passed *ex parte*. This provision is omitted from the present Code, and there is no other provision expressly shutting out an appeal from decrees passed *ex parte*. We think therefore that, under Section 540, an appeal now lies from decrees so passed.

Further, in the present case, we find that the defendant appeared at the first hearing and filed a written statement. There does not seem to be any authority for placing a defendant *ex parte* who has so appeared.

We shall reverse the decree of the District Judge and remand the case in order that he may replace the appeal on his file and proceed to dispose of it. The costs will be costs in the cause.

NOTE.—*See* L.R., 5 I.A., 233 ; I.L.R., 2 Bom., 648 ; I.L.R., 2 Mad., 78.

NOTES.

[The rule in this case was affirmed in (1886) 9 Mad. 445. As to appeals *ex parte*, see (1886) 8 All. 354 F. B.]

[3 Mad. 265.]

APPELLATE CIVIL.

The 15th March, 1880.

PRESENT:

MR. JUSTICE INNES AND MR. JUSTICE MUTTUSAMI AYYAR.

Simmani Ammal.....(Second Defendant) Appellant

versus

Muttammal.....(Plaintiff) Respondent.*

Hindu Law—Succession of daughters—Barren daughter.

Sonless or barren daughters are not excluded from inheritance by their sisters who have male issue.

[266] THIS was an appeal against the decree of R. *Vasudeva Rau*, Subordinate Judge of *Negapatam* in O.S. No. 31 of 1877.

The Advocate-General (Hon. *P. O'Sullivan*) and *V. Bhashyam Ayyangar* for the Appellant.

A. Ramachandrayyar for the Respondent.

The facts of the case and arguments of Counsel are sufficiently set forth in the **Judgment** of the Court (INNES and MUTTUSAMI AYYAR, JJ.) which was delivered by

Muttusami Ayyar, J.—One *Ramasami Ayyan*, to whom the property now in litigation originally belonged, died about thirty-two years ago, leaving him surviving, a widow named *Anantammal*, and three daughters consisting of the plaintiff. the second defendant, and the mother of the first defendant, *Narayanammal*, who died about two years previous to the suit. Upon the death of the widow *Anantammal*, in the year Datu (1876-77) the plaintiff claimed as one of two surviving daughters a moiety of her father's estate, but the defendants resisted her claim, the first on the ground that her mother had divided the

*Appeal No. 109 of 1878 against the decree of R. Vasudeva Rau, Subordinate Judge of Negapatam, dated 18th September 1878.

property in 1872 with her sisters, and that he was in possession of his mother's share only, and the second for the reason that as a daughter with male issue she was entitled under the *Mitakshara* law to take the entire property in preference to the plaintiff who, it was alleged, neither had, nor was likely to have, male issue. The Court of First Instance found as a fact that the plaintiff was only thirty-six years of age and likely to bear children, and that, even if she was not capable of having male issue, barren daughters were competent to inherit and not excluded by daughters having male issue.

The main question argued and the only one which it is necessary to decide for the purposes of this appeal is, whether sonless or barren daughters are excluded from inheritance by their sisters who have male issue, and we think there is no sufficient authority for the contention that they are excluded.

The *Smritis* or the original texts recognize but two rules of preference as regulating the rights of daughters *inter se*, and the text of *Katyayana* prefers the unmarried to the married, and that of *Gautama* prefers also the unprovided or unendowed to the provided or endowed (*Mit.*, Ch. II, Sec. 2, paras. 3 and 4). **[267]** As to the other texts which in terms bear on the daughter's succession as heir in preference to male sapindas, it was pointed out in the *Shivaganga* case (I. L. R., 3 Mad.) that in ancient times all women were excluded from inheritance by the strict theory of religious efficacy ; that the case of an appointed daughter was the only exception recognized on the ground that the daughter then inherited not in her own right but in that of the son she was appointed to produce ; that when the appointment of daughters to produce sons for their fathers became obsolete, the theory of consanguinity took its place, and that it was subordinated to the doctrine of spiritual benefit by *Katyayana* and *Vrihaspati*, who advocated the rights of women, by making their succession a case of interposition so as to pass the heritage on after their death to the next male sapinda of the last male owner, and next by cutting down their inheritance to a mere personal provision, conceded in consideration of their propinquity, and restricting their power of alienation except under certain special circumstances.

