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declaration prayed for would be beyond the Court's jurisdiction." That declaration related to the question of headship and the share in respect of it. In the suit before us now, that is in substance the declaration prayed for.

For these reasons the decree must be confirmed with costs. There must be separate sets of costs.

BATCHELOR, J.:—I agree that this is a suit to obtain a declaration from the Civil Court to the effect that, the late head of the family, Sambhu, being now dead, the present head of the family is one of the plaintiffs and not one of the defendants; and that the plaintiffs are in consequence entitled to a proportional share of the Vatan. A suit of this character seems to me to fall directly under the ban of clause (*d*) of section 67 of the Hereditary Offices Act. The decision in *Govind Sitaram* v. *Bapuji Mahadeo*[1] can be of no assistance to the present plaintiffs who are not suing as Vatandars for the adjustment of any dispute between themselves as to their distributive shares in a total portion awarded by the Collector to the head of the family.

I agree, therefore, that this suit is not competent.

Decree confirmed.

R. R.

(1) (1893) 18 Bom. 516.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Chandavarkar.

1912. *January 16.*

BAI PARSON, WIDOW OF SELAT JIVRAM MAGANLAL, AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* BAI SOMLI, WIDOW OF PRANSHANKAR MAGANLAL (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu Law—Mitakshara—Mayukha—Stridhan—Devolution—Daughter's sons take severally and not jointly—Coparcenary—Basic notion of coparcenary—Obstructed and unobstructed succession—Estate by partition—Estate by birth—Dayada—Rikhta—Interpretation—Self-acquired property.

Property inherited by sons from their mother is not a joint estate but a tenancy-in-common, according to both the Vyavahara Mayukha and the Mitakshara.

* Second Appeal No 466 of 1911.

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The basic principle of a joint tenancy or coparcenary under Hindu law explained,

A joint tenancy is property inherited as an unobstructed succession and is called *rikhta*, It devolves on the heirs as a coparcenary.

A tenancy-in-common is property inherited as an obstruction and is called *samavibhaia*, because when the inheritance falls in, it devolves on the heirs as a devided estate.

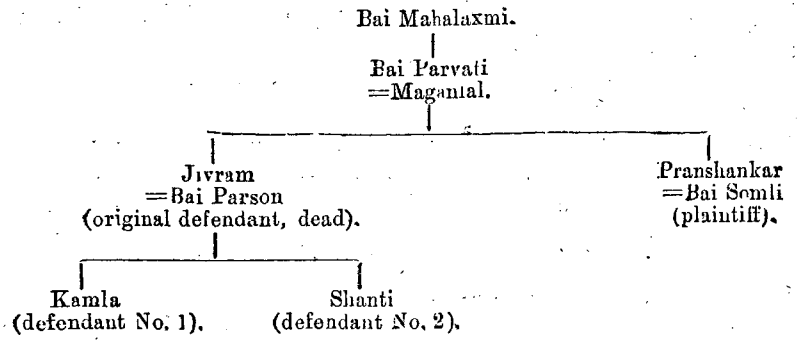
The term *self-acquired property*, as distinguished from *joint property*, explained.

Property originally self-acquired, because acquired without detriment to joint ancestral estate, becomes joint when it has been mixed with and treated as part of the said joint estate by the coparceners.

SECOND appeal from the decision of A. C. Wild, Joint Judge of Ahmedabad, varying the decree passed by J. N. Bhat, Subordinate Judge at Borsad.

The facts were that one Bai Mahalaxmi owned the property, which she devised on her death to her daughter Bai Parvati. When Bai Parvati died, the property was inherited by her two sons, Jivram and Pranshankar. Of these two, Pranshankar was the first to die. Jivram thereupon took possession of the whole of the property. On Jivram's death, the property passed into the possession of his widow Bai Parson (the defendant). Pranshankar's widow Bai Somli filed this suit against Bai Parson, to recover from her by partition a moiety of the property. Bai Parson died during the pendency of the suit: she was represented by her two daughters Kamla and Shanti (defendants Nos. 1 and 2).

The following genealogical tree shows the relationship of the parties:—



The defendant in her written statement contended *inter alia* that the estate taken by Jivram and Pranshankar was

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joint in interest and that on Pranshankar's death Jivram took the whole estate by survivorship.

