Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Lulloobhoy Bappoobhoy and others v. *Cassibai and others, from the High Court of Judicature at Bombay, delivered 24th June* 1880.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague E. Smith.
Sir Robert P. Collier.

THE question which arises in this appeal relates to the succession to the estate of Mouljee Nundlall, a Hindoo inhabitant of Bombay, which opened on the death of his widow Surusvuthebai. Mouljee died in 1840, leaving as his only child a daughter, who died childless in the lifetime of his widow. The widow died in 1862.

At the time of Mouljee's death, his paternal first cousin, Gungadass Vizbhoocundass, was his nearest male relative. He died in the lifetime of Mouljee's widow, leaving no son, but leaving a widow Mancooverbai, the original Defendant in this suit, and two daughters, who all survived Mooljee's widow. Mancooverbai died during the progress of the suit, and the Respondent Cassibai is her executrix.

The first and second Plaintiffs in the suit claim to be entitled to the estate of Mouljee, as being his nearest male heirs when the succession opened on the death of his widow.

Their relationship is clearly stated in the following passage of the judgment of Chief Justice Westropp:—

"It has not been denied that, according to the law, which under the Mitakshara and Mayukha prevails in this Pre-

sidency, Lulloobhoy and Mulchund (the father of Cassidass, the second Plaintiff) were gotraja sapindas of Mooljee; the common ancester of them and of Mooljee was Motilall, who, counting inclusively, was sixth in ascent from Mooljee, and the brothers Lulloobhoy and Mulchund were seventh in descent from Motilall. They are therefore on the extreme verge of sapinda relationship."

The other Plaintiffs are purchasers from the first two Plaintiffs.

Several of the issues raised in the suit have been finally disposed of by the Courts in India, and the single question to be now decided is, whether by the Hindoo law of inheritance prevailing in Western India, Mancooverbai, the widow of Gungadass, who as paternal first cousin was related in the third degree to Mouljee, became by her marriage with Gungadass a gotraja sapinda of Mouljee, and as such entitled to succeed to his estate in preference to the first and second Plaintiffs, who were related to him only in the remote degree above indicated.

Mr. Justice Bayley, sitting as a Judge exercising the original jurisdiction of the High Court, on his first hearing of the cause, decided in favour of the right of the widow, following the decision of a Division Bench in the case of Lakshmibai *v.* Jayram Hari (6, Bombay High Court Reports, 152). Upon a remand of the case on other points, Mr. Justice Bayley, acting on his own opinion, came to an opposite conclusion upon the question of the widow's right from that arrived at in the decision he had before followed, and gave a decree in favour of the Plaintiffs. On appeal, this last decree was reversed by the unanimous judgment of a full Bench of the Bombay High Court, and Mr. Justice Bayley's original judgment was restored.

It is fully acknowledged by the learned Judges of the High Court that the law prevailing in Bengal and Southern India is opposed to the

right claimed by the widow; but they arrived at the conclusion that a different interpretation of the law has been accepted in Western India, and the elaborate judgments of the Chief Justice (in which Mr. Justice Sargent concurred) and of Mr. Justice West are directed to elucidate the grounds on which the distinction rests.

The books whose authority is principally followed in Western India are Manu, the Mitakshara, and the Mayhuka. These are stated by the Chief Justice, and, no doubt, correctly, to be "the reigning authorities" in the Presidency of Bombay. The learned Judges have sought to support their decision in favour of the widow from passages found in these works. It is acknowledged that the rule of succession to which they have given effect is but dimly enunciated in these passages, but the Judges have considered that the interpretation which has been given to them in Western India, evidenced by decisions and the opinions of shastris, has fixed and determined the law for that part of India.

A text of Manu was cited, which is supposed to affirm the right of women to inherit:—"To the "nearest sapinda, male or female, after him in "the third degree, the inheritance next belongs; "then, on failure of sapindas and their issue, "samanodaka or distant kinsmen shall be the "heir." (Cap. IX., pl. 187). The words "male or female" appear to have been imported into the text by Sir W. Jones and Mr. Colebrooke on the authority of a commentator, Kalluka Bhatta. Even if it be assumed that these words are rightly introduced, the text, though it sanctions the principle that women may inherit as sapindas, and so is consistent with the right of the widow to inherit as a sapinda of her husband's family, does not affirm that right.

