband, and in her default the daughter. As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" In the face of authorities so clear and explicit as these are, and so generally regarded as binding on this side of India, it becomes immaterial to examine the case referred to in argument, as having been decided in Bengal, where a different school of doctrine prevails as to some portions of the line of Hindú inheritance. We will observe that the above expression in Kátyáyana, "let the daughters inherit if unmarried," is shown by the next following paragraph in the Mitákshará not to be restrictive, but inferential only, as between married and unmarried daughters.

It thus appears that upon no construction of Bhagvantráv's Will have the plaintiffs, on the face of the bill, shown that they are entitled, upon the decease of Lakshmibái, to take the whole or any part of the estate of Bhagvantráv for an estate of inheritance or any other estate. They have, of course, equally failed in showing that they are interested in the account as prayed, and the demurrer must be allowed with costs.

Demurrer allowed.

1864.

VINA'YAK ANNADRA'V *et al.* *v.* LAKSHMIBA'I *et al.*

The plaintiffs in September 1861 petitioned the Court for, and obtained, leave to appeal to the Privy Council against this decree.

The appeal was heard, and the judgment of the Privy Council* was delivered on February 17th, 1864, by Knight Bruce, L.J. :—

THE question raised by the demurrer, the subject of this appeal, is whether the plaintiffs in the suit, the appellants, have by the statements in their bill shown any interest in the estate of Bhagvantráv, the testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhagvantráv was a Hindú, resident at Bombay. He died in the year 1851, having made his Will in the English language in that year. He appointed his wife, one of the respondents, now his widow, sole executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus :—"All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral, and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to Luxumeebaee, my dearly beloved wife, and my little son, Gujanun, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression "the joys, &c., I have made for my wife and children, they belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys, &c."

The testator, as has been said, died in the same year, survived by his wife, the executrix, one of the respondents, and her three daughters by him, who are also respondents, and by the infant son, Gajánan, who died in the year 1853, a child under four years of age.

Observations have been very properly made concerning the true construction of the words of the gift of the resi-

* Present : Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir Lawrence Peel, Sir James W. Colvile.

1864.

VINA'YAK ANNADRA'V *et al.* *v.* LAKSHMIBA'I *et al.*

due—whether as giving or not giving an absolute interest, and whether as giving or not giving an interest in the nature of what English lawyers call a joint tenancy, or as giving or not giving an interest of the nature of what English lawyers call a tenancy in common. In the circumstances that happened their Lordships do not think it necessary to give an opinion upon that point or those points of construction: for whether the gift was absolute or not absolute, whether in common, as we call it, or in joint tenancy, as we call it, upon the testator's death the widow and his son took the whole between them, at least in possession, and upon the death of the son, an infant of tender years, the widow became in every possible view entitled to the whole, at least for her life. There is no possible claim to an interest in possession in the appellants. Their claim is thus founded:—They contend that upon the death of Gajánan the absolute interest in the whole, or a moiety subject to a life-interest in the widow, devolved upon his heirs, and that those heirs were the appellants, and not the three daughters of the testator, the co-respondents, with the widow. They make out, they say, that proposition by the nature of their relationship, namely, that they were the sons of the brother of the testator, and, being so related in the male line, they excluded by law, they say, the sisters of Gajánan from the heirship to him, a proposition which the respondents deny.

Now upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts of India, and a general leaning in favour of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point upon which probably it may be said that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice, in giving his judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says (p. 9 of the Appx., line 29), "Supposing then Lakshmibái to take a life-estate only in the descended inheritance, the reversion vests in the next heir of Gajánan,

and, upon the best authorities recognised in
that heir is his sisters, who are defendants in th
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after enumerating the mother (see paras. 14 and 15), th
brother and his sons (paras. 16 and 17), the paternal g
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is shown to be in existence on the face of this bill), the commentator, in para. 19, proceeds thus :—'In default of her (the paternal grandmother) comes the sister, under this text of Manu: 'To the nearest sapinda (male or female) after him (or her) in the third degree the inheritance next belongs;' and this of Bríhaspati, 'Where many claim the inheritance of a childless man, whether they be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the gentile relationship: neither is she mentioned in the texts as the occasion of taking the wealth, but as next of kin she succeeds.' Considering the high authority of the Mayúkha on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but according to certain commentators on the Mitákshará the sister comes next in order of inheritance after the brother. The passage in the Mitákshará is contained in the first paragraph of Ch. II., Sec. 4. 'On failure of the father, brethren share the estate.' Nanda Pandita and Bálam Bhatta, says Mr. Colebrooke in his note to this passage, consider that as including 'brothers and sisters,' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar. They observe that the brother inherits first, and in his default the sisters; this opinion, Mr. Colebrooke states, is controverted by Kamalacara, and the author of the Mayúkha. It certainly is so in para. 16 of Ch. IV., Sec. 8, of the Mayúkha, but it should be observed that in para. 15 (Ch. IV. Sec. 8) of the same commentary the doctrine of the Mitákshará now generally regarded as established, as to the word 'parents' including both 'mother and father,' is controverted, and on precisely the same grammatical grounds."

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in

...s subject, or upon the construction of the ...n,' is wrong; but certainly neither are they satis... ...e construction put on the passage in the Miták... ...hich has been mentioned, and generally adopted as ...ms in Bombay, is wrong. Their Lordships come to the ...nclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother, rather than the paternal relatives of the description of the present plaintiffs. Accordingly their Lordships think that they may safely and properly in the present instance adopt or accept that rule. They consider that, in Bombay at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the Will of the testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that, therefore, the appellants here, the sons of the brother of the testator, are suing in a matter in which they have not shown the slightest interest, nor with which have they any concern. The result is, in their Lordships' opinion, that the demurrer was rightly allowed, and that the appeal should be dismissed, with costs.

It ought to be added, as to the argument that the marriage of the daughters, and their marriage portions, excluded them from participation, that their Lordships think there is no ground for that argument, either in principle or otherwise.

Appeal dismissed.