The lower Court decreed the plaintiff's claim, holding that Parvatishankar and Jivram held the property as tenants-in-common and not as joint tenants.

The defendants appealed to the High Court.

L. A. Shah for the appellant.—The case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[1] is a conclusive authority on the point in dispute here. The doctrine of survivorship is not limited to unobstructed succession and will obtain in the case of sons inheriting from their mother. Refers to *Karuppai Nachiar* v. *Sankaranarayanan Chetty*[2] and *Bai Rukhmani* v. *Keshavlal*[3].

Whatever the law may be in this respect under the Mitakshara, it cannot be the same under the Mayukha. The definition of "Daya" or heritage under both systems are different. See Vyavahara Mayukha, c. 4, s. 2, pl. 1 and 2; Mitakshara, c. 1, s. 1, pl. 2 and 3.

G. N. Thakor for the respondent.—The Privy Council case of *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*[1] does not apply, for in Madras under the Mitakshara, the daughter's sons inherit directly to their maternal grandfather, which is not the case in Bombay.

There is no difference between the Mitakshara and the Mayukha in this respect. The doctrine of survivorship does not rest on the definition of heritage.

Again, the technical stridhan of a woman descends to her daughters as tenants-in-common; the same should be the case when the sons of daughter inherit. Refers to *Jogeswar Narain Deo* v. *Ram Chandra Dutt*[4]

L. A. Shah, in reply, cited West and Buhler, p. 300 (3rd edition), Mayukha, c. 4, s. 2.

(1) (1902) 25 Mad. 678.
(2) (1907) 9 Bom. L. R. 1293.
(3) (1903) 27 Mad. 300.
(4) (1896) 23 Cal. 670.

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CHANDAVARKAR, J.:—The only question for decision on this second appeal, arising under the Vyavahara Mayukha, is whether the sons of a woman who inherit her *stridhan* property, take it jointly as coparceners or severally as tenants-in-common.

The lower Courts have held that they take it severally as tenants-in-common, on the authority of the Full Bench ruling of the Madras High Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty*(1). That decision has been followed by a Division Bench of this Court, consisting of the learned Chief Justice and Batchelor, J., in *Dattambhat bin Appanbhat* v. *Yamnabai kom Rambhat*(2). Both these decisions are under the law of the Mitakshara. It is urged in support of this second appeal that the law of the Mayukha is otherwise. Reliance is placed on the passage in that authority, where the word *daya* (heritage) is defined and then explained by the author, Nilakantha (Ch. IV, sec. 2, placita 1 and 2, pp. 46 and 47, of Stokes' Hindu Law Books). There, after defining *daya* as "wealth not reunited, nor put back again into a common stock, and (still) admitting of partition," Nilakantha goes on to quote from the *Smriti Sangraha*, which says:—"That which is received through the father, and that received through a mother, is described by the term *Heritage*." Upon this it is argued that, since property inherited by sons from their mother is put by the text quoted from the *Smriti Sangraha*, upon the same footing as property inherited by them from their father, and since the law of coparcenary undoubtedly obtains as to the latter, it ought to prevail as to the former also.

Before discussing the soundness of this argument, it will be convenient to consider first the basic principle or root-idea of the term coparcenary or joint tenancy under the Hindu law, and then to determine whether that principle is common to both the Mitakshara and the Mayukha.

(1) (1903) 27 Mad. 300.

(2) S. A. No. 277 of 1911, decided on 1st December 1911 (Un. Rep.).