According to the received doctrine of the Bengal

and Madras schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of Bandhayana which declares that " women are devoid of the senses, " and incompetent to inherit." The same doctrine prevails in Benares; the author of the Viramitrodaya yields, though apparently with reluctance, to this text. (Chap. 3, Part 7).

The principle of the general incapacity of women for inheritance, founded on the text just referred to, has not been adopted in Western India, where, for example, sisters are competent to inherit. That principle, therefore, does not stand in the way of the widow's claim in the present case. She still, however, has to establish that she is a gotraja sapinda of her husband's family, and as such entitled by the law prevailing in Bombay to inherit the estate of one of its members.

It is not disputed that on her marriage the wife enters the gotra of her husband, and it can scarcely be doubted that in some sense she becomes a sapinda of his family. It is not necessary to cite authorities on this point. But a statement of the doctrine in a note by Mr. Borradaile to his reports may be referred to. He says, "because a woman on her marriage " enters the gotra of her husband, so Respon- " dents, being sugotras of Pitambur, are sugotras " of his wife also" (1 Borr. 70. n. 2). Whether the right to inherit follows as a consequence of this sapinda relationship is the question to be considered.

The following passage from the Achara Kanda of the Mitakshara was cited to shew that sapinda relationship depends on having the particles of the body of some ancestor in common, and not on the connection derived from the capacity of making

funeral offerings. It was also cited for the declaration that husband and wife and brother's wives are sapindas to each other :—

"(He should marry a girl) who is non-sapinda, *i.e.*,* a sapinda (with himself). She is called his sapinda who has (particles of the body) (of some ancestor) 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 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 the wife and the husband are sapinda relations to each other, because they together beget one body (the son). In like manner brother's wives also are (sapinda relation 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."

A translation of some passages in the Sanskara Mayukha to the same effect will be found in the judgment of Chief Justice Westropp, of which the following is an extract :—

"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.*) Dehavayava (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

* *Sic.*

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 sapindya from the husband, because they are the generators of one body. In some instances, sapindya exists 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 sapindya in other cases also should be inferred."

Vijnyanesvara and Nilakantha were, no doubt, treating in these passages of sapinda relationship in connection with marriage; but no further definition of sapindas is given in those parts of their respective books which treat of inheritance. The learned Judges below have inferred, in the absence of any indication to the contrary, that the above-mentioned definitions were intended by the authors of the Mitakshara and the Mayukha to apply wherever in those books sapindaship was treated of, and consequently where it was treated of in relation to the right to inherit.

In addition to the above-mentioned authorities, the Chief Justice (Record 103) refers to the Dattaka Mimansa, as strongly maintaining the doctrine that sapindaship depends upon community of corporal particles, and not upon the presentation of funeral offerings to the pitris.

It was contended by the learned Counsel for the Respondents that, even if sapindaship for the purpose of inheritance had to be determined by the efficacy of funeral oblations, the widow would be entitled as a gotraja to succeed, because her offerings would benefit the manes of her husband's grandfather Kissoredass, the common ancestor (in the third degree) of her husband and Mooljee. Their Lordships do not think it necessary to consider the authorities on which this contention was supported (though they may observe that a judgment of Mr. Justice Mitter affirm-

ing that a sister's son is, under the Mitakshara, as interpreted in Benares, entitled to succeed, throws great light on the subject, 2 Bengal L. R., F. B. R. 28) ; since they are prepared to assent to the conclusion to which the Judges of the High Court, upon consideration of the authorities, arrived, that by the law of the Mitakshara, as interpreted and accepted in Western India, the preferential right to inherit in the classes of sapindas is to be determined by family relationship or the community of corporal particles, and not alone by the capacity of performing funeral rites. It may happen that, in some instances, the same person would be the preferential heir, whichever of these tests was adopted.

If then, as already pointed out, the wife upon her marriage enters the gotra of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him, with his family, there would appear to be nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of the general incapacity of women to inherit. But, though it may be consistent with this theory of sapinda relationship to admit the widow so to inherit, the existence of the right has still to be established.

It is acknowledged that the widow of a collateral relative is nowhere specified and named as heir to members of her husband's family ; she must therefore come into the succession, if at all, as one of the class of gotraja sapindas, and it is in this way that her claim has been put forward at the bar.

