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be exercised by the Magistrates, no mention is made of any power of the District Magistrate to sanction a prosecution under sections 468 and 469. Padmanabh's pleader has argued from this that the Magistrate of the District has no such power in the case of offences committed before a Magistrate of the First Class. But the argument is deprived of weight by the circumstance that the list in question equally omits all mention of the District Magistrate's power, (which is unquestioned,) to sanction prosecutions in respect of offences committed before Magistrates of the lower grades. The list in question is useless, unless exhaustive: and it is for the Legislature to consider whether the omission here noticed, ought not to be supplied.

Order accordingly.

[ORIGINAL CIVIL.]

Before Sir M. R. Westropp, Knt., Chief Justice, Sir Charles Sargent, Knt., Justice, and Mr. Justice West.

1876. April 29.

LALLUBHA'I BA'PUBHA'I, KA'NDA'S MULCHAND, RA'MDA'S JAGMOHANDA'S, AND MA'NIKJI DHANJIBHA'I (ORIGINAL PLAINTIFFS), APPELLANTS *v.* MA'NKUVARBA'I, WIDOW AND EXECUTRIX OF GANGA'DA'S VIZBHUKANDA'S, WHO WAS SURVIVING EXECUTOR OF MULJI NANDLA'L AND BHA'ISHET TRIKAMLA'L AND JAIKISANDA'S GANGA'DA'S (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu executor, rights of—Limitation—Act XIV. of 1859, Section I., clauses 12 and 16, and Section 2—Trustee—Adverse possession—Inheritance, Female right of—Sapinda-relationship what constitutes—Gotraja-sapinda.

1. The rule of English common law, that the undisposed of residue of personal estate vests in the executor beneficially, does not apply to the will of a Hindu testator in India.

2. In the exercise of the testamentary power amongst Hindus, the intention to disinherit must be clear and unambiguous. Mere bequests of special portions of the testator's estate to the heir, without language of disherison, do not exclude him from the undisposed of residue.

3. An executor, who by the will is made an express trustee for certain purposes, is, as to the undisposed of residue, a trustee, within the scope of section 2 of Act XIV. of 1859, for the heir or heirs of the testator.

* Suit No. 563 of 1870, Appeal No. 196 of 1872.

4. In the Presidency and Island of Bombay the wife is a *sapinda* as well as a *gotraja* of her husband, and, if he die (without leaving a son or grandson), she, on the subsequent death of his separated *sapinda*, and in the absence of any specially designated heir entitled to preference, ranks in the same place in the order of succession to the property of such separated *sapinda* as her husband would have occupied if he were living. Thus the widow of a first cousin *ex parte paternâ* of the deceased *propositus* was held prior in order of succession to a fifth male cousin *ex parte paternâ* of the same.

5. Or, in other words, a wife becomes by her marriage a *sagotra-sapinda* of her husband and his *gotraja-sapindas*, and in that capacity succeeds as a widow to property which he would have taken as a *sapinda* before the male representative of a remoter branch.

6. The Institutes of Manu, the Mitakshara, and the Mayukha, although of great authority in the Presidency of Bombay, are all subject to the control of law and usage. No one of them is, as a whole, in full force in any part of the Presidency. In all of them there are precepts which, if they ever were practical law, have, for a time beyond the memory of living men, been obsolete.

7. *Salter* v. *Cavanagh*, (1) *Lakshmibái* v. *Jayrám Hari* (2) followed and approved.

THE plaintiffs sued for an account of the estate and effects of one Mulji Nandlál, the undisposed of residue of which they claimed as his nearest heirs.

Mulji Nandlál died on the 15th January 1840, leaving a widow Sarasvatibái, and one daughter Jethibái, who was married to Haridás Kásidás. By his will, made in the Guzerathi language, he disposed only of a portion of his property which was of considerable amount, and consisted both of real and personal property; and he appointed Gangádás Vizbhukandás, his first cousin by the father's side, and Trikamlál Avechuldás, his nephew, to be his executors. The executors proved the will and entered into possession of the estate. Jethibái died without issue in May 1841, leaving her husband Haridás Kásidás surviving. Trikamlál died in 1842, and, after his death, the other executor, Gangádás, continued in sole possession of the personal estate, and received the rents and profits of the real estate of the testator, allowing the widow Sarasvatibái a sum of Rs. 25 per month for her maintenance.

(1) 1 Drury and Walsh 668.

(2) 6 Bom. H. C. Rep. O. C. J. 152.

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Gangadás died in May 1861, leaving a widow, the defendant Mánkuvarbái, and three daughters. By his will he appointed Mánkuvarbái his executrix, and she thereupon took possession of his estate and of the estate of Mulji Nandlál.

Sarasvatibái died on the 20th March 1862 intestate, and without issue. The following paragraphs of the plaint set forth the plaintiffs' claims in this suit :—

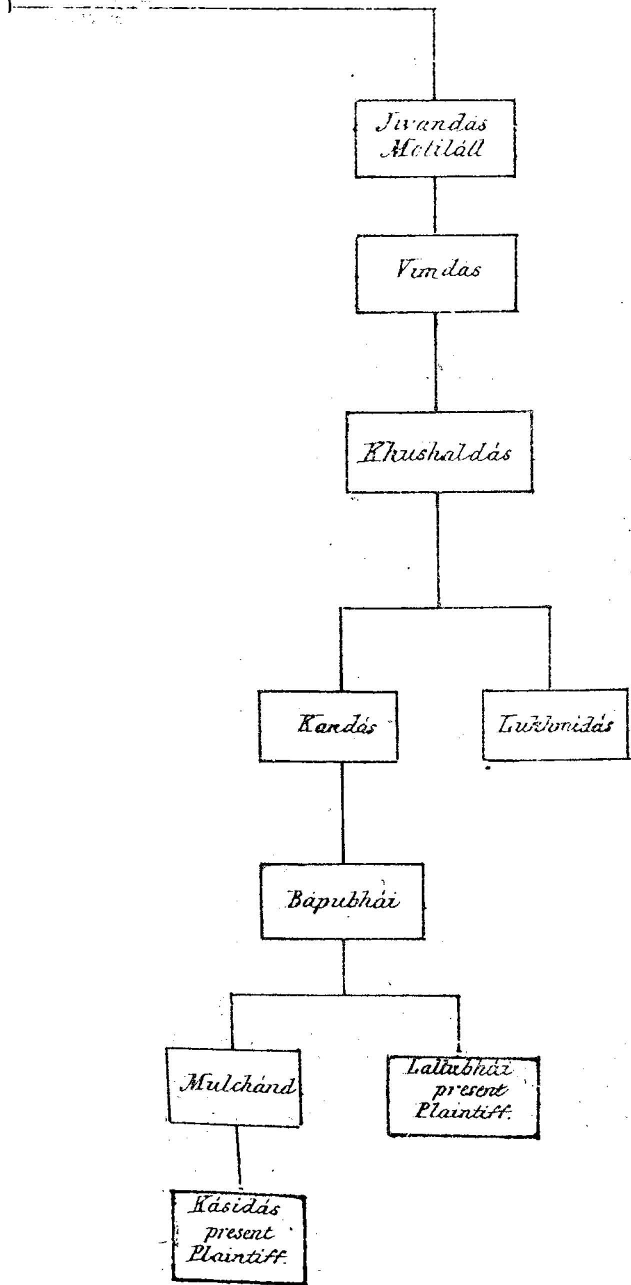
14. "The plaintiffs contend that the residue of the said Mulji Nandlál's estate was undisposed of by his will, and that, in the events which have happened, the said Sarasvatibái became beneficially entitled thereto, and that on her death, intestate and without issue, it passed, according to Hindu law, to the nearest male heirs of the said Mulji Nandlál.

15. "The plaintiffs and the said Mulji Nandlál are, respectively, descended from two brothers, Jivandás Motiláll, the ancestor of the plaintiffs, and Narsidás Motiláll, the ancestor of the said Mulji Nandlál. At the time of the death of the said Sarasvatibái there was no male descendant of the said Narsidás Motiláll alive, and the plaintiffs then were and are now the nearest male descendants of the said Jivandás Motiláll, and, as such, the heirs and legal personal representatives of the said Mulji Nandlál."

The defendant Mánkuvarbái in her written statement pleaded that the suit was barred by the provisions of the Limitation Act XIV. of 1859. She further alleged that Haridás Kásidás, who as the surviving husband of Jethibái, the only child of the testator, was believed to be entitled to the residuary estate of the said Mulji, had for valuable consideration assigned his interest in the said estate to Bháishet Trikamlál on the 26th January 1863, and that on 7th January 1874 the said Bháishet Trikamlál had executed a release to the defendant Mánkuvarbái of all claims against her relating to Mulji's estate.

She further stated that, in February 1868, she (Mánkuvarbái) had duly adopted one Jaikisandás as son to her deceased husband Gangádás Vizbhukandás, and she submitted that the said Jaikisandás was lawfully entitled to the residuary estate of Mulji.

The other defendants to the suit also put in written statements.


Jivandás Motiláll
Vimdás
Khushaldás
Kandás
Lukhmidás
Bápubhái
Mulchánd
Lallubhái present Plaintiff.
Kásidás present Plaintiff.

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The suit came on for trial before the Honourable Mr. Justice Bayley. The principal issue raised, was whether the plaintiffs were the nearest heirs of Mulji Nandlál according to Hindu law, and the learned Judge, following the decision in *Lakshmibái* v. *Jayrám Hari*,[1] recorded his finding in the negative, and passed a decree for the defendants.

The material facts and the subsequent proceedings in the suit are fully stated in the judgment of the Chief Justice. The annexed table shows the relationship of the various parties.

The appeal was heard by a Full Bench consisting of WESTROPP, C. J., SARGENT and WEST, JJ.

Farran and *Badrudin Tyabji* for the appellants:—The main points involved in this case are these: 1st, whether, according to Hindu law, the term *gotraja* includes females at all; and, 2nd, if it does, whether the widow of a *gotraja-sapinda* is herself a *gotraja-sapinda*. As to the first point, we say no; because Manu lays down the general principle that females cannot inherit. That the general effect of Manu's doctrine is to exclude all women from inheritance, see *Vijiárangam* v. *Lakshuman*.[2] The authors of the Mayukha and Mitakshara both rely on Manu, and nowhere controvert his general proposition further than that they specially name as heirs certain females occupying very special positions and not mentioned by Manu. They do not lay down the broad proposition that females are capable of inheriting generally, and where they name a particular female as heir, they explain the reason why she is so to be considered. Thus, Nilakantha in pl. 2, 10, 14, 18, 19[3] shows why a man's wife, daughter, mother, grandmother, and sister, respectively, are to inherit. So in the Mitakshara, ch. II., secs. 1—5.[4] From the section last cited, mentioning the grandmother *and gotrajas*, we have to conclude whether or not the Mitakshara intends that females generally should inherit.

To support the respondents' contention on this point, it will be necessary for this Court to hold that the Mayukha and Mitakshara

(1) 6 Bom. H. C. Rep. O. C. J. 152.

(2) 8 Bom. H. C. Rep. 244 O. C. J.; see p. 258.

(3) See Stokes' Hindu Law, Vyav. Mayukha, chap. 4, sec. 8.

(4) See Stokes' Hindu Law, Mitakshara, chap. 2.

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intend females generally to inherit. But, as we have seen, certain females only are enumerated as capable of inheriting, and those are females in a very peculiar category; while, on the other hand, no mention at all is made of those near female relations whom we should have expected to have been named as heirs, if all females were capable of inheriting generally. If females were intended to inherit generally, a brother's daughter would have come into the enumeration immediately after a brother's son; but there is no mention whatever of a brother's daughter. Great-grandmothers take; but that is on the same principle as that which allows mothers and grandmothers to take. This is shown from their taking before great-grandfathers; but it does not follow that the widows of collaterals are to take immediately after their husbands, as is laid down in West and Bühler. The contrary rather is to be inferred; because, if they did so take, they would exclude their own sons. The correctness of the judgment in *Lakshmibái* v. *Jayrám Hari*[1] is, in fact, now on its trial. That judgment, we say, was based on insufficient authority, being founded entirely on the law laid down in West and Bühler. The Full Bench ruling in *Amrita Kumári* v. *Lakhi Náráyan*[2] supports the proposition that women other than those enumerated in the Mitakshara do not take under that law, and *Girdhárilál* v. *The Government of Bengal* [3] contains a like decision on the same point that a sister's son can take. In *Thakoorain* v. *Mohun Lal* [4] there is a general proposition stated that a sister's son cannot take; but this is got over in both the cases last cited as being merely a *dictum* in a case in which the contention was between a sister's son and a *gotraja-sapinda*, so that the point whether the former could take at all, never really arose. Lastly, Strange lays it down that, as a rule, women are incompetent to inherit.[5]

As to the second point in this case; assuming that women are capable of inheriting generally, the question arises,—does the widow of a first cousin exclude a more distant male relative? Again, we say no; and in support of this contention rely on 1st

(1) 6 Bom. H. C. Rep. 152 A. C. J.

(2) 2 Beng. L. R. 28 F. B.; see p. 43.

(3) 1 Beng. L. R. 44 P. C.

(4) 11 Moo. Ind. Ap. 386; S. C. 7 Calc. W. R. 25 P. C.

(5) 1 Str. H. L. 168.

West and Bühler, 148, 159, 163. A first cousin's widow can only seek to come in as a *gotraja*; and the question here is whether, according to Nilakantha, she is a *gotraja*; but Nilakantha, under the term *gotraja*, intends to include only those originally born in the family.[1] Nor can a woman by marriage be born into the *gotra* of her husband, for Nilakantha holds that a married sister still belongs to the *gotra* of her brother, and no person can belong to two *gotras*.

Upon the other points in the case the following authorities were cited: *Hunt and Bateman*, 10 Ir. Eq. Rep. 360; *Salter* v. *Cavanagh*, 1 Dru. and Walsh; *Gibbs* v. *Rumsey*, 2 V. and B. 294; *Thomas* v. *Thomas*, 2 K. and J. 79; *Mapp* and *Elcock*, 2 Phill. 79, S. C. 3 H. L. C. 492; *Pelley* v. *Bascombe*, 33 L. J. Ch. N. S. 100, S. C. 34 L. J. Ch. N. S. 233; *Lalchand* v. *Gumtibái*, 8 Bom. H. C. Rep. 140 O. C. J.; *Báboo Lall Doss* v. *Jamál Ally*, 9 Calc. W. R. 187; *Musst Khyroonissá* v. *Salehooniássá*, 5 Calc. W. R. 238; *Umá Sundári Dási* v. *Dwárkenáth Roy*, 2 Beng. L. R. 284 A. J.

Scoble (Advocate General), *Latham*, and *Kasináth Trimbak Telang*, for the respondents:—Both under the Mayukha and the Mitakshara a woman is by marriage born into her husband's family.[2] The author of the Mayukha places the paternal grandmother first among the *gotraja-sapindas*. Her right is not conferred on her by the text. The right exists independently of the text, which only points out what is her position in the class. From the original Sanskrit it is clear (though the meaning is obscured in the translation) that by marriage a sister passes from the *gotra* of her brother into the *gotra* of her husband. Unless a woman were by marriage born into the *gotra* of her husband she could not be *gotraja-sapinda* to her grandson. For the purposes of inheritance a woman may be *gotraja* in two families, in one by right of birth, in the other by right of marriage. The proposition of the other side, that Manu is opposed to inheritance by females, is unsupported by authority; nor does *Vijiárangam* v. *Lakshuman* [3] go so far as was contended for. The text of Manu—"a wife, a son, and a slave, have no wealth of their own"—is referred to in the Mayukha, and explained to mean wealth earned by mechanical arts

(1) 1 West and Bühler 149, 150, 154, 157, Q. 2.

(2) Stokes' Hindu Law, Mayukha., pl. 18, chap. 4, sec. 8.

(3) 8 Bom. H. C. Rep. 244 O. C. J.