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One of the cardinal principles of Hindu law, borrowed from its Shastras, is that a son is his father reborn. This principle rests on a passage from the Vedas quoted by Baudhayana, in which a father thus addresses his son:—"From my several limbs thou art distilled; from my heart thou art produced; thou art indeed myself but denominated son." Every son is, therefore, identified in interest with his father and all the sons together with him constitute one body, so to say, in the eye and for the purposes of law and the Shastras. So, Vijnaneshwara tells us that when a father brings a suit as to his own property, his son or sons can appear for him and prosecute the suit even when he is living and that, because the word *plaintiff* includes the sons and grandsons of the man suing, "their interests being identical" (Mit. Moghe's Edn. No. 3, p. 113). Starting with that idea of identity, the law has engrafted on it the principle that every son takes an interest by birth in his father's property. Hence the injunction that a man shall not give away the whole even of his self-acquired property when he has sons, because "procreating sons, the father must perform their initiatory ceremonies and provide for their livelihood" (see the Chapter on gifts of the Mitakshara, Moghe's Edn. No. 3, p. 225; West and Buhler's Digest, 3rd Edn., p. 759, note). The same injunction is given in the Mitakshara in placitum 27 of Ch. I, sec. 1: "Though immoveables ... have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They, who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support; no gift or sale should, therefore, be made" (Stokes, pp. 375 and 376).

The doctrine that sons take property in their father's estate by birth is propounded by the Mitakshara in a highly learned disquisition (Ch. I, sec. 1, pl. 17 to 22) in answer to those who maintain that the "property" of the sons "is not by birth but by demise of the owner, or by partition." According to the latter, all property, whether inherited from the father or other relations, is of the same character, the man inheriting getting ownership in it on the death of the person

from whom it is derived. The Mitakshara and those who follow it hold otherwise. They distinguish between property inherited by sons from their father and property inherited from others. The former they call unobstructed succession; the latter obstructed succession. According to the opposite school, all inherited property is obstructed succession. The Vyavahara Mayukha discusses the question and upholds the view of the Mitakshara. The passage in the Mayukha (Ch. IV, sec. 1, pl. 3, Stokes) is as follows:—

> "According to Dhareshvara Acharya, 'the ownership of sons and the rest, in the wealth of the father, is not generated previously during his life, but is produced by partition.' And the author of the Smriti Sangraha says the same. But it is not so."

It will be perceived from these discussions in the Mitakshara and the Mayukha that their view is that sons take interest in their father's property *by birth*, and that the opposite view which they combat is that the sons' interest arises *by partition*. The contrast between these two expressions, *by birth* and *by partition*, is significant, because in them lies the root-idea or basic principle of the coparcenary system as distinguished from a tenancy-in-common. To take ownership in an estate *by partition* is to take a defined share in it as a severalty at the very moment that it falls in as an inheritance. When the father dies, the estate at once of itself comes to the sons by partition in shares. To take the estate *by birth* means to have an inchoate, undefined interest, and all the sons take it as an aggregate of persons standing as the father reproduced; so, when the estate falls in as an inheritance on the father's death, no son can say "this is my share," but all take what was a joint interest from the time of their birth.

Hence it is that the right of sons to inherit their father's property is termed unobstructed succession (*apratibandha daya*). They are the primary heirs, whose interest arises when they are born and that interest ripens in its joint condition when the father dies and inevitably comes to them as

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heirs for enjoyment without any obstruction. They take jointly and the joint interest continues until they by common agreement effect a partition. And partition in that case does not create a fresh interest of ownership, for that existed from the time of their birth; only it substitutes defined ownership of a part for an undefined ownership of the whole.

It is because of this nature of the right of the sons that the word *rikhta*, which means inheritance, is defined as unobstructed succession (*apratibandha daya*). After pointing out that a man becomes owner of property in one of five ways, by inheritance, purchase, partition, seizure, or finding, Vijnaneshwara in the Mitakshara brings out the contrast between inheritance and partition. He says: "Unobstructed heritage is here denominated 'inheritance,' *rikhta*" (Ch. I, sec. 1, pl. 13). And he then states of partition: "Partition intends heritage subject to obstruction." Explaining these definitions given by Vijnaneshwara, the Viramitrodaya points out accordingly that sons become "owners" of their father's property by birth, not by partition, and he quotes the Mitakshara, which contrasts the right of ownership acquired by partition with the right acquired by sons to their father's property from their birth (Viramitrodaya, Ch. I, sec. 36, Sarkar's Edn., p. 19).