The author of the Mitakshara, after discussing in detail the series of heirs first entitled to inherit down to brother's sons, proceeds in cap. 2. sect. 5 to treat of the succession of Gentiles. Extracts from this section are given in the

judgment of the Chief Justice, the translation of Mr. Colebrooke being amended by substituting for the English rendering of the names of the various classes of kindred, the Sanskrit names given in the original.

The first six slocas are thus rendered :—

"'1. If there be not brother's sons, gotrajas (*a*) share the 'estate. Gotrajas are the paternal grandmother and sepindas (*b*) 'and samonodaka (*c*).'

"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 (*d*) cited. And the mother also being dead, the father's mother shall take the heritage (*e*). 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 (*f*)—namely, the paternal grandfather and the rest—inherit the estate.

For binnagotra sapindas (*g*) are indicated by the term bundhu (*h*).

"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 samangotra sapindas (*i*).

(*a*.) Trans. by Colebrooke, "Gentiles."

(*b*. Tran. by Colebrooke, "relation connected by funeral "oblations of food."

(*c*.) Trans. by Colebrooke, "relations connected by libations "of water."

(*d*.) Mitax., ch. ii., s. 1, pl. 7.

(*e*.) Manu., ch. ix., pl. 217.

(*f*. Trans. by Colebrooke, "kinsmen sprung from the same "family with the deceased, and connected by fureral obla-"tions."

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

(*h*.) Trans. by Colebrooke, "Cognate."

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

"6. if there be none such, the succession devolves on samanodakas (*a*), and they must be understood to reach the seven degrees beyond sapindas (*b*), 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 (*c*) 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 (*d*).'"

It cannot be said that these passages contain direct authority for the admission of a widow of a collateral relative to inherit as a sapinda to a member of her husband's family; but they were cited to show that women are entitled to inherit as sapindas, the paternal grandmother being named as the first sapinda for this purpose. There is a passage also to this effect in the Mayhuka, c. 4, sec. 8, pl. 18.

That the mention of certain members of the family as gotraja sapindas is not exhaustive, and that others than those expressly mentioned may be included in the class, may be inferred from the following passage in pl. 3 of c. 2, sec. 5, of the Mitakshara cited above :—"On failure of the "paternal grandmother, gotraja sapindas, namely, "grandfather *and the rest*, inherit the estate." It would seem, also, though the grandmother and great grandmother are alone expressly mentioned, that the wives of the remoter ancestors in the direct ascending line up to the seventh degree would likewise succeed to their descendants as sapindas. Moreover, it has been decided by this Board that the enumeration of bundhus contained in the Mitakshara is not exhaustive.—(Gridhari Lall *v.* The Bengal Govern-

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(*a*.) Tran. by Colebrooke, "kindred connected by libations "and water."

(*b*.) Trans. by Colebrooke, "the kindred connected by funeral "oblations."

(*c*.) Trans. by Colebrooke, "those connected by a common "libation of water."

(*d*.) Trans. by Colebrooke, "the relation of family name."

ment, 12 Moore, J. A., 448). The reasons for so holding are applicable to the enumeration of sapindas, though, as Mr. Graham observed, the step from the wives of paternal ancestors to the wives of collaterals is a long one.

Mr. Justice West, after discussing the Mitakshara and some of its commentators, came to the conclusion that "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 among the "gotrajas." Perhaps the most that can be said is, that the text of the Mitakshara is not inconsistent with the claim of the widow, and allows of an interpretation favourable to her right to inherit. The important point for consideration remains, namely, whether such an interpretation has been given to the Mitakshara by its expounders and the lawyers of the Bombay school, and has been so sanctioned by usage and decisions as to have acquired the force of law.

The Mayhuka is also very fully discussed in the judgment of Mr. Justice West, and his consideration of it led him to the conclusion that, "if the foundation of the rights of widows of "gotrajas under the Mitakshara is slender, under "the Mayukha it may be called almost shadowy." After this appreciation of the two leading authorities by a Judge who has much studied them, it is obvious that the right of the widow must be mainly rested on the ground of positive acceptance and usage.