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and the like.[1] The interpretation of Manu's text accepted in the Bengal school, viz., that women are excluded from inheritance, is clearly not the construction accepted in the western schools. This is best shown by the way in which the lists of heirs are given both in the Mayukha and the Mitakshara, including great-grand-mothers and sisters, neither of whom are expressly mentioned in Manu, and they are mentioned in the books of the western schools, not as exceptions from, but as illustrations of, a general rule.[2] It is an error to suppose that the incapacity of females to inherit is anywhere laid down in the text of Manu. He lays down that females are not independent, and states certain restrictions on the use of property by females, but none on their capacity to inherit. Whatever the correct interpretation of the text of Manu may be, the question for the Court now to consider is—How has Manu been interpreted in the Mayukha and the Mitakshara? The passages relied on by the other side, as being explanations why certain females are to inherit, are rather explanations of the passages in Manu which might, at first sight, appear to deny the right of those females to inherit.[3] No doubt there was a certain confusion which gave rise to two general doctrines, one adopted by the Bengal and Madras lawyers, that women do not inherit; the other that they do, adopted by lawyers of the western school. Unless there is something to show that women under the western school do not inherit, it lies on the other side to show that they do not, and not on us to show that they do; and so it becomes important to consider what interpretation has been put upon the word *gentiles* by western lawyers, whether, that is, they include in it females as well as males. As to the argument that Nilakantha by mentioning the sister could not have meant to include those born into a family by marriage, it is negatived by the words "among these" occurring in the same context.[4]

Lakshmibái v. *Jayrám Hari*[5] is not illogical. According to the Mitakshara, widows in the ascending line take before their husbands on the ground that the soil is preferable to the seed; but

(1) Stokes' Hindu Law, Mayukha, chap. 4, sec. 10, pl. 7.
(2) Stokes' Hindu Law, Mitakshara, chap. 2, sec. 5, pl. 1 *et seq.*
(3) Stokes' Hindu Law, Mitakshara, chap. 2, sec. 1.
(4) Stokes' Hindu Law, Vyav. Mayukha, chap. 4, sec. 8, pl. 18.
(5) 6 Bom. H. C. Rep. 152 A. C. J.

this reason fails in the case of collaterals. If, however, females in the ascending line come in as *gotrajas* in right of their marriage, females in a collateral line must do so also, though they do not, for the reason stated, take in preference to their husbands.

Upon the remaining points in the case the following authorities were cited:—*Barrs* v. *Fewkes*, 2 Hem. and Mil. 60; *Dawson* v. *Clarke*, 18 Ves. 254; *Clarke* v. *Hilton*, L. R. 2 Eq. 810; *Prosunno Coomár Ghose* v. *Tarrucnáth Sirkár*, 10 Beng. L.R. 267; *Nobin Chunder* v. *Issur Chunder*, 9 Calc. W. R. 505; *Beckford* v. *Wade*, 17 Ves. 97; *Collard* v. *Hare*, 2 R. and M. 675; *Cholmondeley* v. *Clinton*, 2 Jac. and W. 190; *In re Peats' trusts*, L.R. 7 Eq. 302.

Cur. adv. vult.

WESTROPP, C. J.:—The material facts of this case are the following:—

Mulji Nandlál, a Hindu of the Vániá caste, died, on the 5th of January 1840, possessed of considerable moveable and immoveable property. The latter, with the single exception of a house and premises situate at Jambusir, in Guzerat, lay in the island of Bombay. He left no male issue, but his widow Sarasvatibái and his daughter Jethibái (called, in his will, Ben Jethi) survived him. By that will, which was written in the Guzerathi language and character, and was dated the 2nd of January 1840, he appointed Gangádás Vizbhukandás and Trikamlál Avechuldás his executors. More translations than one of it have been put in evidence. We take the best of these translations as our guide to the contents of the will, namely, that made by our present chief translator, Mr. Flynn, on the 2nd September 1874. The appointment of Gangádás Vizbhukandás and Trikamlál Avechuldás as executors was made thus:—

"To Sháh Gangâdás Vizbhukandás and Sháh Trikamlál Avechuldás. Written by Sháh Mulji Nandlál. To wit: the cause of (this) being written, is as follows:—At present my body is in a sickly state. Therefore I have made this will. Now, in the event of my decease, I have given you my absolute full 'power' as follows:—As to whatever 'estate' there is belonging to me, and whatever property there may be belonging to me, 'power' (over) the whole thereof and all my claims and debts is given to

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you two persons. Therefore, in the event of my decease, do you be pleased to take (the same), and after me (you are) to make the outlays, and (are) to give according to what I have written. Do you be pleased to do all that. The particulars thereof are written below." The testator then proceeded to specify various legacies to Maharajas of his caste, to temples, and to private individuals, and outlays to be made for his funeral obsequies. The words "power" and "estate," above mentioned, are introduced in English words, but in Guzerathi characters, into the Guzerathi vernacular —a common practice with respect to these words amongst the natives of this island. Mr. Flynn, in the margin of his translation, notes that the English word "power," which is used in the text, generally signifies, when employed by natives, the power given by a testator to his executor. We may add that it is very frequently used here in Guzerathi and Marathi documents to signify also the actual probate or letters of administration.

After directing the executors to give certain gold ornaments to his brother's wife, Jadow Váhoo, the will proceeded thus :—

"Item.—Should the said party, namely, the Bái (lady, *i.e.* Jadow Váhoo), live together with (my wife) in the house, (it will be) well. And in case she should not live with (her), then Rs. 1,001, namely, one thousand and one, are to be deposited at interest in a good place; and out of the interest that may be received in respect thereof, she is to eat (her) bread as long as she may live."

"To my wife Sarasvati Váhoo, do you be pleased to give ornaments (worth) Rs. 3,500, and these ornaments (she shall have as long as she may wear them). And afterwards those ornaments are to be sold, and the money (realized thereby) is to be deposited in some good place, and should she not agree to live with my brother's wife, and should she live apart, then out of the interest which may be received for the said money which may be deposited in another place, she is to eat (her) bread or go on a pilgrimage, should she wish to go."

"To my daughter Ben Jethi do you be pleased to give (as follows):—The particulars thereof (are as below). The ornaments I have made for (the use of) my house are with Ben Jethi. The same I have given to Ben Jethi. And, in the event of her decease, do you be pleased to dispose of the same as you may deem proper."

"There is my house situated in Sootarchawl. The rent which may be received for the same, Ben Jethi may appropriate; and (but) the said house cannot be sold by her."

"Item.—There is my one godown situate at Chinch Bandar. With the rent which may be received for the same, do you be pleased always to give after me (*i.e.*, after my decease) daily alms."

"As to the one house (known as that of Jhara Vasûdev) in which I live, in one story of the same my wife and my brother's wife shall live. The whole of the rest is to be let, and should my wife and my brother's wife (living) together not agree, then they may live separately in the said story, and act in accordance with the respectability of my house. And, should they live together, do you be pleased to pay Rs. 301, namely, three hundred and one, per one year, for (their) expenses."

"In this way I have given in writing to you. Now, in the event of my decease [you are] to give in accordance with what I have written, and are to make outlays. And there are my three (sailing) vessels, and there is a house at Jambusir. All the authority appertaining to the same is yours. And there are my account books. Having examined all the claims and debts (entered) therein, the outlays and the payments are duly to be made in proportion to what may be realized of those (claims). Anything you may see fit (to do) besides what I have written (to be done), you in that case are duly to do accordingly. This document I have given in writing of my free will and pleasure and in sound mind, having read (it) and become informed (of its contents). It is agreed to by me and my heirs and representatives and my heiress. In the year 1896, Magsar Vad 13th, the day of the week Thursday, the English date the 2nd January 1840." Then followed the signatures of the testator and four attesting witnesses. The will gives authority to the executors in that capacity over the whole of his property, but specifies in detail only a part of it.

There is not any evidence to show that either Sarasvatibâi, the wife of the testator, or Jethibâi, his daughter, was present at the execution of the will, or concurred in it. The petition of the

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executors filed on the 26th February 1841, praying that probate should be granted to them, and the affidavit (made on the 25th February 1841) of one of the attesting witnesses to the execution of the will, stated that the testator's wife, Sarasvatibái, was of the age of fifteen years, and Jethibái of the age of seventeen years at the time of his decease, and that the latter was the testator's daughter by a former wife, Ladkubái, and was married to Haridás Kásidás.

Probate issued forth of the Supreme Court on its Ecclesiastical Side to the executors Gangádás Vizbhukandás and Trikamlál Avechuldás, on the 13th of April 1841, in the ordinary form, and not as executors according to the tenor; and they entered into possession of the property of the testator, Mulji Nandlal. Trikamlál Avechuldás died in February 1842. He was the son of Pránkuvarbái, a sister of Mulji Nandlál. She had died in 1840. Trikamlál left surviving him a son, named Bháishet. Trikamlál, as a sister's son, could only have claimed to inherit from Mûlji Nandlál as a *bandhu*, and, therefore, could not successfully compete with the plaintiff Lallubhái and his brother Mulchand, who were *gotraja-sapindas* of Mulji Nandlál, still less could Bháishet do so. The plaint alleged that, "after the death of Trikamlál Avechuldás, the said Gangádás Vizbhukandás entered into *exclusive possession* of the personal estate and receipts of the rents and profits of the real estate of the said testator to an amount much more than sufficient to pay the funeral and testamentary expenses and debts of the said testator, and the pecuniary legacies bequeathed by him."

Some stress has been laid on the employment, by the plaintiff, of the phrase "exclusive possession" as amounting, it was argued, to an admission that the possession of Gangádás was, from the death of Trikamlál, adverse to the widow and daughter of the testator and to the present plaintiffs. But we think that the phrase has been used merely in antithesis to the previously stated joint possession of both executors, and cannot be regarded as admitting or averring that the possession of Gangádás was anything more than that of an executor.

Jethibái died in May 1841 without issue, but leaving her husband surviving her.

On the 5th July 1843, Gangádás filed, in the Supreme Court, an inventory of personal property of Mulji Nandlál, and did not mention in it his immoveable property, or the rents and profits thereof.

The plaint stated that Gangádás paid to Sarasvatibái a monthly allowance of about Rs. 25 " for her maintenance."

He died on the 29th of May 1861 without male issue, but leaving surviving him his widow Mánkuvarbái and three daughters. Mulji Nandlál's widow, Sarasvatibái, who also survived Gangádás, died, as the plaint alleged, intestate, and, admittedly, without issue, on the 20th March 1862. Gangádás had continued, down to the time of his decease, in possession of the estate of Mulji Nandlál. By his will of the 8th July 1860, Gangádás had appointed his wife to be his sole executrix. She obtained probate of that will on the 21st August 1861, and entered into possession as well of her husband's estate, which was considerable, as of that of Mulji Nandlál. The allegation in the plaint is that Mánkuvarbái " thereupon entered into possession of so much of the personal estate of the said Mulji Nandlál, and into the receipt of the rents and profits of so much of his real estate as had been held by her said husband (Gangádás) up to the time of his death."

In her written statement in defence to this suit she said :—

" 4. After the death, in May 1841, of the said Jethibái, intestate and without issue, the house and jewels given to her by the will of the said Mulji Nandlál reverted to his estate, and possession thereof was resumed by his executors."

" 5. After the death, in February 1842, of the said Trikamlál Avechuldás, the said Gangádás Vizbhukandás had sole possession and *management* of the estate and effects left by the said Mulji Nandlál, so far as the same had not been disposed of by his said will, or applied to the purposes therein directed, and, after the death, on the 29th May 1861, of the said Gangádás Vizbhukandás, this defendant, his widow and executrix, has had sole possession and administration of the same."

" 6. This defendant has been informed that the said Sarasvatibái, before her death in the month of March 1862, executed a document purporting to be her last will, and thereby gave her

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estate and effects to the said Bháishet Trikamlál; but the said will has not, this defendant believes, been either proved or otherwise established."

"7. It being at one time supposed that the said Haridás Kásidás, the surviving husband of the said Jethibái, was, as his heir or otherwise, entitled to the residuary estate of the said Mulji Nandlál, or to some interest therein, an assignment of his right, title, and interest, (if any,) in such estate was on the 26th June 1863 made by him for valuable consideration to the said Bháishet Trikamlál."

"8. On the 7th of January 1864, the said Bháishet Trikamlál released to this defendant, for valuable consideration, all rights, claims, and demands whatsoever against this defendant relating to or against the estate of the said Mulji Nandlál."

In her evidence Mánkuvarbái said that, although the consideration in the indenture of release was stated to be Rs. 5, she had, in fact, paid Rs. 51,000 to Bháishet Trikamlál for his execution of it, which sum was first paid to him in cash and then entered as a provision for his family, he being in embarrassed circumstances, to his wife's credit in the books of the firm of Gangádás Vizbhukandás, which was still carried on in his name.

Subsequently to the death of Gangádás, one Lallubhái Nathubhái (a more distant male relative of Mulji Nandlál than the present plaintiffs) instituted a suit against Mánkuvarbái in December 1862, claiming the estate of Mulji Nandlál, but he eventually withdrew that suit.

Upon the 13th of August 1870, Lallubhái Bápubhái filed his plaint in the present suit against Mánkuvarbái as widow and executrix of Gangádás, who was surviving executor of Mulji Nandlál. The plaint was, in April 1871, amended by adding as a plaintiff Kásidás Mulchand, who is son of Mulchand Bápubhái (plaintiff Lallubhái's brother), who survived Gangádás, and at Mánkuvarbái's request, as she in her evidence admits, performed the funeral ceremonies of Gangádás. Mulchand Bápubhái died before the plaint in this suit was filed. The plaint was further amended in November 1871 by adding Bháishet Trikamlál, Jaikisandás Gangádás, Kásibái, wife of Vithuldás Jaganáth, and Diválibái, wife of Jethá

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bhái Khusháldás, as defendants, and in April 1872 by adding Rámdás Jagmohandás and Mánikji Dhanjibhái as plaintiffs. Bháishet Trikamlál was added as a party in consequence of Mánkuvarbái having, in her said written statement in July 1871, objected that he ought to be made a party, which objection, however, was improper, for her allegation (and subsequent proof) that he had executed, in her favour, the release already mentioned, showed that it was quite unnecessary to make him a party. Upon her objection, also, Jaikisandás (an infant of six years of age at that time) was made a party, she alleging that she had, in February 1868, duly adopted him as son to her deceased husband Gangádás. Diválibái is the surviving daughter of Gangádás by his first wife; Kásibái is his surviving daughter by his second wife, the defendant Mánkuvarbái, and is natural mother of Jaikisandás by her husband Vithuldás Jaganáth.

The reason for making Rámdás Jagmohandás and Manikji Dhanjibhái parties as plaintiffs, was that they purchased the whole of the alleged interest of the plaintiff Lallubhái Bápubhái, and part of the alleged interest of the plaintiff Kásidás Mulchand, in the estate of Mulji Nandlál.

The plaint alleged that the residue of Mulji Nandlál's estate was left undisposed of by his will, and that, in the events which happened, Sarasvatibái, his widow, became beneficially entitled thereto, and that on her death, intestate and without issue, it passed, according to the Hindu law, to the nearest male heirs of Mulji Nandlál, which it alleged that the plaintiffs Lallubhái and Kásidás were. It prayed the establishment of the will of Mulji Nandlál, and that its trusts should be carried into execution, that an account might be taken of his personal estate and the rents, profits, and produce of real estate which may have come into the possession of Gangádás Vizbhukandás and of the defendant Mánkuvarbái; also, if necessary, an account of the funeral and testamentary expenses, debts, and legacies of Mulji Nandlál, and that the balance of his estate and effects remaining unapplied, and any balance found due from her, may be applied in due course of administration, and the clear residue ascertained and paid over to the plaintiffs.

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Mánkuvarbái, by her written statement already mentioned, submitted that either she or Jaikisandás, in virtue of his adoption by her, was beneficially entitled to the undisposed of residue of the estate of Mulji Nandlál.