Here, again, we have the root-idea or basic principle of a joint tenancy as distinguished from a tenancy-in-common brought out very prominently. When we are told that unobstructed heritage is *rikhta* or inheritance proper and that obstructed succession (*sapratibandha daya*) is partition, the plain meaning is this. In the case of obstructed succession, the idea of inheritance and the idea of partition go together; one is a necessary complement of the other, so that, at the very moment the inheritance falls in the heirs take by partition, that is, as owners of defined shares, and therefore, as tenants-in-common. But it is not so with unobstructed succession. There the sons inherit as a united body of heirs in virtue of a right pre-existing (from the time of their birth) without the idea of partition being a natural incident of the inheritance at

the moment it falls in. Obstructed succession, in other words, is *partitioned* succession; unobstructed succession is *unpartitioned* heritage, subject to partition at the option of the sons inheriting.

This division of heritage into unobstructed and obstructed succession, adopted in the Mitakshara and followed in the Mayukha and the Viramitrodaya, who belong, generally speaking, to the Mitakshara school, is not recognised by another school of Hindu lawyers, which maintains that it is only on the death of a propositus, whether father or not, that the property of the heir arises and that "heritage is in all cases obstructed and never otherwise." (Viramitrodaya, Sarkar's Edn., Ch. I, sec. 22, p. 13)

This contrast between unobstructed and obstructed succession is further brought out by Vijnaneshwara in other portions of the Mitakshara. For instance, in the Chapter on Debts, he first deals with the liability of the sons and grandsons of a deceased Hindu to pay his debts. Then he discusses the question:—Who is liable to pay them if the deceased has left no sons or grandsons? Yajnyavalkya's text answers that in that case the person who takes the deceased's property as heir must pay the debts. That person is termed in the text *rikhta grahaha*, *i. e.*, the person who takes the *rikhta* or inheritance. But we have seen that the term *rikhta*, as explained by Vijnaneshwara, means primarily not all but only unobstructed inheritance, *i. e.*, the inheritance of sons and grandsons and great-grandsons. How then does it come to be applied here by Yajnyavalkya on the subject of Debts to the case of obstructed succession? To remove ambiguity on that score, Vijnaneshwara explains what the term *rikhta grahaha*, as used by Yajnyavalkya, in the text in question means. "(The term) *rikhta grahaha* (means) he who takes the inheritance by means of partition as the door, *vibhaga dwarena*)". That is to say, the person so taking enters into the inheritance through or by means of partition—at the very moment it comes to him it comes *partitioned*, so that if there are several heirs to the property in the case of obstructed succession, they

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take it by division as a natural and inherent incident of their right attached by law.

These considerations do not apply to property inherited by sons from their father. The term unobstructed succession (*apratibandha daya*) is exclusively used of that property and is out of place in the case of all other property such as that inherited by the sons from their mother or from other relations. In the latter case, the heir inheriting does not take any interest in the property by birth; and the basic principle of a coparcenary is essentially absent with reference to the right to inherit. When it comes to the heirs on the death of the propositus, it comes not in virtue of a right pre-existing from their birth but in virtue of the character of *partition* annexed by law to it as obstructed succession.

So far, then, as the Vyavahara Mayukha is concerned, it agrees expressly with the Mitakshara in maintaining that sons take interest in their father's property from their *birth*, and not by *partition*. As to the other considerations derived from the Mitakshara, that is, as to its definition of *rikhta* or heritage as unobstructed succession and of *samavibhaga* or partition as obstructed succession, it is true that Nilakantha is silent. But on the established principle of this Court, his silence must be regarded as assent to the propositions laid down in the Mitakshara and dealt with in the foregoing part of this judgment, unless we find in the Vyavahara Mayukha anything which either expressly or by necessary implication shows that Nilakantha intended to apply the law of coparcenary also to property inherited by sons from their mother.

