Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Thakoorain Sahiba and another, and Mohun Lall and others, from the late Sudder Dewanny Adawlut, North Western Province, at Agra; delivered the 4th March, 1867.

Present:

MASTER OF THE ROLLS.
SIR JAMES WILLIAM COLVILE.
SIR RICHARD T. KINDERSLEY.

SIR LAWRENCE PEEL.

THEIR Lordships have authorized me to state that in their opinion the preliminary objection which has been taken to the maintenance of this suit must prevail. It unquestionably lay upon the Plaintiff, Mohun Lall, one of the Respondents, to show that he had a right to sue. The suit is of a peculiar nature, because it is one brought by a person who, even if his own case were true, might probably never have an interest in the property, inasmuch as he can have only a contingent estate during the lifetime of the Appellant Thakoorain. Such a suit is permitted simply on the ground of the necessity that the contingent Reversioner may be under of protecting his contingent interest. It is, therefore, essential to see that he has such an estate as entitles him to come in in that way,—in other words, that he holds the character which he professes to hold.

Now the admissions which have been properly and candidly made at the Bar, have reduced the question to a very narrow compass. As the suit was originally launched, and upon the face of the plaint, there was some uncertainty as to the mode in which the parties sought to establish their title. There was apparently some confusion in the mind of the Pleader whether Inderjeet or his father was what we call the "*propositus*," and whether it was not sufficient to deduce a title to inherit from the father. Before the case reached the Sudder Court

that confusion had been dispelled, and the Judges of that Court (as appears by their Judgment) considered the case on the assumption that Inderjeet was, as he no doubt was, the "*propositus*," and that the Respondent had to show that he was in the line of heirs to him.

The admission, however, which Mr. Piffard made at the Bar to-day, implies that the learned Judges of that Court decided in favour of the Respondent upon a ground which is no longer tenable. They treated him as having an interest, on the ground that, being a sister's son, he comes within the category of the cognates or bandhus. That view is now abandoned, and therefore the question is narrowed to that raised by the very ingenious argument of Mr. Piffard, viz. whether, upon the true construction of the Mitacshará, the sister's son does not come in as one of the earlier class of heirs known as Sapindas?

We think that if this question were *res integra*, and to be determined on a construction of the Mitacshará alone, there would be considerable difficulty in coming to the conclusion to which Mr. Piffard would bring us. There is, no doubt, some foundation for the ingenious arguments which he has addressed to us. It is, perhaps, a startling anomaly, that whilst among the cognates the aunt's sons are included, the sister's sons should be altogether excluded from the inheritance; and there is also something plausible in the argument which he has founded upon the fourth article of the fifth section, which says that "on failure of *the father's descendants* the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons." The difficulty, however, that occurs on the words "on failure of the father's descendants" is really not insuperable, because they may well be taken to import the failure of the father's descendants, who, according to the rules expressed in the treatise, are capable of inheriting. Indeed, unless so qualified, they would give by implication a right to inherit not only to sisters' sons, but to sisters who, *ex concessis*, are excluded from the inheritance.

Mr. Piffard's argument had, in truth, a sort of double aspect. At first he dwelt a good deal upon the authority of the author of the treatise called the Vyavahára-Mayú'eha; but afterwards he fell

back upon the authority of Balambhatta and Nanda Pandita. The two authorities are not consistent. We may at once dismiss that of the Mayú'cha by saying that that treatise, though received in the Bombay Presidency, appears to be of no authority in the districts the law of which has now to be applied. It is further to be observed that, if received, it would not support the contention of Mr. Piffard, because it gives the right of heirship to the sister herself, and not merely to the sister's son, and puts the sister after the paternal grandmother and between the paternal grandmother and the paternal grandfather.

The other argument, that on which Mr. Piffard finally rested his case, is shortly this. The seventh article of the fourth section of the second chapter of the Mitacshará says,—"On failure of brothers also, their sons share the heritage in the order of the respective fathers." Two ancient commentators, Balambhatta and Nanda Pandita, held that the words "their sons share the heritage" are to be construed so as to include the daughters as well as the sons of brothers and the sons and daughters of sisters; and Mr. Piffard would have us adopt this construction. But the article clearly implies that the parent, if in existence, is to take the succession. And accordingly the two Hindoo commentators (see the note on sect. 10, art. 1) would include sisters in the term "brothers," and give them a place in the line of succession. But Mr. Piffard is constrained to admit that sisters are excluded. In fact, it would not suit his client's case to admit them.

On the other hand, if "brothers" are to be taken simply as "brothers," and "their sons" as brother's sons, the text of the Mitacshará is perfectly clear; and the first clause of the fifth section shows that on the failure of brothers' sons, Gentiles share the estate, the paternal grandmother being the first person of that class of heirs who take the estate. Again, were the arguments in favour of the construction which Mr. Piffard would put upon the Mitacshará far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession

as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindoo commentators, would be most dangerous, inasmuch as it would unsettle existing titles.

Of what may be called the modern authorities, we have first the decision of the Sudder Dewanny Adawlut, at Calcutta, in 1806. It is impossible to read that case without seeing that the point was clearly raised before the Court, which at that time consisted of Judges who were considerable authorities on Hindoo law. That decision has received the high sanction of Sir William Macnaughten; it is also cited by Sir Thomas Strange, and it has ever since been considered to be a correct exposition of the law. Nor can it be said, as was suggested by Mr. Piffard, that all the subsequent authorities rest upon this decision, which he attributed in part to the inability of English Judges fully to appreciate and apply the terms of the Hindoo treatises. For at page 85 of the second volume of Mr. Macnaughten's 'Principles and Precedents,' we have the Bywusta or opinion of the Pundit of Zillah Behar, purporting to interpret the text of Yaynawulkya, and making no reference whatever to this decision of the Sudder Court. He there puts sisters' sons out of the category in which Mr. Piffard would include them; although, erroneously perhaps, he puts them among the Bandhus, or distant kindred. Again, from the MS. case produced at the Bar, we find that the Agra Court, overruling its decision in this case, has recently held that the sister's son is not in the line of heirs at all; that the same point has been decided at Madras, and was recently decided in the High Court of Bengal. It had previously been decided in the case which is set forth in the Record. Against all these concurrent authorities we have nothing to set but the decision now under review, which it is admitted at the Bar cannot rest upon the ground on which the Judges put it.

Their Lordships are, therefore, of opinion that they must humbly recommend Her Majesty to reverse the decrees under appeal, and to declare that the suit ought to have been and be dismissed with costs. The Respondent Mohun Lall must also pay the costs of this appeal.