Diválibái and Kásibái, in their written statements, admitted the priority of the claims of Mánkuvarbái and Jaikisandás, but alleged that, in default of the adoption of the latter, or subject to his rights, they would be, on the death of Mánkuvarbái, entitled to the residue of the estate of Mulji Nandlál in preference to the plaintiffs.

Jaikisandás, by the written statement filed on his behalf by Mánkuvarbái, as his guardian *ad litem*, claimed, by virtue of his adoption as son of Gangádás, to be heir of Mulji Nandlál, and as such entitled to his undisposed of estate. The issues originally framed were :—

1. Whether this suit is barred by the provisions of Act XIV. of 1859, an Act to provide for the Limitation of Suits.

2. Whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand are the nearest heirs of Mulji Nandlál according to Hindu law.

3. Whether the plaintiffs are entitled to the relief prayed, or any part thereof.

4. Whether the defendant Jaikisandás Gangádás was lawfully adopted as the son of Gangádás Vizbhukandás.

5. Whether, as such adopted son, the said Jaikisandás Gangádás is not a nearer heir to the said Mulji Nandlál than the plaintiffs, or either of them.

6. Whether, in the event of Jaikisandás Gangádás not having been validly adopted, the defendants Kásibái and Diváli are not nearer heirs to the said Mulji Nandlal than the plaintiffs, or either of them.

7. In the event of the fourth issue being found in the affirmative, whether the adoption of the said Gangádás Vizbhukandás has not been revoked.

Immediately after the settlement of issues, Diválibái and Kásibái, at the request of their counsel and with the consent of

the plaintiffs' counsel, were dismissed by Mr. Justice Bayley from this suit, with costs to be paid by the plaintiffs.

At the hearing of the cause before Mr. Justice Bayley, he, following, but not expressing any opinion upon, *Lakshmibái* v. *Jayrám Hari*,(1) found the second and third of the above issues in the negative and for the defendant Mánkuvarbái, *i.e.*, that the plaintiffs Lallubhái, Bápubhái, and Kásidás Mulchand are not the nearest heirs of Mulji Nandlál according to Hindu law, and that they, therefore, are not entitled to the relief prayed by their plaint, or any part thereof. Upon the other issues he did not arrive at any finding. He made a decree with costs for the defendants other than Diválibái and Kásibái, previously dismissed from the suit as already mentioned.

The plaintiffs, having appealed against that decree, the Appellate Court ordered "that it be referred to the Division Court, to try the following issues, and return its finding thereon, together with the evidence, to this Court :—

"1. Whether this suit, or any part thereof, is barred by the Law of Limitation.

"2. Whether the defendant Jaikisandás Gangádás was duly adopted by the defendant Mánkuvarbái as son to her deceased husband Gangádás Vizbhukandás, and, if so, when ?

"3. If there has been any such valid adoption as aforesaid, whether, having regard to the will of Mulji Nandlál, or independently thereof, the defendant Jaikisandás is entitled to the moveable and immoveable estate of Mulji Nandlál, deceased, or either of the same, or any and what part thereof.

"4. If there has been any such valid adoption of the defendant Jaikisandás as aforesaid, whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand were, or either of them was, at the decease of Sarasvatibái, widow of the said Mulji Nandlál, entitled to the moveable and immoveable estate of the said Mulji Nandlál, or either of the same, or any and what part thereof.

"5. If there has not been any such valid adoption of the defendant Jaikisandás as aforesaid, whether the plaintiffs Lallubhái

(1) 6 Bom. H. C. Rep. 152.

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Bápubhái and Kásidás Mulchand were, or either of them was, at the decease of the said Sarasvatibái, entitled to the moveable and immoveable estate of the said Mulji Nandlál, or either of the same, or any and what part thereof." And the Appellate Court further ordered "that, in determining the said issues, regard be had to the fact that the defendants Kásibái and Diválibái have been dismissed as parties from this suit with the consent of all parties thereto, and have thereby waived any claim to share in the estate, moveable or immoveable, of Mulji Nandlál, and also to the fact that the defendant Mánkuvarbái by her counsel waives any claim to the said estate as assignee from Bháishet Trikamlál, and relies solely on her claim as widow of Gangádás Vizbhukandás under the will of Mulji Nandlál, and also as his heir, and this Appellate Court doth reserve further directions and costs."

The waiver (which is mentioned in that order), by Mánkuvarbái's counsel, of claim through Bháishet took place in the Appellate Court before Mr. Justice Melvill and myself.

In April 1874 Mr. Justice Bayley came to the following findings:—

On the first of the new issues he found that this suit is not barred by the Law of Limitation.

On the second of those issues he found that Jaikisandás Gangádás, not having been given in adoption by his father Vithuldás Jaganáth (who is still living), or with his consent, was not duly adopted as son to Gangádás (*Náráyan Bábáji* v. *Náná Mánohar* (1)).

This finding on the second issue rendered any finding on the third and fourth issues unnecessary, and accordingly he arrived at none.

The fifth of the new issues he, dissenting from the ruling in *Lakshmibái* v. *Jayrám Hari*,(2) found in the affirmative, thus: "That the plaintiff Lallubhái Bápubhái and Mulchand Bápubhái (the father of the plaintiff Kásidás Mulchand) were, at the decease of Sarasvatibái, entitled to the moveable and immoveable

(1) 7 Bom. H. C. Rep. 153 A. C. J. (2) 6 Bom. H. C. Rep. 152 A.C.J.

estate of Mulji Nandlál." For these findings Mr. Justice Bayley states his reasons in an elaborate judgment.

The defendants excepted to the findings of Mr. Justice Bayley on the first, second, and fifth of the new issues.

The case was argued before my brother Sargent and myself upon these exceptions, and generally upon the merits. At an early stage of the argument, the Advocate General (Mr. Scoble), on behalf of Mánkuvarbái, and Mr. Latham, for Jaikisandás, abandoned any attempt to controvert Mr. Justice Bayley's finding, that the alleged adoption of Jaikisandás in February 1868 was invalid. Mr. Latham also stated that, pending this suit, Mánkuvarbái had formally, and with the consent of Vithuldás Jaganáth, the father of Jaikisandás, adopted Jaikisandás as son to Gangádás anew, and Mr. Latham admitted that such latter adoption, having been made *pendente lite*, cannot affect this suit, and was virtually an admission of the invalidity of the alleged adoption in 1868.

There remained the questions as to the limitation of the suit, and as to whether the plaintiffs Lallubhái Bápubhái and Kásidás Mulchand are the heirs of Mulji Nandlál. These and the question, whether the executors took for their own benefit, under his will, the residue of his property, were argued for several days before my brother Sargent and myself at considerable length and with much ability.

Mánkuvarbái has lately died, having previously made a will as the executrix of which her daughter Kásibái has been lately added as a defendant to this suit.

Whatsoever may be the effect of the Hindu Wills' Act (XXI. of 1870) and the application—to the wills of Hindus, of section 179 of the Indian Succession Act (X. of 1865), upon the position of the executor of a Hindu, this case is quite untouched by those Acts—the execution of the will of Mulji Nandlál, the time of his death, and the grant of probate to his executors, all being anterior to the 1st of September 1870, when Act XXI. of 1870 came into force.

There is not any evidence as to whether the moveable or immoveable estate of Mulji Nandlál was ancestral or self-acquired.

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There is not any precedent, of which we know, for applying to the wills of Hindus the rule of the common law in England, that the undisposed of residue of personal estate vests in the executors beneficially. There are many reasons for not applying that rule to Hindus, and we are not at all disposed to make a precedent in favour of it. In *Mapp* v. *Elcock* (1) Lord Cottenham said: "It must be borne in mind that the title of an executor to personalty not otherwise disposed of, did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he has to apply it, there was nothing to interfere with the legal title of the executor, and he, therefore, retained such property for his own benefit; but this result, being, as was supposed, generally unforeseen, and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and, when they were found in the will, declared the executor trustee for the next of kin, and among these was any expression showing that the executor was intended to hold the property upon trust; and when such intention sufficiently appeared, there could not be a more conclusive reason against the claim of the executor, whose title, depending on there being no trust, was necessarily negatived by the testator's declaration that there was to be a trust."

Setting aside the Hindu Wills' Act of 1870, as to the effect of which we give no opinion,(2) the reason given by Lord Cottenham in that case for the title of an executor in England to personalty, viz., that it is derived not from any gift of the testator, but from the operation of law incident to the office, does not exist in the case of the executor of a Hindu. Although the testamentary power and the right to appoint an executor has been recognized in all three presidencies as belonging to Hindus, that power and right have been regarded as subject to Hindu law and usage.

In *Mussumat Bhoobun Moyee Debiá* v. *Rám Kishore Acharj Chowdhry* (3) in the Privy Council, Lord Kingsdown, in giving judgment, said: "There is no doubt that, by the decision of

(1) 2 Phil. 793, at p. 796. (2) See 8 Beng. L. R. 208, 220.

(3) 10 Moo. Ind. App. p. 279; see p. 308.

Courts of Justice, the testamentary power of disposition by Hindus has been established within the Presidency of *Bengal*; but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by any analogy to the law of *England*. Our system is one of the most artificial character, founded, in a great degree, on feudal rules, regulated by Acts of Parliament, and adjusted by a long course of judicial determinations to the wants of a state of society differing, as far as possible, from that which prevails amongst Hindus in *India*."

The Courts in this country have regarded an executor under the will of a Hindu as possessing a power inferior to that of an executor in England.

In *Sreemutty Dossee* v. *Tarachurn Coondoo Chowdry*(1) Peacock, C.J., said: "We are also of opinion that, under the will of *Rájmohun Roy*, *Doorgápersad* had no right to create the mortgage; and although he became the attorney, or executor, under the will of *Rájmohun Roy*, he had not, according to the Hindu law, the same power over the moveable and immoveable estate of *Rájmohun* which an executor would have over leasehold estate according to English law. We think that, according to the Hindu law, an attorney or executor under a will has no greater power over immoveable estate than a manager who, according to the decision of the Privy Council in the case of *Honoomanpersaud Panday* v. *Mussumut Bábooee Munraj Koomeree*(2) has only a limited and qualified power; and, further, we are of opinion that the general power of a manager under a will may be restricted by the will, and that the manager is bound to act according to the directions in the will."

In *Srimati Jaykali Debi* v. *Shibnáth Chatterjee*,(3) Phear, J., in giving judgment, said: "I suppose it is now clear that probate

(1) Bourke's Reports, Part VII., p. 50. See also *Lálchand Rámdyál* v. *Gumtibái* (8 Bom. H. C. Rep. 140, 144 to 151 O. C. J.) And *In the goods of Sumboochunder Mitter* (1 Taylor and Bell 39-40) and *Mohar Ranee Essadah* v. *The East India Company* (1 Taylor and Bell 290) as to the power of the administrator of a Hindu's estate. It may be well to mention what does not appear with sufficient distinctness in the report of *Lálchand Rámdyál* v. *Gumtibái*, that not only the attachments, but also the issuing of letters of administration to the Administrator General in that case, all occurred previously to the coming into force of Act XXI. of 1870.

(2) 6 Moo. Ind. App. 393.

(3) 2 Beng. L. R, O. J., page i.

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does not confer upon the executor of a Hindu will any personal rights of property analogous, in any way, to an English estate or interest. The will gives him just such powers of dealing with the property comprehended in it as its words express, and no more. Beyond the scope of the will, and so far as he is not constructively restricted by its directions, it may be that he has the powers which are implied in the bare authority of a manager during minority; but these are all he can claim. At any rate, this doctrine seems to have been laid down with regard to immoveable property in the case of *Sreemutty Dossee* v. *Tarachurn Coondoo Chowdry*,(1) by which I readily admit myself bound to be guided. It follows that a stranger would not be allowed with impunity to take immoveable property from an executor, unless he could show that he had previously satisfied himself, by reasonable inquiry, that the alienation was justified either by the directions to be found in the will, or by the exigencies of the estate (see *Honoomanpersaud Panday* v. *Mussumut Bábooee Munraj Koomeree*(2)). Now, I apprehend that moveable property is, without doubt, according to Hindu law, in the same predicament as immoveable property."

It seems to my brother Sargent and myself that we should be acting in a manner contrary to the spirit, if not also to the letter, of the Charter of the Supreme Court, which reserves to Hindus (3) their law of inheritance and succession, if we were to apply to them the English common law rule that an executor shall take beneficially the residue as to which a Hindu testator may have died intestate. That reservation was continued by section 18 of the High Court's Charter of 1862 and section 19 of its Charter of 1865.

It has, however, been further contended on behalf of the defendants that the will of Mulji Nandlál indicates his intention that the executors should take the residue beneficially.

The mode of construction applicable to the wills of Hindus has been laid down by the highest authority.

(1) Bourke, Part VII., 48.

(2) 6 Moo. Ind. App. 393.

(3) *Sub nomine* "Gentûs," as to the scope of which term see *Lopes* v. *Lopes*, 5 Bom. H. C. Rep. pp. 183 to 186, O. C. J.; *Bhagvandás Tejmál* v. *Rájmál*, 10 Bom. H. C. Rep. 241 at p. 259.

In *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullick*[1] Lord Justice Turner, in giving the judgment of the Privy Council, said: "In determining that construction, what we must look to, is the intention of the testator. The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily, the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances, no doubt, must be regarded. Amongst the circumstances thus to be regarded, is the law of the country, under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."

The will of Mulji Nandlál opens with what is a common mode in the wills of natives of this island, of appointing executors. We have already mentioned that the English word 'power' is, amongst them, a familiar and, indeed, the most ordinary phrase for denoting the authority of an executor or administrator, and is also a well-known equivalent for probate or letters of administration. Next in the will follow a number of legacies, which are to be paid, and trusts, which are to be performed, including trusts for the benefit of his sister-in-law, his wife, and his daughter. As, on the one hand, the word 'trust' does not invariably create a trust, so, on the other hand, trust may be created without the employment of that word: *The Commissioners of Charitable Donations and Bequests* v. *Wybrants*.[2] The special benefits which the testator conferred by the will on his wife and daughter have been relied upon as showing that he did not intend that either of them should have

(1) 6 Moo. Ind. App. 526, 550. (2) 2 J. & L. 182.

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the general residue of his estate. Even, however, in England, where there is a devise upon trusts which do not exhaust the property devised, the mere conferring of a legacy, or other benefit, upon the heir does not prevent there being a resulting trust of the residue for him, unless there be other circumstances sufficiently strong to turn the scale in favour of the devisee: *Starkey* v. *Brooks*;[1] *Rendall* v. *Bookey*,[2] *Hopkins* v. *Hopkins*,[3] *Salter* v. *Cavanagh*.[4] On the same principle the mere gift, by a testator, of an annuity to his wife has been held not to be sufficient without other circumstances demonstrative of his intention that she should not have both it and dower to induce the Courts in England to put her to her election between the annuity and dower: *Pitts* v. *Snowdon*,[5] *Pearson* v. *Pearson*,[6] *Foster* v. *Cooke*,[7] *Greatorex* v. *Carey*,[8] *Hill* v. *Hemsworth*,[9] *Norcott* v. *Gordon*,[10] *Holdich* v. *Holdich*,[11] *Gibson* v. *Gibson*,[12] *French* v. *Davis*.[13] Those cases show that the intention to exclude her dower must be clear. Even where there is an expressed intention to exclude the next of kin from the residue of personalty, or the heir from the residue of realty, there must be a distinct devise away from them; otherwise there will be a resulting trust in their favour: *Fitch* v. *Weber*,[14] *Johnson* v. *Johnson*.[15] The words in the will of Mulji Nandlál following the nomination of executors—"Do you be pleased to take the same"—will, having regard to the passages immediately preceding and following those words, be most appropriately interpreted by construing them as meaning that the executors should take the property into their possession for the purpose of managing it in accordance with the directions of the will, and *in usum jus habentium*.