It is urged for the appellant that Nilakantha does so intend, because in explaining the definition of *daya* (heritage) he quotes the *Smriti Sangraha* which says that that term applies both to paternal and maternal heritage. That definition, of *daya*, it must be remembered, is from a *smriti* or text, and, seeing that a *smriti* is generally meant to be the condensed expression of a rule, it is in every case a question whether the subjects or objects specified in it are exhaustive or whether they are illustrative. Now, in the case of the text

quoted by Nilakantha from the *Smriti Sangraha*, on which the appellant's pleader strongly relies in support of his argument, we have Nilakantha's own explanation to make it clear beyond doubt that the text in question is illustrative, not exhaustive. After quoting that text, he goes on to quote also from the *Nighantu* where it is said :—"The learned define heritage to be the wealth of a father, which admits of partition." Here is an apparent contradiction between the text from the *Smriti Sangraha* and the text from *Nighantu*. The former says heritage means *paternal* and also *maternal* property. The latter says it is *paternal* property. Nilakantha cites both. How are they to be reconciled? He reconciles them by explaining that "the word *father* is merely put to denote relations in general, as a part for the whole." In Nilakantha's view, *daya* means heritage derived from any relation, father, mother, brother or so forth, the word "father" being merely illustrative. So the word "mother" in the text from the *Smriti Sangraha* comes in by way of description, not enumeration.

It must be observed here that, though the words *daya* and *rikhta* are sometimes used indiscriminately to mean heritage in general, their strictly legal connotations are different and even popular language recognises that. A *dayada* in popular language is one who takes a deceased's estate by obstructed succession. That is its strictly legal sense also. The word *rikhta* primarily means in law he who takes by unobstructed succession. Often they are used as if they were interchangeable, but that is not strictly legal, according to Hindu law. Vijnaneshwara points this out in pl. 33 of Ch. I, sec. 11, of the Mitakshara (Stokes), where he says :—"The word 'heir' (dayada) is frequently used to signify any successor other than a son."

If, then, both the Mitakshara and the Mayukha so far agree, is there anything in their treatment of the subject of *stridhan* and of devolution to it to support the argument of the appellant's pleader? According to both those authorities, heritage in the case of *stridhan* is obstructed succession ; so partition is its natural incident. According to both again, as

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interpreted by this Court, when daughters, and, in default of them, their daughters, inherit the mother's estate they take as tenants-in-common. The same law must apply to the sons also, when they in their turn inherit, in the absence of any express rule that the law as to unobstructed succession applies. No distinction is made as between daughters and sons with reference to the character of their right to inherit their mother's *stridhan*. They all stand forth as *heirs*; and if daughters take as tenants-in-common, the sons ought to take as such on the principle of the canon called *Nyaya Samya* (rule from equity). And that the canon was intended to apply is clear from the gloss of the Mitakshara on a text of Manu quoted in the Chapter on *Stridhan* (Ch. II, sec. 11, pl. 19 and 20, Stokes, pp. 462 and 463). Manu's texts is; "When the mother is dead, let all the uterine brothers and the uterine sisters equally divide the maternal estate." On this the Mitakshara's gloss is:—" All the uterine brothers should divide the maternal estate equally; and so should sisters by the same mother." Both brothers and sisters are put on the same footing, so far as the nature of the right is concerned. In the case of both, the right of inheritance accrues when the mother dies; that is the point of time; and it is at that point that the division takes effect, whether sisters take or brothers take. The inheritance and the division are simultaneous in either case.

As held by a Full Bench of this Court in *Dayaldas Laldas* v. *Savitribai*[1], the Mayukha interprets the abovementioned text of Manu with reference to *anvadheya stridhan* differently from the Mitakshara. While the latter takes it to mean that brothers form a class of heirs separate from the sisters and that the division mentioned is of brothers *inter se* and of sisters *inter se*, the Mayukha interprets the text as meaning that both the brothers and the sisters inherit together as one class and the division mentioned is of the mother's estate among them all equally. This difference of interpretation does not affect the question before us. Both the Mitakshara and the

(1) (1909) 34 Bom. 385.

Mayukha agree so far that, whether the brothers and the sisters form one class or two distinct classes; they take, when they take at all, by division. Nay, the Mayukha's interpretation serves as a cogent reply to the appellant's argument. If the *anvadheya stridhan* is inherited by brothers and sisters together as one class, and the sisters take as tenants-in-common, it follows the same rule must apply to the brothers, as they stand in the same category of heirs, This is on the rule of Hindu law laid down by Baudhayana (according to the Viramitrodaya), and by Ushanas (according to the Mitakshara), that "what is affirmed of even one among many that have a common property, the same is to be extended to all, since they are declared to be similar" (see the Viramitrodaya, Sarkar's Edn., Ch. II, pt. 1, sec. 10, p. 59; the Mitakshara, Moghe's Edn. No. 3, p. 397).