The author of the *Mitakshara* consequently omits all allusion to the texts which rested the daughter's succession solely on the rights of her son as a male sapinda, and, in explaining the term 'unprovided' in the text of *Gautama*, says "it may mean either unprovided with issue according to the Bramana or Vedic text that offspring is a provision, or (in its literal sense) unprovided with wealth." (*Mit.*, Ch. 11, Sec. 11, p. 14, and *Varadaraja's Vyavahara Nirnaaya*, p. 45). Thus, the *Mitakshara*, far from being an authority for the exclusion of a sonless daughter, regards her unfortunate position as a ground of preference. We may further observe that the text of *Gautama* originally applied to the descent of *Stridhanam*, in which the element of religious efficacy has no place at all, and that it was declared applicable to paternal property by traditional or customary law. (*Mit.* Ch. II, Sec. 2, p. 4, and *Vyavahara Mayukha*, Ch. IV, Sec. 8, p. 12.)

On the other hand, the authors of the *Dayabaga* and *Dayakrama Sangraha* respected the opinion of a commentator in *Bengal* named *Dikshata*, who referred to the text of *Narada* which put the daughter's succession solely on the position of her son as a sapinda, and inferred from it that a barren daughter, or one **[268]** who is not likely to have male issue, or who is already a childless widow, is not entitled to succeed. They altogether ignored the text of *Gautama* in connection with paternal property, owing perhaps to the absence of a tradition in that part of the country such as has already been mentioned, and further interpreted the term 'unprovided' in connection with maternal property as

unprovided with husbands or unaffianced. (*Dayabaga*, Ch. XI, Sec. 2, para. 3; Ch. IV, Sec. 2, p. 13; *Dayakrama Sangraha*, Ch. I, Sec. 3, p. 5.) The author of the *Vivada Chintamani*, the leading authority in the *Mithila* School, also ignored the traditional law and denied any claim to preference on the ground of indigence or of the existence of male issue.

Thus the distinction between the two leading commentaries on the ancient Hindu Law consists in this—that according to the one, the daughter's capacity to produce a sapinda is the sole cause of her succession, while, according to the other, the conception is a mixed one, consanguinity alone being regarded when the succession opens up, and religious efficacy being a ground only for reducing her estate to a personal provision and her succession to an interposition between two regular male sapindas. In a case concerning the *Shivaganga* Zemindari (I.L. 3 Mad.) it was argued that the theory of spiritual efficacy had nothing to do with the daughter's estate, while it is now contended, in effect, if not in terms, that consanguinity has nothing to do with the daughter's succession; but, as already mentioned, we think that neither of these propositions is sound law. In passing, we may add that in *Bengal* a maiden daughter excludes married daughters from succession, while in *Southern India* the rule in her favour is one of preference only; so that married daughters are entitled to succeed her upon her death in preference to her son, and that the theory of religious efficacy is more strictly adhered to in the one than in the other.