The form is not an uncommon one here, amongst Hindus, in wills appointing executors, and has not been understood as inconsistent with the vesting of the property in the heir, subject, however, to the management of it by the executors conformably to the will when the testator is so circumstanced as to have testa-

(1) 1 P. Wms. 390. (2) 2 Vern. 425 S. C. Prec. Chan. 162.
(3) Cas. temp. Talbot 44. (4) 1 Drury and Walsh 668. (5) 1 Bro. C. C. 292.
(6) 1 Bro. C. C. 291. (7) 3 Bro. C. C. 347. (8) 6 Ves. 615.
(9) Ll. & G. (temp: Plunket) 87. (10) 14 Sim. 258.
(11) 2 Y. & Col. C. C. 18. (12) 1 Drew 42. (13) 2 Ves. Jun. 576.
(14) 6 Hare 145. (15) 4 Beavan 318.

mentary power over the property. The strongest words in the will in favour of the executors are used in relation to the ornaments of his daughter—" and, in the event of her decease, do you be pleased to dispose of the same as you may deem proper." These words, however, are limited to the ornaments. It is not, however, very clear whether the immediately previous passage should not be regarded as an absolute gift of the ornaments to her. The words under consideration which follow the gift to her, may very well mean that, if she have not disposed of them in her life-time, the executors may either retain them as part of the trust estate, or realize their value by sale for the benefit of the estate. Having regard to the whole of the will, we do not think that there was any intention to give to the executors a beneficial interest in those ornaments. After providing for apartments for his wife and sister-in-law in the house in which the testator lived, why should he direct that the rest of that house should be let? If he intended that the executors should have taken a beneficial interest in the residue of his property, such a direction would have been superfluous. He might in that case have left it to their discretion to let the rest of the house or not. Again, in speaking of the three sailing vessels and the house at Jambusir, he does not devise them to the executors, but speaks only of all the authority being that of the executors. That must be understood to mean authority as managers of his estate. He next refers to his account books, and directs that, after examination of the debits and credits therein, the outlays and payments (meaning those thereinbefore directed) should be made in proportion to what might be realized after examination of the claims (*i.e.*, credits) and debts therein. Then comes the direction, on which much argument has been expended : " Anything you may see fit [to do] besides what I have written [to be done] you in that case are duly to do accordingly." We think it perfectly impossible to construe that direction into a residuary devise for the benefit of the executors. It must be taken with what immediately precedes it. It certainly is not in the language of gift, and seems to us to mean nothing more than a desire on the part of the testator that the executors should have a large discretion in the management of the estate. There is not in this will, after providing for the trusts, any such clear, unmistakeable devise of the residue to the execu-

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tors by name as there was in the recent case of *Williams* v. *Arkle*,[1] or as there was to the testator's wife and executrix in *Prosunno Coomár Ghose* v. *Tarrucknáth*[2] which can be brought in aid of other indications to show that the intention was that the executors should take the residue beneficially. Disherison is not to be laboriously spelt out of a will. The intention to disinherit must be clear.

The surrounding circumstances in which the testator was placed, do not encourage the supposition that he intended to give the residue of his estate to the executors for their own benefit. No doubt he states that he was ill when making this testamentary disposition; but he does not say, nor is there any evidence that he believed himself then to be sick unto death.

His wife, Sarasvatibái, would, in the absence of a son, have been his heir, and if she had died without children or without having adopted a son for him, his daughter, Jethibái, would have been his heir. They were both young, and there does not appear to have been then any reason for supposing that they might not have children. It is not probable that the testator would have preferred a cousin, such as Gangádás, or a sister's son, such as Trikamlál, to a daughter or a daughter's son. If, however, the testator had intended to disinherit his wife and his daughter and their possible issue, he would most probably have left his estate exclusively to Gangádás, his nearest male heir, and not to him and Trikamlál. The union of both names indicates executorship only. He makes no distinction between them as to shares, as he probably would have done had he intended them to take beneficially. Again, he does not intimate in his will any disapprobation of the adoption of a son to him by Sarasvatibái, which, by the law of this Presidency, was a course open for her to pursue, unless he refused to adopt or prohibited her from adopting. Such adoptions by widows, after the decease of their husbands, are matters, in this Presidency, of frequent occurrence.[3]

The next point is, whether this suit is barred by Act XIV. of 1859, so far as regards immoveable property by section 1, clause 12, and as

(1) 7 Eng. & Ir. Appeals 606. (2) 10 Beng. L. R. 267.

(3) 5 Bom. H. C. R 181 A. C. J.; 7 *Ibid.* 153, 171, 172 A. C. J. and Appx. pp. i., xvi, xvii.

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to moveable property by section 1, clause 16. It has been already stated that we do not think that the 6th paragraph of the plaint, as contended on behalf of the defendants, admits any adverse possession in Gangádás. The passages which have been read from the written statement of Mánkuvarbái, so far from pleading any adverse possession on his or her part, rather indicate the contrary. The term "sole possession," used in the 5th paragraph, does not imply adverse possession, and the terms "management" and "administration" in the same paragraph savour of executorship. The compromises mentioned in the 6th, 7th, and 8th paragraphs, and especially Mánkuvarbái's transaction with Bháishet, show that she could not have supposed that the possession of Gangádás was adverse. The filing, by him, of the inventory in the Supreme Court in July 1843, subsequently to the deaths of Jethibái and Trikamlál, shows that he regarded himself as executor and not adverse holder. Mánkuvarbái must, by means of her books and papers, have been able to show whether Gangádás mixed the accounts of Mulji Nandlál's estate with those of his own property, and treated it as his own. She has neither alleged nor proved that he did so, and it is a most important fact that Gangádás in his own will, made in July 1860, at a distance of 20 years from the death of Mulji Nandlál, does not mention or affect to deal with any of the property of Mulji Nandlál.

Pelley v. *Bascombe*,[1] affirmed on appeal,[2] is a stronger case than this; for there the will, appointing James Bascombe executor, had never been proved, and the exclusive possession of the executor and, after his death, of his executrix had endured from 1833 to 1860; yet the Court held that the possession, which in its commencement was fiduciary in character, never became adverse—Stuart, V.C., saying: "According to my impression of the law on this subject there ought to be nothing equivocal in a possession which is relied upon as a bar." The Courts are loth to convert a possession which commenced lawfully into a wrongful and adverse possession. See the observations of Wood, V.C., in *Thomas* v. *Thomas*,[3] where he said that "possession is never considered ad-

(1) 33 L. J. (N. S.) Ch. 100. (2) 34 L. J. (N. S.) Ch. 233.

(3) 2 Kay & J. 79; see pp. 83, 84.

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verse if it can be referred to a lawful title," and *Doe d. Milner* v. *Brightwen*(1) which he mentioned.

We agree with Mr. Justice Bayley in thinking that, up to the death of Gangádás in 1861, there had not been any adverse possession. We think, too, that Mánkuvarbái, as executrix of Gangádás, entered into possession of Mulji Nandlál's estate in a fiduciary capacity.

It is said that Mánkuvarbái's possession became adverse, at the latest, when she received the hostile notice from Mr. S. Green, as solicitor for Sarasvatibái, dated the 13th December 1861, followed up by another similar notice from him of the 20th January 1862, mentioned in the schedule to Mánkuvarbái's written statement and in her evidence or cross-examination; and that more than six years having elapsed since 1861, and before the filing of the plaint in 1870, this suit is barred, so far as regards the moveable property at least.

That point raises the question whether this case falls within section 2 of Act XIV. of 1859; or, in other words,—is the alleged resulting trust such a trust as is contemplated by that section? The word "express," which occurs in the English Statute 3 & 4 William IV., c. 27, s. 25, is not to be found in this Indian enactment. Cases collected in Mr. Thomson's useful book upon Act XIV. of 1859 show that section 2 has been applied to trusts other than express trusts. There have been subsequent unreported (we believe) decisions of this Court to the same effect.

It would seem, however, unnecessary for us to inquire whether that section has in that respect been rightly construed; for, if *Salter* v. *Cavanagh*,(2) which occurred in 1838, were correctly decided, as we think it was, the resulting trust in the present case arising on the will of Mulji Nandlál, subsequently to the trusts specified in it, should be regarded as an express trust as respects both the moveable and immoveable estate. The learned Advocate General (Mr. Scoble) referred to the following remarks of Lord St. Leonards in *The Commissioners of Charitable Donations and Bequests* v. *Wybrants*(3) as betraying some doubt, on his part, of the sound-

(1) 10 East. 583. (2) 1 Dr. & Walsh 668. (3) 2 J. & L. 182.

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ness of *Salter* v. *Cavanagh*[1]:—"In the case of *Salter* v. *Cavanagh* it seems to have been held that an implied trust is an express one within the Act (3 and 4 Wm. IV., c. 27, s. 25), where it arises upon the face of the instrument itself, and is not to be made out by evidence; but upon this point I am not called upon to give any opinion." If that be a doubt, it is a very faint one, and has been more than dispelled by the fact that Lord St. Leonards himself in his subsequently published work on the Real Property Statutes[2] says:—"Although the section under consideration speaks of an express trust, yet a trust may fall within its enactment where the trust is not in words expressly declared. Therefore, where a man is made an express trustee of a term for certain purposes, and is, on the face of the instrument, by the rule of equity, a trustee of the surplus, he is a trustee throughout within this section," and for that proposition he cites in his note *Salter* v. *Cavanagh*.[3] He continues: "What amounts to a sufficient expression of a trust, must depend upon the terms of the instrument and the rules of equity: *Commissioners of Charitable Donations and Bequests* v. *Wybrants*[4] and *Hunt* v. *Bateman*.[5] It certainly is not necessary to use the word 'trust' in order to create an express trust."[6] In *Mapp* v. *Elcock*,[7] already referred to by us upon another point, Lord Cottenham said that "there is, first, a gift of all the real and personal estate to Edward Elcock, his heirs, executors, administrators, and assigns to and for the several uses, intents and purposes following: then come several directions as to part of such property, in each of which it is described as held upon trust; and the will concludes with these words: 'Lastly, I nominate and appoint the said Edward Elcock executor of this my last will and testament.' *This is clearly a gift of the whole property in trust, though the trusts declared do not exhaust the whole.*" His Lordship accordingly held the executor to be a trustee for the next of kin[8]

(1) 1 Dr. & Walsh 668.
(2) Page 103 (edn. of 1852).
(3) 1 Dr. & Walsh 668.
(4) 2 Jo. & Lat. 182.
(5) 10 Ir. Eq. Rep. 360.
(6) See 2 Jo. & Lat. at p. 197.
(7) 2 Phillips 799.
(8) See also *Mutlow* v. *Bigg*, L. R. 18 Eq. 246; *Harris* v. *Harris*, 29 Beavan 110.

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We concur with Mr. Justice Bayley in thinking that this suit is not barred by Act XIV. of 1859.

The next question is, whether, at the time of Sarasvatibái's death, the right to inherit the estate of her deceased husband, Mulji Nandlál, devolved upon the plaintiffs or upon the defendant Mánkuvarbái. The plaintiffs upon the one side and she upon the other allege of themselves, respectively, that they are *gotraja-sapindas* of Mulji Nandlál, and, therefore, under Manu,(1) the Mitakshara,(2) and the Vyavahara Mayukha,(3) entitled to his estate. Mánkuvarbái further especially relied upon *Lakshmibái* v. *Jayrám Hari*(4) as conclusive of her right; but the soundness of that decision has been questioned on behalf of the plaintiffs and by Mr. Justice Bayley. The text of Manu, referred to, is:—"To the nearest sapinda, male or female, after him in the third degree, the inheritance next belongs; then, on failure of sapindas and of their issue, the samanodaka or distant kinsman shall be the heir," &c. It is highly important to note that two such skilled orientalists as Sir W. Jones and Mr. Colebrooke concur in importing into their translations of that text the words "male or female" from the valuable commentary of Kalluka Bhatta.(5) The passage from the Mitakshara,(6) declaring the order of succession in ch. II., sec. I., pl. 2, is:—"The wife and the daughters also, both parents, brothers likewise, and their sons, gentiles (*gotrajas*), cognates (*bandhus*), a pupil, and a fellow-student: on failure of the first among these, the next in order is, indeed, heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all (persons and) classes." The words "persons and," in the last sentence, are obtained by Mr. Colebrooke from the most celebrated commentary on the Mitakshara, viz., the Subodhini of Visvesvára. The text itself is that of

(1) Chap. IX., pl. 187, Cole. Dig., bk. V., ch. VIII., pl. 434.

(2) Ch. II., sec. I., pl. 2, and sec. V., pl. 1, 3, 4, 5.

(3) Chap. IV., sec. VIII., pl. 18.

(4) 6 Bom. H. C. R. 152 A. C. J.

(5) Manu, ch. IX., pl. 187; Cole. Dig., bk. V., ch. VIII., pl. 434. As to the value of Kalluka Bhatta's commentary, see the preface to Sir W. Jones' translation of Manu, Haughton's edn. of 1825, p. xviii., *nomine* Culluca; Colebrooke's preface to the Digest, vol. I., p. xiv., edn. 1801; *Murarji Goculdás* v. *Parvatibái*, Ind. L. R. 1 Bom. 180.

(6) Chap. II., sec. I., pl. 2.

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Yajnyavalkya,(1) on whose writings Vijnyanesvara was commenting in the Mitakshara. We shall presently advert to the other portion of the Mitakshara relied upon.

It has not been denied that, according to the law which, under the Mitakshara and Mayukha, prevails in this Presidency, Lallubhái and Mulchand were *gotraja-sapindas* of Mulji Nandlál. The common ancestor of them and of Mulji was Motiláll, who (counting inclusively both him and the *propositus* Mulji) was sixth in ascent from Mulji, and the brothers Lallubhái and Mulchand are (counting inclusively both themselves and Motiláll) seventh in descent from Motiláll. They are, therefore, on the extreme verge of the *sapinda* relationship. Kásidás, the son of Mulchand, is beyond the verge, and can only be regarded as a *samanodaka*; but Mulchand, his father, having survived Sarasvatibái, may be permitted to stand in his place. It is a matter of indifference to the defendants whether he does so or not; as, if he do not, the whole estate would devolve upon the plaintiff Lallubhái, if the latter rank as an heir before Mánkuvarbái. He, however, by associating his nephew with him as a co-plaintiff, has admitted his right to a moiety of the residue of Mulji's estate. The real questions are whether Mánkuvarbái, the widow of Gangádás (who was first cousin of Mulji on the paternal side, and, therefore, a much nearer *gotraja-sapinda*(2) of Mulji than Lallubhái and Mulchand) is entitled, as such widow of a paternal first cousin, to be regarded as a *gotraja-sapinda* of Mulji, and, if she be so, does she stand next in rank to her husband Gangádás? These, and more especially the latter, are questions of some nicety, and were originally argued before Sir C. Sargent and myself only, but were, at our suggestion, re-argued before us and Mr. Justice West, of whose profound knowledge of Hindu law we were anxious to avail ourselves. It is with the first of those questions that I purpose chiefly to deal. My brother West will state in detail the reasons upon which we ground our conclusion upon the second.

(1) Mr. Colebrooke in his translation of this text of Yajnyavalkya renders "*gotrajas*" as "kinsmen sprung from the same original stock," and "*bandhus*" as "distant kindred." Cole. Dig., bk. V., ch. VIII., pl. 398.

(2) Mitak., ch. II., sec. V., pl. 4, paternal uncle's son.

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For the plaintiffs it has been argued that the wives of collateral *gotraja-sapindas*, such as Mánkuvarbái was, are not themselves *gotraja-sapindas* at this side of India any more than in Bengal or Madras, and that the general rule, here as well as there, is that females, unless named as heirs by special texts, are incompetent to inherit.