But it is urged for the appellant that, in dealing with the question of partition, both the Mitakshara and the Mayukha make no distinction between property inherited by sons from their father and property inherited by them from their mother. It is argued upon that, that both the authorities intended to put both the properties on the same footing and treat them as joint and subject to partition among the sons holding both as coparceners. This argument overlooks the fact that even in the case of property which is inherited by the sons from their mother, the law must lay down what its character is as a succession coming in a *partitioned* condition as a tenancy-in-common. It would not have done for the law simply to have said that the estate falls in as an estate *divided* in interest, because that gives rise to the question :—What interest does each son take? How is that interest to be determined? Hence the necessity of dealing with the property as a subject of partition. Because in so dealing with it the law-givers and the commentators deal also at the same time with the mode and time of partition of the property inherited from the father, when this partition is made by the sons by mutual agreement after the estate has come to them as joint in character, it does not follow that the mother's property is also inherited as

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a joint estate. To give to the estate inherited from the mother that character, it must be an unobstructed succession, which it obviously is not.

In dealing with the subject of self-acquired property Vijnaneshwara no doubt explains that self-acquisition is that which is acquired without detriment to the paternal or the maternal estate inherited by sons. It may be argued that he would not have mentioned the maternal estate there with the paternal estate if, in his opinion, the former were not joint like the latter. The argument, however puts on Vijnaneshwara's gloss a construction which makes it practically contrary to the substantial meaning of Yajnyavalkya's text defining self-acquired property and to the meaning of Vijnaneshwara's gloss thereon. The question of self-acquired property arises and can arise only with reference to a family the members of which are or were joint in estate. Yajnyavalkya's text refers only to such a family. Now, property held by a family as joint need not necessarily be only paternal. It may be property originally inherited from other relations, or it may be property originally acquired by one or more of the coparceners by his or their own exertions, and both these may have been thrown into the common stock and turned into joint property. The established law is that self-acquired property is that which is acquired by a member of a joint family by his own exertions without detriment to the joint property and not thrown into the common stock. When Yajnyavalkya speaks of self-acquired property as property acquired without detriment to the *paternal estate* and Vijnaneshwara in his gloss speaks of it as property acquired without the help of the *paternal* and *maternal* estate, both mean in substance by such estate all estate which is joint in character, whatever its derivation. If the argument we are noticing is sound, we must take Yajnyavalkya's text and Vijnaneshwara's gloss in their literal sense and restrict self-acquired property to that which is acquired without detriment only to the paternal or to the maternal estate of the joint family and we must exclude all other property, acquired by inheritance or otherwise and then thrown into the common stock.

Such exclusion is not sanctioned by Hindu law—Vajnyavalkya's text defining self-acquired property and the glosses of Vijnaneshwara and of Nilakantha do not warrant it. The sensible way of interpreting Vijnaneshwara's gloss is, therefore, to take the word *maternal estate* as standing for all property, which, though not inherited from the father but acquired otherwise by the members, has been nevertheless thrown into the common stock and so has become joint by being mixed up with the paternal estate.

The paternal estate is the determining and dominant factor of the joint tenancy. When other estate is mentioned with it with reference to a joint family, the meaning is that that other estate has become joint by becoming through the volition of the coparceners mixed with the paternal estate and, therefore, partaking of its character. In other words, the words *paternal estate* in Yajnyavalkya's text and *paternal and maternal estate* in Vijnaneshwara's gloss must be treated as illustrative and refer to all property treated as joint, though at the time of acquisition by inheritance or otherwise it had been self-acquired.

On these grounds we must hold that, under the law of the Vyavahara Mayukha as also under that of the Mitakshara, property inherited by sons from their mother descends to them, not as a joint tenancy, but as a tenancy-in-common. This conclusion is in accordance with the view of the learned authors of West and Buhler's Digest (see note *c*, pages 710 and 711, 3rd Edn.)

The decree must, therefore, be confirmed with costs.

Decree confirmed.

R. R.