Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Venayeck Anundrow and others v. *Luxumeebaee and others, from the Supreme Court of Bombay; delivered the* 17*th of February*, 1864.

Present:

LORD KINGSDOWN.
LORD JUSTICE KNIGHT BRUCE.
LORD JUSTICE TURNER.

SIR LAWRENCE PEEL.
SIR JAMES W. COLVILE.

THE question raised by the demurrer, the subject of this Appeal, is whether the Plaintiffs in the suit, the Appellants, have by the statements in their Bill shown any interest in the estate of Bhugwantrao, the Testator in the cause, or any concern with it. If they have not, the demurrer was rightly allowed.

Bhugwantrao was a Hindoo, resident at Bombay. He died in the year 1851, having made his will in the English language, dated in that year. He appointed his wife, one of the Respondents, now his widow, sole executrix, and in addition to some directions, which need not be now particularly mentioned, he expressed himself thus:—"All the outstanding debts due to me must collect, and after paying legal debt due by me, and the expense of the funeral, and other ceremonies during the first year of my death, the remainder property, both moveable and immoveable, &c., I give and bequeath to Luxoomabaee, my dearly beloved wife, and my little son Gujanon, an infant." Then follows an expression which has with propriety been the subject of observation, namely, the expression "the joys, &c., I have made for my wife and children, they

belonging themselves respectively." Their Lordships, however, consider that the word "respectively" has no application to the gift of the residue, but refers only to whatever may have been meant by "the joys, &c."

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

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

Now upon the question of the capacity of the sisters to be heirs to their brother, different views of the law appear to have been taken in different parts

of India, and a general leaning in favour of excluding the sisters in such a case appears to prevail in Bengal, but appears not to prevail in the territories of Bombay. It is a point upon which, probably, it may be said, that a reasonable difference of opinion may be entertained; but the authorities most regarded in Bombay, whence this case comes, seem to be in favour of preferring the claim of the sisters to the claim of the male paternal relatives, the cousins. The Chief Justice, in giving his Judgment in the present case, quotes a book with which we are not familiar here, but which seems to be well known in Bombay, and to be considered and treated as an authority there. He says (page 9 of the Appendix, line 29), "Supposing, then, Luxumabai to take a life estate only in the descended inheritance, the reversion vests in the next heir of Gujanun, and, upon the best authorities recognized in this Presidency, that heir is his sisters, who are Defendants in this suit. This appears, from Muyukhu, chap. 4, p. 19, where, after enumerating the mother (see p. 14 and 15), the uterine brother and his sons (secs. 16 and 17), the paternal grandmother (sec. 18), (and no paternal grandmother of Gujanun is shown to be in existence on the face of this Bill), the Commentator, in Section 19, proceeds thus:— 'In default of her (the paternal grandmother) comes the sister, under this text of Menoo. To the nearest Sapinda (male or female) after him (or her) in the third degree the inheritance next belongs, and thus of Bruhuspitia, where many claim the inheritance of a childless man, whether they may be paternal or maternal relations, or more distant kinsmen, he who is the nearest of them shall take the estate.' And the next rank is hers (the sister's), both from her being begotten under the brother's family name, and there being no further reservation with respect to the Gentile relationship. Neither is she mentioned in the texts as an occasion of taking the wealth, but as next of kin she succeeds. Considering the high authority of the Muyookhu on this side of India, this might alone seem sufficient to establish the position that the sister comes next in order of inheritance after the paternal grandmother; but, according to certain Commentators on the Mitacshara, the sister comes next in order of inheritance after

the brother. The passage in the Mitacshara is contained in the first paragraph of chap. 2, sec. 4; 'On failure of the father, brethren share the estate.' Nanda Pandita and Balam Bhatta, says Mr. Colebrooke, in his note to this passage, consider that, as including 'brothers and sisters' in the same manner in which 'parents' have been explained 'mother and father,' and conformably with an express rule of grammar. They observe that the brother inherits first, and in his default the sisters; this opinion, Mr. Colebrooke states, is controverted by Camalacara, and the author of Muyookhu. It certainly is so in section 16 of chapters 4 and 8 of the Muyookhu, p. 105; but it should be observed that in p. 15 of the same Commentary, the doctrine of the Mitacshara, now generally regarded as established as to the word 'parents' including both 'mother and father' is controverted, and on precisely the same grammatical grounds."

Their Lordships desire not to be understood as expressing an opinion that the general course said to be taken in Bengal upon this subject, or upon the construction of the word "brethren," is wrong; but certainly neither are they satisfied that the construction put by the passage in the Mitacshara, which has been mentioned, and generally adopted as it seems in Bombay, is wrong. Their Lordships come to the conclusion that the general rule in Bombay has long been, and is, to treat the sisters as heirs to the brother rather than the paternal relatives of the description of the present Plaintiffs. Accordingly their Lordships think that they may safely and properly, in the present instance, adopt or accept that rule. They consider that in Bombay at least, the sisters, in such a case as this, are the heirs of the brother. The consequence is, that in whatever possible manner the Will of the Testator is read, the entire interest in the property in question must, we think, be viewed as vested in the widow and her daughters, or some or one of them, and that therefore the Appellants here, the sons of the brother of the Testator, are suing in a matter in which they have not shown the slightest interest, nor with which have they any concern. The result is, in their Lordships' opinion, that the demurrer was rightly

allowed, and that the Appeal should be dismissed, with costs.

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