Manu, the Mitakshara, and Mayukha are the reigning authorities in this Presidency.(1) In the island of Bombay a general—I do not, however, by any means, say a universal—predominance has been given by our predecessors in the Recorder's, Supreme, and High Courts to the Mayukha over the Mitakshara, partly perhaps because they found it more frequently quoted to them than the Mitakshara, partly perhaps because the Mayukha was very much praised and followed in Guzerat—Bombay having formed a part of the ancient kingdom of Guzerat before the cession of the former to the Portuguese,(2) and partly because the Mayukha was the more modern treatise, and might be supposed to embody, to a considerable extent, such variations in usage as had occurred during the long period which intervened between its composition and that of the Mitakshara. The Mayukha is spoken of by Mr. Colebrooke (3) as the work of an eminent writer, having, concurrently with the Mitakshara, considerable weight amongst the Mahrattas, and as amongst those works which "agree in generally deferring to the authority of the Mitakshara, in frequently appealing to its text, and in rarely and at the same time modestly dissenting from its doctrines on particular questions." Mr. Colebrooke, in writing to Sir T. Strange (1 Stra. H. L. 318), observed that "in the west of India, and *particularly among the Mahrattás*, the greatest authority after the Mitakshara is Nilakantha, author of the Vyavahara Mayukha and of other treatises bearing the same title." Mr. Borradaile, the translator of the Vayahara Mayukha, in his preface to his translation, after mentioning the five schools of Hindu law, observes that "in all but the first (Bengal or Gauriya school), the

(1) See *Pránjivandás* v. *Devkuvarbái*, 1 Bom. H. C. Rep. 131; *Náráyan Bábáji* v. *Nána Manohar*, 7 Bom. H. C. Rep. at p. 166 A. C. J., and Appendix, pp. 6, 10, 11.

(2) See *Secretary of State* v. *Bombay Landing Company*, 5 Bom. H. C. Rep. 6 O. C. J., p. 32.

(3) See preface to his translation of the Daya Bhaga and Mitakshara

Mitakshara, one of the very earliest of these compilations, is received with respect as the chief general authority, though in each some more modern local work is allowed to compete with it on a few points. The most remarkable of those are the Mayukha for the Máhárashtra and the West, the Smriti Chandrika for the south of India, the Ratnakara and Chintamani for Mithila. Bengal proper alone denies authority to the Mitakshara, having established for itself a totally different school, of which Jimuta Vahana is the head."

Subsequently, he says: "The Mitakshara is equally authoritative with us on this side of India as elsewhere; but, as previously observed, the doctrines of it are sometimes opposed by the Mayukha, which is allowed to compete with it."

Mr. Borradaile observes that Nilakantha's doctrine "sometimes accords with one (Jimuta Vahana and the Digest) and sometimes with the other (the Mitakshara)," but that "conformity with the Mitakshara should be aimed at as far as consistency will allow."

He (in 1827) speaks of it, as stated by one of Nilakantha's descendants, Hari Bhatta Kasikar, as published upwards of 200 years ago, whilst the general opinion is that his (Nilakantha's) writings were first circulated about 125 years ago. Mr. Steele (in 1827) says that the Mayukha "was composed about 300 years ago; it is of chief notoriety in the Karnatic, though attended to both at Poona and Benares."

Mr. Borradaile states that in examining the *vyavasthas*, or expositions of civil law recorded in the Courts under this Presidency, "very little inquiry sufficed to show that the Mitakshara and Vyavahara Mayukha were on all occasions quoted by them."

It must, however, be recollected that, high as undoubtedly is the authority of the Institutes of Manu, the Mitakshara and the Mayukha in this Presidency at large, it cannot be affirmed that the whole of any one of these works is in full force in any part of this Presidency. They are all subject to the control of usage. In all there are precepts which, if they ever were practical law, have, for a time beyond the memory of living man, been obsolete. Many instances might be given. For the present, however, I

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shall limit myself to the mention of one only, and that, too, in the latest of those treatises. There is not any case known in which the co-parcenery, contemplated at the close of the 20th placitum of sec. 8 in chap. IV. of the Vyavahara Mayukha between the paternal great-grandfather, the father's brother, and the sons of the half brother, has ever been recognized by the Courts, or has taken effect in practice, and we are not aware that it has ever been even advanced as the foundation of a claim.

Of the proposition that a wife is a *gotraja-sapinda* of her husband, we do not understand that the first branch, viz., that she is a *gotraja* of the husband, has been denied. Before marriage she should be of a different *gotra* from that of her husband; (1) but that, on her marriage, the wife enters the *gotra* (family) of her husband, is a fact familiar to the ears of all acquainted with Hindu usage in this Presidency. Mr. Steele, in his note to the page in his book just mentioned, says: " After marriage a wife's *gotra* becomes that of her husband." To the same effect are the answers of the sastris to question 1, p. 231, and question 3, p. 233, of 1 West and Bühler.(2)

Thenceforward she recites the triple invocation to the manes of the ancestors of her husband,(3) and after his death she makes offerings to his manes.(4) After her death her husband's family alone can perform her funeral rites.(5)

In complete accordance with this doctrine, the Mitakshara(6) and the Vyavahara Mayukha(7) include the paternal grandmother amongst the *gotrajas*. The Mitakshara(8) also consistently names the paternal great-grandmother amongst them. These instances suffice to show that we cannot, in this Presidency, treat the word "*gotraja*" as confined to males. It is observable that, although

(1) Manu., ch. III., pl. 5.; Steele on Hindu Law and Customs (1st edn.) p. 33—(2nd edn.) p. 26; Max Müller San. Lit., p. 387.

(2) See also note (2) to *Dhoolubh Bhái* v. *Jeevee*, 1 Borr. at p. 78.

(3) Manu., ch. IX., pl. 28; Cole. Dig., bk. V., ch. VIII., pl. 399—400.

(4) Mayukha, ch. IV., sec. 8, pl. 2; Mitak., ch. II, sec. I, pl. 6.

(5) 1 West and Bühler 222; Cole. Dig., bk. V., ch. VIII., pl. 432.

(6) Chap. II., sec. V., pl. I.

(7) Ch. IV., sec. VIII., pl. 18.

(8) Ch. II., sec. V., pl. 5.

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Mr. Monier Williams, in his Dictionary (page 297, column 2), gives to that word the two limited meanings of 'born in the same family,' adding, however, also the meaning of 'relation' or 'gentile,' he is careful to refrain from describing it as denoting any one gender more than another. Visvesvara, in discussing, in the Subodhini, the rights of the paternal grandmother as laid down in the Mitakshara, says that there is no objection to understand the word '*gotrajas*' in the sense of 'male and female *gotrajas*,'(1) and he, as we shall subsequently see, gives effect to that opinion. Those authorities and the instances of female *gotrajas* already specified, render it unnecessary, I think, to endeavour to fortify our opinion by resort to the ambiguous case of a sister, whom Nilakantha in the Vyavahara Mayukha brings in as an heir after the paternal grandmother, which the sister undoubtedly is in this Presidency.(2) It seems to me that he introduces her rather on the ground of *sapinda-ship* than of *gotra-ship*, but calls to his aid a quibbling play upon the term '*gotra*' as a make-weight. The passage(3) relating to the sister is, in Mr. Borradaile's translation, so infelicitously rendered as to be, especially towards its conclusion, absolutely unintelligible. In a re-translation, made for the purposes of this suit by competent scholars, and approved by this Court, it runs thus :—" 19. In case of the non-existence of that (the paternal grandmother) the sister (takes) according to the *dictum* of Manu,(4) that 'whoever is the nearest *sapinda* his should be the property;' and according to the text of Brihaspati,(5) that where there are many jnati, sakulyas and bandhavas, among them whoever is the nearest he should take the property of the childless; she the sister also being born in the brother's *gotra*, and so there being no difference of *gotrajatva* (the state of being born in the *gotra*). But (says an objector) there is no *sagotrata* (state of being in the same *gotra*). True, but neither is that stated here as a reason for taking property." *Sagotra* is an abbreviation of *samanagotra*, which means "in the same *gotra*," or "a person in

(1) 1 West and Bühler 146.

(2) *Vinayek Anandráo* v. *Lakshmibái*, 1 Bom. H. C. R. 117, 126, S. C. 9 Moo. Ind. App. 516.

(3) Stokes' Hindu Law, Vyav. Mayukha, ch. IV., sec. VIII., pl. 19.

(4) Chap. IX., pl. 187 ; Cole. Dig., bk. V., ch. VIII., pl. 434.

(5) Cole. Dig., bk. V., ch. VIII., pl. 437, cl. 4.

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the same *gotra*." Nilakantha's concluding sentence amounts to no more than an assertion that the sister was at her birth a *gotraja* of her father and brother, which is true, but is followed by what is tantamount to an admission that on her entrance into the married state (which her religious law imperatively required her to assume) she ceased to be their *gotraja, i.e.,* she was no longer a *sagotra*. So far, therefore, as *gotra-ship*, as understood in this Presidency, is an essential qualification for inheritance, she, if her marriage preceded her brother's death, would not be qualified to succeed to his estate, inasmuch as, after her marriage and consequent transfer to the *gotra* of her husband, the only relation which existed between her and the family in which she was born, was *sapinda-ship* and not *gotra-ship*. It is worthy of note that Nilakantha seeks to justify the introduction of the sister as an heir by reference to a text of Brihaspati (*alias* Vrihaspati) which, like the text of Manu, also relied upon by Nilakantha, does not specify the sister: whereas there is another text of Brihaspati that does expressly name her, but apparently introduces her at an earlier stage of the succession. It is as follows:—" But she, who is his sister, is next entitled to take the share; this law concerns him who leaves no issue, nor wife, nor father, *nor mother*."(1) The words "nor mother" have been added to that text by the translator, Mr. Colebrooke, in conformity with another text of Brihaspati,(2) which provides for the succession of the mother to a son (who dies leaving neither wife nor male issue), unless she consent to waive her right in favour of the brother of the deceased. Some of the Bombay sastris have been so far influenced by Nilakantha's play upon the term "*gotra*" as to style the sister '*gotraja*' as well as *sapinda*.(3) The better opinion seems, however, to me to be that which would regard her heirship as dependent either on the special mention of her by Brihaspati and Nilakantha, or upon her *sapinda-ship*. The assertion of the latter that she has '*gotrajatva*,' *i. e.,* the state of being born in the *gotra*, substantially amounts to no more than a statement that she is a *sapinda*.

(1) Cole. Dig., bk. V., ch. VIII., pl. 407, cl. 3.

(2) Cole. Dig., bk. V., ch. VIII., pl. 423, and see Manu, *Ibid.*, pl. 424.

(3) 1 West and Bühler, 150—152, and see p. 155.

The answer to the question—whether the wife is a *sapinda* as well as a *gotraja* of her husband?—must also, we think, be, in this Presidency at least, in the affirmative.

In the Achara Kanda of the Mitakshara, (translated at page 141 of 1 West and Bühler,) Vijnyanesvara states his views as to what constitutes *sapinda-relationship* as follows:—

"(He should marry a girl) who is non-sapinda, *i. e., asapinda* (with himself). She is called his sapinda (who has particles of) the body (of some ancestor, &c.) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda-relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son of a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise (does he stand in sapinda-relationship) with paternal uncles and aunts, and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son) with those (severally) who have sprung from one body (*i. e.,* because they bring forth sons by their union with the offspring of one person, and thus their husband's father is the common bond which connects them). Therefore, one ought to know that, wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

This shows that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted *sapinda-ship,* and

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adopted, in lieu of it, the theory that *sapinda-ship* is based upon community of corporal particles, or, in other words, upon consanguinity, and that he maintained that there is such a community between the wives of collaterals. In a subsequent passage of the same work (also translated by Messrs. West and Bühler,(1)) Vijnyanesvara assigns the limits in point of degree to *sapinda-relationship* as founded on the theory laid down by him.

The constitution of *sapinda-relationship* by community of particles meets with a passing recognition from Nilakantha in the 4th chapter of his Vyavahara Mayukha. That recognition is, however, so obscured in Mr. Borradaile's translation as almost to escape notice. At the end of placitum 21 of the 5th section of chapter IV., Nilakantha, in discussing the law of adoption, quotes Manu, and Mr. Borradaile translates the quotation thus:—"A given son must never claim the family and estate of his natural father: the funeral oblation follows the family and estate, but of him who has given away his son, the obsequies fail."(2)

In Haughton's revised edition of the translation of Manu by Sir William Jones (3) and also in Colebrooke's translation (4) the same text is rendered thus:—"The funeral cake follows the family and estate, but of him who has given away his son the funeral oblation is extinct." The word rendered by Mr. Borradaile "funeral oblation" and by the others "funeral cake" is in the original Sanskrit of Manu "*pinda*," and the word rendered by Mr. Borradaile "obsequies" and by the others "funeral oblation" is in the original Sanskrit "*svadha*," a word used in several senses,(5) but here apparently employed to denote the customary food or oblation offered to the *pitris*, or spirits of deceased ancestors, or the *srāddha* or funeral ceremony itself. Nilakantha's commentary in plac. 22 of the chapter and section of the Vyavahara Mayukha last mentioned, on this text of Manu, is thus translated: "'Follows the family and estate,' goes after the family and estate, the latter expression corresponding generally with the term 'goes along with.' 'The

(1) 1 West and Bühler, 142, 143.

(2) Stokes' Hindu Law, Vyav. Mayukha, ch. IV., sec. V., pl. 21.

(3) Ch. IX., pl. 142.

(4) Cole. Dig., bk. V., ch. IV., pl. 181.

(5) Monier Williams' Dictionary, p. 1159, and see Manu, ch. III., pl. 252.

given son' the simple adopted; since in the case of a *dwyamushyáyana*, the (double) obligation of family connexion and the like be hereafter declared. The funeral oblation," *(pinda)* "according to Medhatithi, Kalluka Bhatta and others, means the funeral ceremony and other *srāddhas*, *(srāddhamaurddhadehikaditi)*. According to other authors, again, the 'funeral oblation,'" *(pinda)* "means sapinda connexion," *(sāpindyam)*; "and 'obsequies,' the funeral and other *srāddhas*" *(svadaurddhadehikasraddhaditya)*. If the word *sāpindyam*, which Mr. Borradaile has here translated "sapinda connexion," had been rendered "consanguinity," (see Monier Williams' Dictionary, p. 1106), or "connexion by community of corporal particles," it would have brought out more distinctly the meaning of the commentator Nilakantha, who was evidently here referring to the deviation of the Mitakshara and its followers, as to the force of the term '*sapinda*,' from the doctrine of connexion by the offering of funeral oblations maintained by other treatises and commentators.

That this was his meaning, is apparent from certain passages in his work, the Sanskara Mayukha,[1] of which treatise no English translation has yet been published. The following translation by competent scholars thus renders one of these passages as it stands at page 45 *et seq.* of the Sanskrit original:—" Now (about) marriage: Yajnavalkya (says):—One should marry a woman (who) has not been before married by another man; (who) is amiable; (who) is not of the same pinda (with the intended husband); (who) is young" * * * * (In explaining each of the above qualifications fully, the following explanation is given of the term "*asapinda*.")

"(Now) about (the word) asapindam. In Matsya Puran (it is stated) that the sapindata (extends over) ends with seven persons (purusha).[2] And thus: Devadatta[3] has "sāpindya," (state of being of the same pinda) with the six persons (purusha) commenc-

(1) Treating of the sixteen initiatory ceremonies. At p. vi of the Introduction to 1 West and Bühler there is an enumeration of his writings.

(2) 'Purusha' primarily means a man, but is frequently used as the word 'person' in English to represent a member (male or female) of the human species. See Monier Williams' Sanskrit and English Dictionary, p. 585.

(3) The *propositus*.