Commentators on the Mitakshara are referred to in the judgments below who have interpreted its text in a sense highly favourable to women. Two of them, whose opinions are closely applicable to the point under discussion, are thus referred to by Mr. Justice West :—

"Visvesvara, the author of the Subobhini, the chief commentary on the Mitakshara, says that 'gootraja' may properly

be taken to include both males and females; 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."

The author of the Vaijayanti, a commentary on Vishnu, appears to have held that the son's widow would succeed in preference to the daughter. This opinion is referred to in the remarks of Mr. Colebrooke upon a case in the Appendix to Strange's Hindoo law (2 Vol. 234). Mr. Colebrooke thinks that it is opposed to the prevalent doctrine of the school of the Mitakshara, which is that the daughter inherits in preference to the son's widow. He does not appear to question the right of the widow to inherit as a sapinda, though no doubt it was unnecessary to do so in discussing the question of preference.

Their Lordships will now pass to the recorded answers of the shastris, and the decisions of the Courts, bearing on the question.

The answers of the shastris, which have been referred to at the bar, will be found in a Digest of the Hindoo law of inheritance by Messrs. West and Buhler, compiled from the replies of the shastris recorded in the Courts of the Bombay Presidency. Mr. West is the Judge of the High Court, whose judgment has been already adverted to. These replies are in many cases unsatisfactory and incorrect, but they are numerous, and the series taken as a whole undoubtedly recognizes and affirms the right of the widow to inherit as a gotraja sapinda to members of her husband's family. It is not necessary to refer to these answers in detail. Many of them are cited and commented upon in the judgment of Mr. Justice West (Record, p. 115), and among these are answers which affirm that a sister-in-law inherits in preference to distant cousins, and even to first cousins, of the propositus.

Some early decisions of the Sudder Adawlat reported by Borradaile are to the same effect.

In the case of Dhoolubh Bhaee and others against Jeevee, (A.D. 1813) it was held that Jeevee, the widow of the son of a brother of Pitamber, the propositus, was entitled (on the death of Pitamber's widow) to succeed to his estate, and to hold it for her life in preference to a great grandson of another brother of Pitamber (1 Borr. 87). It is not, however, stated in the Report when Jeevee's husband died.

In another of the cases cited from Borradaile (Muhalukmee *v.* the grandsons of Kripastrookul 2 Borr. 510), the Sudder Court held that a predeceased son's widow was entitled to succeed in preference to the sons of a daughter. This case, however, seems to have been decided upon a custom of the caste of Oudeech Brahmins. As a decision on the general law, apart from custom, it may not be capable of support, a ~~sister's~~ daughter's son being specially provided for by the Mitakshara (c. 2, sec. 3, pl. 6).

In a later case reported in Borradaile (1824), it was held that the widow of a predeceased son was entitled to inherit in preference to the brother of the propositus (Roopchund Talukchund *v.* Phoolchund Dhurmchund and another, 2 Borr. 610). This seems to be a direct decision on the right of the widow to inherit, though, whether in the order of heirs, the preference was rightly accorded to her in this case may be questioned.

In the case of Lukshmibai *v.* Jayram Hari and others, the High Court of Bombay (Justices Lloyd and Melvill) gave a clear and unqualified judgment in favour of the right of the widow of a predeceased collateral relative to succeed in preference to a more remote collateral male relative of the propositus. The High Court expressly found that this order of succession was in accordance with the law of inheritance prevailing on the Bombay side of India.

The High Court in the present case, after an exhaustive review of the authorities and pre-

cedents bearing on the question, have unanimously arrived at the same conclusion. Great weight is undoubtedly due to this decision, not only from the learning and research displayed in the judgments separately delivered by Chief Justice Westropp and Mr. Justice West, but also from the circumstance that both these learned Judges have had great and peculiar opportunities of becoming acquainted with the law of inheritance prevailing in Western India. The Chief Justice has passed a long judicial career in the Courts of Bombay, and Mr. Justice West is one of the compilers of the digest of the law of inheritance to which reference has already been made. Their Lordships do not find any satisfactory grounds which should induce them to dissent from the conclusion of the High Court that the doctrine which has actually prevailed in Bombay is in favour of the right of the widow; nor any sufficient reason for holding that the doctrine which has so prevailed should not have the force of law. They will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, with costs.

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