It was argued that, according to the author of the *Smriti Chandrika*, which was cited and followed by the late Sadr Court in a case decided in 1852, barren daughters are not entitled to inherit. The commentator no doubt says in Ch. XI, Section 2, pp. 20 and 21, that the term 'unprovided' means unprovided **[269]** with wealth, and *not* with offspring, for barren daughters and the like are not at all entitled to inherit, as they are incapable of conferring spiritual benefit through the medium of their offspring. In the first place this important distinction is referred to by the commentator incidentally and as a reason for adopting the literal in preference to the secondary interpretation placed on the term unprovided, while the other commentators in the South do not follow him, probably for the reason that no technical construction is to be resorted to when the literal interpretation is admissible. We further note that the term is differently interpreted by the same commentator in connection with the descent of *Stridhanam* called *Adhyagni* in Ch. IX, Section 2, p. 17, where he says following *Apakara*, "unprovided" means issueless or unendowed, that is destitute of wealth, or unfortunate, or a childless widow. Again, in paragraph 20 of the passage relied upon for the appellant, *Katyayana's* text is cited as saying "unmarried or unprovided," while the latter expression is not to be found in the text as cited by the other commentators of the *Benares* School. (See *Mit.*, Ch. II, Sec. 2, p. 2; *Varadaraja's Mayukha*, Ch. IV, Sec. 8, p. 11; *Madaviya*, Sec. 26; *Varadaraja's Vyavahara Nirnaya* p. 34.) Again, in Ch. XI, Sec. 2, p. 13, the commentator curiously enough refers to the daughter's propinquity as the predominant ingredient as her right of succession, and states that "the daughter" is preferred to the father by reason of her superior claims on the ground of consanguinity, notwithstanding "her inferiority to him with respect to her capacity to confer spiritual benefit." In the absence, therefore, of a regular course of decisions or other evidence of usage, indicating a consciousness in the country that this opinion of the author of the *Smriti Chandrika* is living law, we do not feel warranted in departing from the doctrine of the *Mitakshara*. We are also inclined to think that the doctrine of the *Mitakshara* is more rational, for unless consanguinity is recognized as an effective, though a concurrent, cause of her succession, there

would be no legal basis for the position that a daughter is not excluded by her own son at the moment of his birth. Though there is a passage in *Vira Mitrodaya* similar to the one in *Smriti Chandrika*, we find that, as observed by Mr. *Mayne* in his treatise on the Hindu Law, *Colebrooke*, *MacNaughten*, the High [270] Court in *Bengal*, and the Privy Council have held that, under the *Mitakshara* law as administered in the North, barren daughters are not excluded by daughters having male issue.

For these reasons we think this appeal fails, and it must be dismissed with costs.

NOTES.

[*See* the notes to (1878) 3 Cal. 587 P. C. in the Law Reports Reprints. That consanguinity alone is the basis of the succession of females other than the widow was applied to the case of mother in (1907) 3 Mad 100.]

[3 Mad. 270]

APPELLATE CIVIL.

The 13th July, 1880.

PRESENT:

MR. JUSTICE KINDERSLEY AND MR. JUSTICE FORBES.

Rama Varar.....(Second Defendant), Appellant

versus

Krishnen Nambudri.....(Plaintiff), Respondent.*

The Samudayi of a temple is not competent to bring a suit in its behalf. The proper parties to sue are the Uralars (trustees).

THIS suit was brought to recover certain land with rent already due and to become due. It was alleged that the plaintiff managed the affairs of the temple under an agreement. The second defendant, the appellant in the Lower Appellate Court and in the High Court, denied the plaintiff's right to sue.

A. Ramachandrayyar for the Appellant.

Mr. *Lascelles* for the Respondent.

The Court delivered the following

Judgment:—This was a suit brought on behalf of a temple by the Samudayi to redeem a mortgage. The objection has been taken by the second defendant from the commencement of the suit, and again in second appeal, that the suit should have been brought in the name of the Uralars or trustees of the temple, and not in the name of their agent the Samudayi. We think the objection well founded. The defect is not cured if the plaintiff holds an authority from persons who are not parties.

For these reasons we are obliged to reverse the decrees of the Lower Courts and to dismiss the suit. The plaintiff must bear all the defendant's costs.

Suit dismissed.

* Second Appeal No. 92 of 1880 against the decree of V. P. D'Rozario, Subordinate Judge of North Malabar, dated 20th September 1879, confirming the decree of the Court of Domingo D'Cruz, District Munsif of Badagara, dated 30th March 1878.

NOTE.—*See.* I.L.R., 2 Mad., 168.