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ing with his father and with the six persons commencing with his son. The seven persons (purusha) means including the seventh person (purusha). In this way, then, there will be no sāpindya with the sister, &c. Here some have explained away (the difficulty) thus: Sāpindya is maintained on account of (her) being intended[1] as a deity (in Pindadava); and thus in the srāddha, of which Devadatta is the performer, the sister, &c., also being intended, they have certainly sāpindya. If so, then, in Mahalaya,[2] srāddhas and the like there will be sapinda-relationship (sāpindyam) between guru (preceptor) and shisya (pupil), &c. Hence Vijnyanesvara[3] and others abandoned the theory of connexion through the rice-ball offering, and accepted the theory of transmission of constituent atoms. Therefore, (to explain the different parts in the formation of the word 'asapinda' by dissolving the compound 'asapinda,') she is sapinda who has one and the same pinda (body) (*i. e.*) dehávayava (constituent atoms) na (not) sapinda is 'asapinda.' Thus, therefore, the father's constituent atoms, viz., blood, fat, &c., directly enter into the body of the son; and (the constituent atoms) of the paternal grandfather (enter the son's body) through the medium of the father. In the same manner with reference to (the constituent atoms of) the paternal great-grandfather, &c., also, somehow the transmission of constituent atoms mediately exists. So with the mother, &c.; also, so the wife has sāpindya with the husband, because they are the generators of one body. In some instances, sāpindya exists also by reason of being the holders of the same constituent atoms. Thus: the wives of brothers are sapindas to each other, for they hold the constituent particles of the same father-in-law through the media of their husbands. In this way somehow the sāpindya in other cases also should be inferred."

It has been contended for the plaintiffs that in the above extracts from the Achara Kanda and the Sanskara Mayukha the respective authors were dealing with *sapinda-relationship* in its ceremonial aspect only, and that, when they wrote upon *sapinda-*

(1) *i. e.*, included in the invocation.

(2) The great annual sacrifice in the month of Bhádropada.

(3) The author of the Mitakshara.

relationship with reference to inheritance, they may be regarded as viewing *sapinda-relationship* in the same light as the author of the Daya Bhaga and certain other commentators on Hindu law. But we think that the burden rests upon the plaintiffs to show that Vijnyaneswara and Nilakantha regarded *sapinda-relationship* as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the Achara Kanda and the other in the Sanskara Mayukha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional. If Vijnyaneswara and Nilakantha contemplated such a distinction between *sapinda-ship* for the purpose of inheritance and *sapinda-ship* with respect to marriage and ceremonial or religious purposes, we certainly believe that they would have expressly said so. Messrs. West and Bühler in their valuable work on Hindu law (page 140 *et seq.*) regard the definition of *sapinda-ship* given in the Achara Kanda as applicable to inheritance, and, in that portion of the Mitakshara, Vijnyaneswara expressly says that "*wherever the word 'sapinda' is used,* there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

A translation of a not very lucid passage in the Vira Mitrodaya of Mitra Misra has been brought to our notice, in which the author, after referring to the canons of succession laid down by Vijnyaneswara in chap. II., sec. V., of the Mitakshara with reference to the text of Yajnyavalkya in favour of *gotrajas* (gentiles), quotes, at great length and controverts the remarks of Devanda Bhatta in the Smriti Chandrika, chap. XI., sec. V., wherein he maintains that the term '*gotraja*' ought to be construed as including males only, and relies on the Vedic text (Sruti) which by some has been rendered to the effect that "females and persons deficient in an organ of sense or member are deemed incompe-

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tent to inherit." Mitra Misra also quotes and impeaches certain passages in the Daya Bhaga of Jimuta Vahana[1] in which that author maintains that Yajnyavalkya used the term '*gotrajas*' for the purpose of excluding from inheritance females who are *sapindas*; and, relying upon Baudhayana's interpretation of the Vedic text already mentioned as generally excluding females from inheritance, says that the admission of the widow and certain others is exceptional, and depends upon express texts. Although, as we have seen, Mitra Misra condemns the reasoning in the Smriti Chandrika and Daya Bhaga, whereby Devanda Bhatta and Jimuta Vahana compass the exclusion of females from inheritance, he (Mitra Misra) himself construes the Vedic text as excluding women, because, he says, even supposing, with the venerable Vidyaranya, that "*indriya*" means *soma* juice, yet the word "*adáyádatva*" in itself is sufficient to imply a prohibition to inheritance of women. This, however, is not very conclusive reasoning. Although *adáyáda* is often used to signify "not entitled to be an heir," and "*adáyádatva*" the condition of one not entitled to inherit, yet these are not always or necessarily the meanings of those words. They may be applied to non-participation in any particular thing: as, for instance, non-participation in the *soma* juice. And such would appear to be the proper rendering, if Vidyaranya be right in affixing on "*indriya*" the meaning of *soma pithá* (*soma* drink) as he does in the Daya Vibhaga chapter of the Vyavahara Kanda of his Madhaviya Commentary on the Párasara Smriti, which chapter has been translated by Mr. Burnell, and published at Madras in 1868 (see page 33 of that translation).

Messrs. West and Bühler[2] say that the Vedic text may be translated thus: "Women are considered disqualified to drink the *soma* juice, and receive no portion (of it at the sacrifice)."

It should, perhaps, be mentioned that Mitra Misra, in the above passage of the Vira Mitrodaya, probably quoting from memory, as was his habit,[3] has apparently (if the translation furnished to us be correct) misrepresented that portion of Jimuta Vahana's arguments contained in chap. XI., sec. VI., pl. 10 of Mr.

(1) Stokes' Hindu Law, Daya Bhaga, ch. XI., sec. VI., pl. 10, 11.

(2) 1 West and Bühler, p. 145, note.

(3) See the note to 2 West and Bühler, 100.

Colebrooke's translation of the Daya Bhaga. He (Mitra Misra) represents Jimuta Vahana as speaking of "the grandson through the daughter of the father" as born in the *gotra* of his mother's father, which cannot be true. What was probably meant by Jimuta Vahana was "he, too, being by such offering connected with the gotra." Again, Mitra Misra in the same place describes Jimuta Vahana as saying of the female *sapindas* "these not being born in the *gotra*." What Jimuta Vahana probably meant was what Colebrooke has translated him as having said, viz., "females related as *sapindas*, since these also sprung from the same line." For the word "since", perhaps, it might be well to substitute "notwithstanding that." Finally, with respect to the Vira Mitrodaya, I should observe that it is not regarded so much here as at Benares, and occupies a place, amongst the works of authority in this Presidency, far below the Mitakshara and Mayukha, and is not accepted when in conflict with them.

The doctrine that *sapinda-ship* proper depends upon community of corporal particles (or consanguinity), and not upon the presentation of funeral oblations to the pitrás, is strongly maintained by Nanda Pandita in the Dattaka Mimansa. In sec. VI., pl. 6, he quotes the text of Manu, which, together with Nilakantha's Commentary upon it in the Vyavahara Mayukha, has been already mentioned, and then he (Nanda Pandita) elaborately contends (1) that, although affiliation for the purposes of inheritance and funeral oblations takes place, yet the given son does not and cannot become a *sapinda* proper (*i. e.*, by consanguinity or community of particles) of the adoptive father, but continues to be such a *sapinda* to the seventh degree of his natural father and to the fifth degree of his natural mother,(2) and is by special texts only and in virtue of funeral oblations constituted heir and a quasi-*sapinda* of his adoptive father to the third degree.(3) Placitum 10 of that section and Mr. Sutherland's note upon it, are especially deserving of attention. That note is: "The word '*pinda*' signifies either the 'body' or a 'cake,' or ball of food presented to the manes of the deceased: the word '*sapinda*,' therefore, may denote

(1) Pl. 7 to pl. 39, both inclusive.

(2) See pl. 10 and pl. 11, where Nanda Pandita quotes Gautama to this effect.

(3) Pl. 32 *et seq.*

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either one consanguineally related, or one connected through an oblation of such funeral cake." In the original edition of Mr. Sutherland's translation of the Dattaka Mimansa, published at Calcutta in 1821, the typographical errors are least numerous.

Nanda Pandita especially notices the case of a daughter [1] whom he treats as being, in accordance with the theory that *sapinda-ship* rests upon a community of corporal particles, the *sapinda* as well of her husband as of her father. This view is also upheld by Mr. Sutherland in his note to placitum 14 of section VI. She would, however, cease to be the *gotraja* of her father after her marriage, as already observed. Her right to inherit, therefore, depends either upon the special mention of her as an heir, or as being a *sapinda* of her father.

In endeavouring to place a proper construction upon the doctrines of the respective treatises of Vijnyaneswara and Nilakantha which more especially relate to partition and inheritance, it is, we think, indispensable to keep in view the definition of *sapinda-ship* as laid down by those authors in the passages which we have quoted. Otherwise we should arrive at conclusions altogether opposed to their systems, which have so long been recognized, and to a great extent brought into harmony with each other, by usage and in the administration of justice at this side of India. It should also be borne in mind that the sastris, who have furnished in times past the opinions (*vyavasthas*) on Hindu law to our civil Courts on which the decisions of the latter have been based, referred for authorities not to any English translations of the Hindu smritis and commentators (including, amongst the latter, Vijnyanesvara and Nilakantha), but to the original Sanskrit, and, as will be shown in detail by my brother West, have read the Mitakshara and Mayukha, when dealing with *sapinda-ship* in relation to inheritance, in the sense of the passages above extracted from the Achara Kanda and Sanskara Mayukha.

We yield to none in respect for the erudition, accuracy, and discrimination of Mr. Colebrooke; but it is impossible not to perceive that, in his translation of the portion of the Mitakshara which re-

(1) Sec. VI., pl. 14, 67.

lates to partition and inheritance, he has overlooked the definition given by Vijnyanesvara himself, in the Achara Kanda, of the meaning which he attributes to the term "*sapindas*." Mr. Colebrooke's experience lay principally on the eastern side of India; and he has given to the term "*sapindas*" the same meaning, viz., "persons connected by funeral oblations," which it bears in the Daya Bhaga of Jimuta Vahana of the Bengal school, and which Mr. Colebrooke in his English translation of that treatise had given to the same term. The fifth section of chap. II. of his translation of the Mitakshara is that which most especially bears upon the question of Mánkuvarbái's claim to be regarded as a *gotraja-sapinda*. After removing from that translation the English rendering of the names of the various classes of kindred and substituting the Sanskrit names given in the original, that section would run thus:—

"1. If there be not brother's sons, *gotrajas*(1) share the estate. *Gotrajas* are the paternal grandmother and *sapindas*,(2) and *samanodakas*.(3)

"2. In the first place, the paternal grandmother takes the inheritance. The paternal grandmother's succession immediately after the mother was seemingly suggested by the text before(4) cited, 'And the mother also being dead, the father's mother shall take the heritage;(5) no place, however, is found for her in the compact series of heirs from the father to the nephew; and that text ('the father's mother shall take the heritage') is intended only to indicate her general competency for inheritance. She must, therefore, of course, succeed immediately after the nephew; and thus there is no contradiction.

"3. On failure of the paternal grandmother, *gotraja-sapindas*,(6) namely, the paternal grandfather and the rest, inherit the estate. For *binnagotra-sapindas*(7) are indicated by the term '*bandhu*'.(8)

(1) Trans. by Colebrooke "gentiles."

(2) Trans. by Colebrooke "relations connected by funeral oblations of food."

(3) Trans. by Colebrooke "relations connected by libations of water."

(4) Mitak, ch. II., s. 1, pl. 7. (5) Manu., ch. IX., pl. 217.

(6) Trans. by Colebrooke "kinsmen sprung from the same family with the deceased, and connected by funeral oblations."

(7) Trans. by Colebrooke "kinsmen sprung from a different family, but connected by funeral oblations."

(8) Trans. by Colebrooke "cognate."

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"4. Here, on failure of the father's descendants, the heirs are, successively, the paternal grandmother, the paternal grandfather, the uncles, and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of *samanagotra-sapindas*.(1)

"6. If there be none such, the succession devolves on *samanodakas*;(2) and they must be understood to reach to seven degrees beyond *sapindas*;(3) or else as far as the limit of knowledge and name extend. Accordingly, Vhrat Manu says:—'The relation of the *sapindas* ceases with the seventh person, and that of *samanodakas*(4) extends to the fourteenth degree; or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*.'"(5)

The fifth section, as a whole, leads me to the conclusion that Vijnyanesvara intended to place the paternal grandmother as first of the *gotraja-sapindas* after the compact series of heirs. The last sentence in the 5th placitum of that section (viz. "In this manner must be understood the succession of *samanagotra-sapindas*") I think applies to all of the persons named in that and the preceding placitum, and amongst these the first is the paternal grandmother. Those placita (4 and 5), though severed in the translation, are continuous in the original Sanskrit. This remark may be extended to all of the placita in that (the fifth) section. The division into placita is the work of the translator.

It has been urged on behalf of the plaintiffs that, although the paternal uncle's sons (under which denomination Gangádás, the deceased husband of Mánkuvarbái, would fall) are named amongst *gotraja-sapindas* in plac. 4 and 5 of the above section, there is not any mention of the wives of such paternal uncle's sons. The

(1) Trans. by Colebrooke "kindred belonging to the same general family, and connected by funeral oblations."

(2) Trans. by Colebrooke "kindred connected by libations of water."

(3) Trans. by Colebrooke "the kindred connected by funeral oblations of food."

(4) Trans. by Colebrooke "those connected by a common libation of water."

(5) Trans. by Colebrooke "the relation of family name."

plaintiffs, however, are not in a position to contend that the list of *gotraja-sapindas* contained in those placita is exhaustive; for, if it were, they would be excluded from the *gotraja-sapindas* as not being named in that list. However, the author of the Subodhini names as *gotraja-sapindas* several persons not specified in placita 4 and 5, and amongst them are the paternal great-grandfather's mother and the paternal great-grandfather's grandmother, and he says that the same analogy holds good amongst the *samanodakas*.(1) There does not appear to be any better reason for supposing that Vijnyanesvara's enumeration in these placita of *gotraja-sapindas* is exhaustive than his enumeration of *bandhus* (bandhavas) in plac. 1 of sec. VI. in chap. II., which has been held to be illustrative only and not exhaustive: *Girdharilall* v. *The Bengal Government*,(2) *Amrita* v. *Lakhinárayen*.(3) And as more than once already observed, both Vijnyanesvara in the Achara Kanda and Nilakantha in the Sanskara Mayukha include the wives of male *sapindas* amongst the *sapindas*. That Baudhayana's interpretation of the Vedic text to the exclusion of women from inheritance has not been adopted by Vijnyanesvara, is further shown by the Mitakshara, plac. 24, 25 and 26 of ch. II., sec. 1 as to the general competency of women to inherit; and if it be contended that those placita relate only to the widow, whose rights are the subject of that section, the reply is, that his subsequent introduction in sec. V. of the paternal grandmother and paternal great-grandmother amongst the *gotraja-sapindas* as heirs shows that those placita are not to be confined to the widow, and this view is corroborated by the additional list of *gotraja-sapindas* in the Subodhini. In the 18th plac. of sec. VIII. in chapter IV. of the Vyavahara Mayukha, Nilakantha puts it beyond doubt that a woman may inherit as a *sapinda* by expressly naming the paternal grandmother as first of the *gotraja-sapindas* for the purpose of inheritance. That placitum in the translation of part of sec. VIII. which has been mentioned as in evidence in this cause runs thus:—

"18. In the case of the non-existence of the brother's sons, the gotraja-sapindas succeed. The first among these is the pater-

(1) See Colebrooke's note to sec. V., pl. 5, of the Mitakshara.

(2) 12 Moo. Ind. App. 448.

(3) 2 Beng. L.R. 28 F. B.

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nal grandmother according to the *dictum* of Manu" (chap. IX., sloka 217), "that if the mother also be dead, the father's mother should take the property. Although she is mentioned after the mother, yet as she is not introduced in the fixed order ending in the brothers' sons, and as agantus," (persons coming in accidentally), "she should be introduced after the brothers' sons." Whatever criticism or doubt his mention of the sister as a *gotraja* in the following (19th) placitum, already quoted by us, may be subject to, cannot be extended to his denomination of her as a *sapinda* in the same placitum. It is quite consistent with his adoption of the community of particles as the basis of *sapindaship*, and is an additional proof that he did not limit that doctrine to marriage or ceremonial matters. It is also consistent with Kalluka Bhatta's introduction of the words "male or female" into plac. 187 of Manu, chap. IX. It certainly seems less difficult to construe "*sapindas*" as including females than to interpret "sons" as including daughters, and "brothers" as including sisters, both of which heights have been scaled in Hindu hermeneutics.

For these reasons we think that females may be *gotraja-sapindas* for the purpose of inheritance in accordance with the doctrine of the Achara Kanda chapter in the Mitakshara and of the Sanskara Mayukha. My brother West will state the grounds on which we have arrived at the conclusion that Mánkuvarbái, as wife of Gangádás, the first cousin of Mulji Nandlál, is, in conformity with that view, to be deemed a *gotraja-sapinda* of Mulji Nandlál, and nearer, as such, in position to him than the plaintiff Lallubhái and his brother Mulchand.

If this case were not to go beyond this Court, our decision on the fifth of the new issues involving the question of Hindu law would render any determination of the points involved in the first and second of those issues unnecessary. But as it is not improbable that this case may be taken to Her Majesty's Privy Council, we have deemed it the better and least expensive course for the parties that we should decide these points also, in order that, if their Lordships should take a different view of the question of Hindu law from that which we have now expressed, they may be

in a position finally to dispose of the whole case without remanding it on the other points for the determination of this Court.

We concur with Mr. Justice Bayley in his findings in the negative on the first and second of the new issues referred to him by this Court. We also concur with him in holding that his finding on the second issue rendered any findings on the third and fourth of the new issues unnecessary. We differ from him in his finding on the fifth of the new issues, and we resolve that issue in the negative, and, therefore, declare that neither the plaintiffs nor either of them, nor Mulchand Bápubhái, the father of the plaintiff Kásidás Mulchand, was or were, at the decease of Sarasvatibái, entitled to the moveable and immoveable estate of Mulji Nandlál, or to either of the same or any part thereof.

We accordingly affirm the original decree of the Division Court made on the 20th day of April 1872, except so far as it is hereinafter altered as to costs. We vary that decree as to costs by directing that all parties, other than Diváli and Kásibái, bear their own costs in the said Division Court and in this appeal; and we further direct that the costs incurred in making Kásibái, as executrix of Mánkuvarbái, a party for a second time, should be borne by Kásibái. My brother Sargent concurs in this judgment. My brother West concurs in so much of it as relates to the question raised on the fifth issue. In the rest of the case he has not taken any part.

WEST, J.:—Of the plaintiffs in the present case Lallubhái is the seventh and Kásidás the eighth in descent according to the inclusive mode of reckoning followed by the Hindus, from Motiláll the sixth in ascent, by the same method from the deceased Mulji whose former property is the subject of dispute. According to the law prevailing in Bengal, neither of the plaintiffs would rank as a *sapinda* of the deceased. When the common ancestor (within three degrees) is reached, the collateral descent constituting *sapinda-ship* stops with his great-grandson, or, if the connexion be through his daughter, with the grandson.[1] The maternal relations within the same degrees take the next

(1) Stokes' Hindu Law, Daya Bhaga, ch XI., sec VI., pl. 6-7; Dáyakram Sañgraha, ch. I., s. X.

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place, and those must be exhausted before the next class, called the *sakulyas*, come in. These are three descendants below the great-grandson and three ascendants above the great grand-father with the collateral descendants from each down to the great-grandson, or the grandson through a daughter, as in the case of the *sapindas*. [1]

According to this system, Lallubhái, the plaintiff in the present case, would be excluded from the inheritance by the nearer collateral relatives of Mulji, if any, through his mother as well as through his father. As a descendant from a *sakulya*, but beyond the third in descent, he could rank only as a *samanodaka* under the rule indicated in Cole. Dig., bk. V., ch. VIII, pl. 436, which does not, indeed, expressly provide for his case, but by extending the line of heirs springing from the eighth ascendant down to the fourteenth in descent, gives inferentially the like right to descendants beyond the third from the nearer ascendants in the line above the *propositus*.

According to the Smriti Chandrika, which may, apparently, be regarded as the governing authority in Madras, and the Vyavahara Madhava, which also is of weight in that Presidency, the maternal relatives do not come in immediately after the nearer *sapindas ex parte paternâ* as in Bengal. The ascending line of *sapindas* continues for six degrees, and then follow six *samanodakas*. But only the son and grandson, no daughter or daughter's son of an ascendant, are recognized in each instance as coming next after their progenitor. Failing them the succession goes one degree higher, and when the class of *samanodakas* thus constituted, has been exhausted, the *bandhus* are brought in,—connexions within five degrees, one of which is through a female.[2] According to this system, Lallubhái's right could not arise, at any rate while there remained a son of the paternal aunt or of the maternal uncle or aunt of the deceased Mulji, or any one standing within the same degree of relationship to Mulji's father or his mother.

(1) Cole. Dig., bk V., ch VII., pl.434 and 435 Comm.; Vyavasthá Darpana, s. 303.

(2) West and Bühler 177; *Girdhárilall* v. *Government of Bengal*, 12 Moo. I. A. 448.

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By the Mitakshara doctrine, as given at 1 West and Bühler 143, those who are within six degrees of a common ancestor in the male line are *sapindas* of each other. In his actual enumeration, indeed, of those taking as *gotraja-sapindas*, Vijnyanesvara stops at the third in descent in the collateral lines,(1) and on this Colebrooke grounded a remark that the Mitakshara line of succession was confirmed by the Vyavahara Madhava and the Smriti Chandrika, but on account of the extension of the *sapinda-relationship* authorized by Vijnyanesvara's comment on Yajnavalkya I. 52 to 53,(2) and sanctioned by the Privy Council,(3) the two orders of succession coincide only to a limited extent. By the Mitakshara the heritable descent may be traced to the sixth below the point of divergence of the two lines. Lallubhái is, therefore, through their common ancestor Motiláll, a *sapinda* of the deceased Mulji. He is not to be excluded from inheritance to Mulji either by *sapindas ex parte maternâ* as in Bengal, or by the *bandhus* as in Madras. The sole question is, whether his right is preferable to that of Mánkuvarbái, the widow of Mulji's first cousin. Such rights as might have been vested in Bháishet have been, it was said, purchased by Mánkuvarbai; but Pránkuvar, the grandmother of Bháishet, having died before her brother Mulji, inherited nothing from him, and her son Trikamlál, standing in the relation of a *bandhu* to Mulji his maternal uncle (*Girdhárilall* v. *Government of Bengal*,(4) could not succeed while any *gotraja-sapindas* of Mulji, or even a *samanodaka* of Mulji, survived. Nothing, therefore, on Trikamlál's death descended to Bháishet which could form an obstacle to the success of Lallubhái's claim in this case. The alleged will, in Bháishet's favour, of Mulji's widow Sarasvatibái, and the alleged transaction between him and the defendant Mánkuvarbái have been disposed of in the judgment of my Lord the Chief Justice.

The succession of the male *gotraja-sapindas* themselves not being provided for in detail by the law books has, as we have seen, given rise to some controversy. The same texts have been con-

(1) Stokes' Hindu Law, Mitak., ch. II., sec. 5, and ch. IV., sec. 5.

(2) 1 West and Bühler 143.

(3) 1 West and Bühler 139, and see *Bhyah Rám Singh* v. *Bhyah Ujár Singh*, 13 Moo. I. A. 373.

(4) 12 Moo. I. A. 448.

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strued by the different schools as pointing to lines which are then to be pursued to a greater or less distance according to the governing principles of interpretation which each school has adopted. As to the right of widows to take the places of their deceased husbands, the meagre indications of the texts have left still more room for dispute, and it has thus been possible for the learned counsel on each side in the present case to lay before us arguments of considerable weight both for the admission and for the rejection of this principle as part of the Hindu law.

The incapacity of women in ordinary cases for inheritance, as pointed out in the case of *Bhau Nanaji* v. *Sundrábái*[1] was probably at one time a generally received doctrine. It forms the basis of the Bengal and Madras laws still,[2] but it is discarded by the Mitakshara,[3] which, agreeably to the principles laid down by it in discussing the rights of a widow, includes the grandmother and great-grandmother amongst the *gotraja-sapindas*. By the other method of interpretation illustrated in the Smriti Chandrika (Engl. Transl., p. 192) *gotraja*, being regarded as essentially masculine in sense, is held to exclude females, though room is made for those who are provided for by special texts. The mere recognition, by Vijnyanesvara, of the mother and paternal grandmother as heirs, might be accounted for by the same texts; but the class in which he places the grandmother, and his inclusion in the same class of the paternal great-grandmother (unentitled except as a mere *gotraja-sapinda*) show that he accepted women's heritable capacity as a general principle enabling him to extend the text of Yajnyavalkya to females not expressly mentioned as heirs in any of the extant Smritis.

It is said that the reason which Vijnyanesvara gives for the precedence which he assigns to the mother over the father, as heir to a son, rests on a ground which, though in part applicable to the grandmother and other female ancestors of the *propositus* in the paternal line, affords no support whatever to the claims of widows of collaterals. The reason assigned for the preference given

(1) 11 Bom. H. C. Rep 249.

(2) See the Smriti Chandrika, ch. IV., pl. V.; Daya Bhaga, ch. X., sec. VI., pl. 11.

(3) See Mitak., ch. II., sec. I., pl. 22, 24, 25.

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to the mother[1] seems a very artificial one. Nilakantha in the Mayukha [2] declines to recognize it. Jagannatha [3] seems to prefer the father, though not decisively. Vachaspati Misra pronounces for the mother's precedence on the authority of Vishnu and Brihaspati, [4] though as to the former he seems to be mistaken,[5] and Brihaspati's rules do not appear to be quite self-consistent.[6] He cites texts of Manu also which might well be construed adversely to this doctrine of the Mithila school. The question might probably be resolved with equal plausibility in either way. But whether Vijnyanesvara's reasons for preferring the mother to the father are good or bad, he does not assign them in favour of the grandmother or great-grandmother. The grandmother he [7] brings in on the strength of a text of Manu,[8] which, as he has to depart from its literal sense, would have enabled him, so far as one can see, to place her as well after as before the grandfather,[9] yet in the precedence which he assigns to her he has been followed by the Mayukha.[10] He has probably determined her place and that of the great-grandmother relatively to their husbands by analogy to the place of the mother relatively to that of the father (as in the Daya Bhaga);[11] and that he did not intend in other respects to give to these ancestors any right except that of *gotraja-sapindas*, is clear from the way in which he sets aside the literal sense of Manu's text assigning to the grandmother the next place after the mother. This would have enabled him to bring her in, as he has brought in the daughter's son [12] apart from her position as a *gotraja*, so that it is clear he thought she was properly included in the class, and afforded an analogy for dealing with the cases of other wives of *gotrajas*, at least in the ascending line.

The difficulty arises in the transition from wives of male *gotrajas* in the ascending line, who take precedence of them, to wives

(1) Mitak., ch. II., sec. III. (2) Ch. IV., sec. VIII., pl. 15.

(3) Cole. Dig., bk. V., pl. 424 Comm.

(4) Vivâda Chintâmani, pl. 293, English translation.

(5) See 1 West and Bühler 341. (6) Cole. Dig., bk. V., ch VIII., pl. 422, 423.

(7) Mitak., ch. II., sec. I., pl. 7; sec. V., pl. 2.

(8) Manu. ch., IX., pl. 217. See also Catyâyana quoted in Cole. Dig., bk. V., ch. VIII., pl. 425.

(9) Mitak., ch. II., sec. V., pl. 1, 2, 3.

(10) Ch. IV., sec. 8, pl. 18. (11) Ch. XI., sec. V., pl. 4.

(12) Mitak., ch. II., sec. II., pl. 6.

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of *gotrajas* in the collateral lines who are postponed to their husbands. Vijnyanesvara, after providing for the great-grandmother, great-grandfather, and their sons and issue, concludes:—"In such a way do *samanagotra-sapindas* to the seventh degree take the property."[1] He no doubt intends to lay down a general rule; but what the precise scope of the rule is, it is not possible to say with certainty; and that the whole subject has been a puzzling one to the native law-writers, is evident from Colebrooke's note.[2] We may observe that by using the word "*samanagotra*" in indicating the continuation of the line of succession, Vijnyanesvara would most certainly indicate "persons connected by *gotra*." In pl. 3 he says: "*Gotraja-sapindas, i. e.,* the grandfather and the like, take the estate; the *binnagotra-sapindas* (*i. e.* of a different *gotra* or family) are included in the term *bandhus*." There cannot be much doubt, therefore, that he may have intended to rank as *gotraja-sapindas* not only persons born in the family, but all included in the family. A woman on marrying quits her own *gotra* for that of her husband,[3] and she would thus in her husband's family fall within the class of *gotrajas* as understood by Vijnyanesvara. Still, though the term, as he understood it, would include a widow, it is possible that he may have had only the male *gotrajas* in view; his omission to provide expressly for the widows of any collaterals, is an argument that he did not intend to include them, and he could not have been unaware that their rights were not universally admitted. On the other hand, it must be remembered that the commentators wrote almost exclusively for their own schools. Vijnyanesvara's rules for the inheritance of the widow and to her property, show that he identified the wife with her husband and his family more closely than the doctors of other schools. He really accepted the proposition that "of him whose wife subsists, one-half the body survives"[4] as a basis for actual practice. The school of the Vajasaneyins, or followers of the White Yajurveda, may be regarded as specially favourable to women. The famous dialogue

(1) Mitak., ch. II., sec. V., pl. 5, 6. (2) *Ibid.* note 5.

(3) Steele on Hindu Law and Custom, p. 27, note. 1 West and Bühler 233, Q. 3, p. 231, note.

(4) Vrihaspati in Cole. Dig., bk V., ch. VIII., pl. 399, and see Manu. IX. 45.

ascribed to Yajnavalkya with Maitreyi[1] points to a division, by that sage, of his property between his two wives when he was himself retiring from the world; and Katyayana's Srauta Sutra, the only one on the White Yajurveda, allows to women, though not to cripples, the right of sacrifice as authorized by the Vedas.[2] Visves'vara, the author of the Subodhini, the chief commentary on the Mitakshara, says that "*gotraja*" may properly be taken to include both males and females;[3] and Balambhatta, insisting on the same view, applies it to the determination of the right of a predeceased son's widow, whom he places next after the paternal grandmother. There is a pervading partiality towards female claims in Balambhatta's Commentary which has led to a strong suspicion that it was composed by a lady;[4] but Colebrooke in the preface to his translation of the Mitakshara speaks of it in terms of commendation.[5] The Vira Mitrodaya argues elaborately, as it would seem, for the right of uncles' widows to succeed as the necessary result of a construction of Yajnavalkya's text according to the doctrines of Vijnyanesvara, in opposition to the narrow rules of the Smriti Chandrika (ch. XI., sec. V.) and the Daya Bhaga (ch. XI., sec. VI., pl. 10, though, for the author's own part, he is disposed to accept the general rule of the exclusion of females as applicable to the *gotrajas*. In this he departs from the Mitakshara, as in the passage at 2 West and Bühler 100, where the Vedic text of disqualification is cited, and Manu misquoted in support of it.

Upon the whole it would appear more probable than not, upon the text of the Mitakshara, and its recognized exponents, that it did intend widows to be included amongst the *gotrajas*, and that the particular place which it assigns to the female *gotrajas* in the ascending line relatively to their husbands is not an argument of much weight against this, as it is probably due only to a rather fanciful analogy which did not influence the author in determining their right to admission. The point, however, is one that admits of infinite controversy so far as the text is concerned, one, therefore, in which actual practice is of the greatest weight in

(1) Müller H. Sanskrit Lit. 22. (2) Müller H. Sanskrit Lit. 199, 349.
(3) 1 West and Bühler 146. (4) 1 West and Bühler, Intro. 5.
(5) Stoke's Hindu Law, p. 177.

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determining which of the conflicting explanations is to be preferred to the others, according to the principles laid down by the Privy Council in the case of *The Collector of Madura* v. *Mootoo Ramalinga Sattrapathy*.(1)

In the case at 1 West and Bühler, 163, the sastri, recognizing the sister-in-law of the *propositus* as a *gotraja-sapinda*, yet adds that she is "not a *sapinda* in the fullest sense of the word," and, consequently, postpones her to a first cousin. What he meant by "the fullest sense of the word" *sapinda*, it is not easy to say, and as he quoted no authorities that were applicable, no light can be gathered from that source. Probably he meant that though *gotraja-sapindas* according to one system, that of the Mitakshara, they would not be so according to the other, by which the cousins, as givers of oblations to the ancestors of the *propositus*, would render a benefit that the sister-in-law could not confer. At page 171, however, of the same work the sister-in-law is given precedence (Q. 3) over a distant cousin, and even (Q. 2) over a first cousin of the *propositus*.

The answer to Q. 3 at p. 173 gives to the widow of the paternal uncle of the *propositus* precedence over the second cousin of his father, *i. e.*, the great-grandson of the great great-grandfather of the *propositus*. And thus recognized as a *gotraja-sapinda*, she, of course, takes, as stated at the same page (Q. 2), before the maternal uncle, *i. e.*, a *bandhu* of the *propositus*. The Vira Mitrodaya says that logical consistency would have bound Jimuta Vahana also to assign her a place next to her husband.

At page 174 it is laid down that the widow of a first cousin of the *propositus* is an heir, and even the widow of a second cousin.

The Mitakshara directs that on the death of a widow, failing specified heirs, a successor is to be sought amongst the *gotraja-sapindas* of her deceased husband.(2) The cases of inheritance to a widow thus serve to indicate in several instances who were regarded by the sastris as the husband's nearest *sapindas*. At 1 West and Bühler, 231, the husband's sister-in-law is preferred as heir to his widow before his sister's son, on the express ground

(1) 13 Moo I. A. 435 to 438.

(2) Mitak., ch. II., sec. XI., pl. 9, 11, 25; 1 West and Bühler 212; *Vizidrangam* v. *Lakshman*, 8 Bom. H. C. Rep. 261; 11 Moo. I. A. App. 175.

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that the sister-in-law is a *gotraja-sapinda*, in virtue of which she ranks before the mere *bandhu*. The sastri's note to his answer in this case has not been translated with sufficient explicitness. It explains that a woman by marriage is born into her husband's family, and thus ceases to be a *gotraja*, though she remains a *sapinda* of her own blood relations. At p. 219, there being two widows of half-brothers, on the death of one of them the mother-in-law, still surviving, was preferred to the other half-brother's widow, but the sastri does not exclude the latter from the line of inheritance. At p. 238, cousins, six or seven removes distant, are pronounced heirs of a cousin's widow as being her *sagotra-sapindas.*

At 1 West and Bühler 115 (Q. 3) the sastri gives the daughter-in-law of the *propositus* precedence over the daughter's son. This is wrong, seeing that the daughter's son is expressly provided for by Mitak, ch. II., s. III., pl. 6; but it shows that the sastri regarded the daughter-in-law's position in the line of heirs as unquestionable, and her place could only be that of a *gotraja-sapinda.* The sastri at p. 169 cites Manu IX., 187, in support of her right. Similarly, at p. 133, the sastri does not exclude her, though he says she "cannot be heir while there is a nephew alive," as in 2 Macn. 75, a nephew being one of the series of heirs specially enumerated. Colebrooke, at 2 Str. H. L. 234, shows that the Vaijayanti prefers the daughter-in-law to the daughter.

The decided cases in the superior Courts bearing on this question are but few in number, and the reports are generally uninforming. In the case reported in 2 Borradaile 557, a daughter-in-law is preferred to a daughter's sons. The Broach sastris would have postponed her, because she was childless, a bad reason for what was probably a correct opinion, the Bengal law[1] not being in force in this Presidency. In *Roopchund* v. *Phoolchund*[2] the daughter-in-law is preferred even to a separated brother of the *propositus*, a decision which only serves to show that she was regarded as a possible and near heir, though by people very inattentive to the law on which they delivered official opinions. A grandson's widow, preferred by the Sadr Court of

(1) Daya Bhaga, ch. XI., sec. II., pl. 3. (2) 2 Borr. 670.

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Bengal to a son's daughter,[1] was by the Sadr Court of Bombay postponed to a daughter's son (Select Rep. 132, 1st edn.), but without any denial of her right of inheritance.

In the Agra Sadr Reports for 1862, at p. 306, there is a case where, under the Mitakshara, the widow of a cousin was preferred to the male descendants of a long-severed branch. That case might be regarded as on all fours with the present one; but the sastri has either given an irrelevant reason, or else the case has been so ill-reported as to considerably impair its authority.

Lastly, we have the case of *Lakshmibái* v. *Jayrám Hari*[2] in which the widow of a collateral was preferred to a male collateral in a branch parting from the common stock at one step further from the *propositus*. If this case was not wrongly decided, it must be taken as conclusive of the rights of widows of *gotraja-sapindas* to succeed next in order to their deceased husbands representing collateral lines according to the law of the Mitakshara. Seeing how uniformly, as cases have arisen, the Hindu law officers have construed the Mitakshara as admitting the widows, it cannot, we think, be said that that case was wrongly decided. The recognition of the widows of *gotraja-sapindas* as themselves *gotraja-sapindas*, however slender the basis on which it originally rested so far as collaterals are concerned, has become a part of the customary law[3] wherever the doctrines of the Mitakshara prevail, and the Courts must give effect to it accordingly. Whether, indeed, the widow of a collateral should take before the son or grandson of the same man, may admit of question. The mother of the *propositus* takes before her son or grandson, and a like precedence is assigned to his grandmother and great-grandmother; but brothers' wives, on the other hand, are not mentioned between brothers and their sons in Yajnavalkya's text, nor has Vijnyanesvara found a special place for them or for a descendant's widow as he has for the daughter's son. Although, therefore, a woman, become a member of her husband's family, takes the benefit of a rule resembling that of the Roman law (*"jurisconsultus cognatorum gradus et adfinium nosse debet:"* Dig. Lib. 38,

(1) 7 B. S. D. A. Rep. 59.

(2) 6 Bom. H. C. Rep. 152 A. C. J.

(3) Manu II. 12, VIII. 46, Yajnyavalkya I. 7 A'pastamba Samayachârika Sutra Ad init; *Bhau Nanaji* v. *Sundrabai*, 11 Bom. H. C. Rep. at p. 266.

t. 10, s. 10), yet as in that law the widow's right of inheritance was limited and of late introduction, the "gradus" applying, in strictness, only to blood relations, so analogy may be thought to lean somewhat to the preference of the eldest surviving male as representative of any branch to the widow of any collateral in the same line; but the point cannot be finally decided until it arises in the proper form. It is enough for the purposes of the present case to say that a widow in a nearer collateral line has precedence, according to the Mitakshara, over a male in a remoter line.

The Mitakshara is the leading authority on the Hindu law of inheritance for this Presidency, but it is subject (see *Viziárangam* v. *Lakshman* (1) and *Krishnáji* v. *Pándurang*(2) to an exception in the island of Bombay, where the doctrines of the Vyavahara Mayukha predominate. It must be seen, therefore, whether, on the point we are considering, the Vyavahara Mayukha makes a provision different from that of the Mitakshara.

As regards the capacity of women to inherit, the two works agree. Nilakantha says that the paternal grandmother is the first amongst the *gotraja-sapindas*;(3) and this is in accordance with his adoption in the Sanskara Mayukha (M. S. 44) of Vijnyanesvara's theory of the *sapinda-relationship* as arising from blood or bodily connexion rather than from sharing in common oblations. He also admits the sister;(4) and this, again, denotes his acceptance of woman's heritable capacity as a leading principle. But it also takes him aside altogether from Vijnyanesvara's line of succession. According to the Mitakshara, "*gotraja*" is equivalent to "*samana-gotra*" (*i. e.*, connected by *gotra*); and a sister who by marriage had passed, or was to pass, of necessity, into another *gotra* would be postponed to all within the *gotra* of the *propositus*. Nilakantha says "*gotraja*" means "born in the *gotra*," and that after the specified heirs the sister takes as the nearest to the *propositus*. In this interpretation of "*gotraja*" he agrees with Devanda Bhatta, the author of the Smriti Chandrika, but the latter limits the term, as we have seen, to males. Having thus admitted the

(1) 8 Bom. H. C. Rep. 244 O. C. J.

(2) 12 Bom. H. C. Rep. 65. (3) Vyav. Mayukha, ch. IV., s. VIII., pl. 18.

(4) Vyav. Mayukha, ch. IV., s. VIII., pl. 19.

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father's daughter as a *gotraja-sapinda*, it would have been a logical extension of Nilakantha's doctrine to admit the grandfather's daughter and the daughters of other ascendants next after males in the same degree. They are all born in the *gotra*, and, therefore, according to his reasoning, *gotraja-sapindas* entitled to take according to their propinquity. Messrs. West and Bühler say:[1] "At all events he would place the daughters of male *gotraja-sapindas* amongst the heirs bearing this name." Yet it does not, on full consideration, seem possible to maintain with confidence this induction from the single instance given by the author. On failure of the sister, Nilakantha says,[2] the grandfather and half-brother are to inherit together; and then, without making any provision for the grandfather's daughter, he proceeds to the great-grandfather, the uncle and the half-brother's sons. The introduction of the sister as a *gotraja-sapinda* is thus counterbalanced by the omission of the paternal aunt, and we are thrown back on the[3] preceding placitum for such guidance as it may afford in determining generally what females rank or not as *gotraja-sapindas*.

Nilakantha, while he admits the paternal grandmother, makes no provision for the paternal great-grandmother by his subsequent arrangements; if they are to be considered as in any way exhaustive he rather implicitly excludes her. Yet, being able to provide for the paternal grandmother apart from all *gotraja* connexion by means of Manu's text in her favour, he has chosen to rank her amongst the *gotraja-sapindas*. She does not, like the great-grandmother in the Mitakshara, rest on this connexion, and this alone, for her place in the line of inheritance; but being designated a *gotraja-sapinda*, and being so only in virtue of her marriage, it follows of necessity that Nilakantha thought that marriage as well as birth created the *gotraja* relationship. This might lead to absurd results, as women, inheriting in two families, while men inherited only in one, might gradually absorb all the property; but, as we have seen, the blood *gotra-ship* of women cannot safely be extended beyond the sister. The admission of the paternal grandmother stands as the sole indication of the recognition of

(1) 1 West and Bühler 148.

(2) Vyav. Mayukha, ch. IV., s. VIII., pl. 20.

(3) Vyav. Mayukha, ch. IV., s. VIII., pl. 18.

wives and widows in the family as *gotrajas*; and this itself is met by a disposition apparently excluding or suggesting the exclusion of all females more remote than the paternal grandmother.(1)

Thus, if the foundation of the rights of widows of *gotrajas* under the Mitakshara is slender, under the Mayukha it may be called almost shadowy. No widow of a collateral is expressly provided for; the only wife of an ascendant expressly admitted, is one for whom there is a special text. It might be supposed that the native jurists would have found it impossible to admit the widows of collaterals to the rank, under such a law, which they have been assigned under the Mitakshara, yet they seem not to have thought the difficulty at all insuperable. It is to be observed that the rule for equal distribution of the property amongst remote relations of the *propositus*(2) standing at an equal distance from him, appears to have been wholly disregarded in practice. No instance of its application is to be found amongst the cases collected by Messrs. West and Bühler, nor has any claim by co-heirs, as far as our experience goes, ever been based upon it. Nilakantha's speculative suggestion in placitum 20 has not then, by its accordance with, or adoption into the customary law, become a binding rule. The pandits perhaps, like Mr. Colebrooke,(3) could not make out what it would lead to, and, therefore, even while professing a general allegiance to the Vyav. Mayukha, adhered to the older rule of the Mitakshara, except where this was qualified by so clear and specific a modification as that in favour of the sister.

That the native authorities have considered the Mayukha to have adopted the Mitakshara doctrine with the exception we have indicated, or else themselves declined to follow the Mayukha any further in its divergence from the older standard, is made clear by the cases to which we have referred. For most of the replies given by them, the sastris cite the Vyavahara Mayukha along with the Mitakshara, as at 1 West and Bühler 238. If the Mitakshara is cited alone in support of a female *gotraja's* claim, as at 1 West and Bühler 171, 174, the Mayukha alone is in other

(1) Vyav. Mayukha, ch. IV., s. VIII., pl. 20.
(2) Vyav. Mayukha, ch. IV., s. VIII., pl. 20.
(3) Mitak., ch. II., s. V., pl. 5, note.

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instances cited for the same purpose.[1] In the case at 2 Borr., 557, evidence was given of custom amongst the Oodich Brahmans having assigned precedence to the daughter-in-law over the daughter's son. In the case at p. 670 the daughter-in-law was assigned precedence over the surviving half-brother. The half-brother, according to the Mayukha, stands at a much greater distance from the *propositus* than the brother of the full blood; but still, being assigned a definite position side by side with the grand-father, he could not be postponed to the daughter-in-law, who is not expressly named, unless the daughter-in-law were deemed entitled to precedence as a *gotraja* according to her propinquity. The Mayukha is not expressly cited for this case, but the parties residing in Guzerat; it may be supposed to have governed the sastri and the Court. It was either supposed to have recognized female *gotraja-sapindas* made such by marriage, or else was not accepted as determining the law.

It results from this investigation that, although the Mayukha's acceptance of Vijnyanesvara's doctrine is so slightly indicated, yet it is on the understanding of this acceptance that it has itself been accepted. Its provision in favour of the sister has been received into the common law, but in other respects it has been reduced to harmony with the Mitakshara. It is quite conceivable that a different construction should have found recognition in the island of Bombay, that the provision for the sister should have been taken as an indication of the rule to be generally followed with respect to females born in the family, that females entering the family should not be recognized as thereby acquiring rights of inheritance, and that males equally remote by ascent or descent, or both, should take together. If such a construction had become a part of the living law of the place, we should be bound to give effect to it; but no evidence of a customary interpretation of the Mayukha, different from what prevails elsewhere, has been laid before us. It is not likely that any difference should exist, for the population that has poured into Bombay from the neighbouring country would naturally bring with it its own customary law, and particular text books, with no other construction and no more binding authority than that customary law assigned to them.

(1) 1 West and Bühler, 115, 170, 171. 174.

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It is to be regretted that we should have to deal with important civil rights by reference to principles which almost elude our grasp when we endeavour to give them a practical application; but we must, in matters of inheritance, administer to the Hindu community such a law, however vague and nebulous, as it has been content to devise for itself, or to accept from tradition. By that law the widow of the *gotraja-sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line, and we must accordingly pronounce against the claim of the plaintiffs.

Appeal dismissed.

Attorneys for the plaintiffs:—*Messrs. Tyabji and Sayâni.*

Attorneys for the defendants:—*Messrs. Hearn, Cleveland, and Lee-Warner.*

[ORIGINAL CIVIL.]

Before Mr. Justice Pinhey.

MIRZA ALLY BEBANEE (PLAINTIFF) *v.* SYED HYDER HOOSEIN (DEFENDANT).*

1878. February 19.

Practice—Setting aside ex parte decree—Substituted service of summons.

Where substituted service of the summons is ordered under section 82 of the Civil Procedure Code (X. of 1877), a sufficient time ought, under section 84, to be given for notice of the fact to reach the defendant, wherever he may be; and, if an *ex parte* decree be obtained by the plaintiff, the Court, on being satisfied that the time fixed was insufficient, will set a side the decree.

THIS was an application by the defendant, under section 108 of the Civil Procedure Code (Act X. of 1877), to have a decree against him set aside, and the suit restored to the Court list.

The summons in the suit was issued on the 24th January, and the day fixed for the hearing was stated in the summons to be the 12th February.

On the 4th February an order to substitute service on the defendant was obtained by the plaintiff from a Judge in chamber, under section 82 of the Civil Procedure Code (Act X. of 1877), and on the same day service was duly effected as required by that section.

On the 12th February the case came on for hearing. The defendant did not appear, and an *ex parte* decree was accordingly

* Suit No. 23 of 1878.