

*Reporter*, which appear to authorize the Court in decreeing costs against a guardian of a defendant, but these are cases which were decided before the present Code came into operation, and we do not consider them to be authorities upon which we can act. The new Code in Section 440 expressly declares that the guardian of a minor plaintiff may be assessed with costs and its silence as to the liability of the guardian of a defendant to costs, except in the case referred to in Section 458, would seem to imply that it was not intended that a guardian for a minor defendant should be liable to the same extent as the guardian for a minor plaintiff. We think that in this case we should not interfere with the discretion exercised, and must dismiss this appeal with costs.

**NOTES.**

[See, however, (1884) 8 Bom., 391 where it was held that in certain cases a guardian *ad litem* may be made to pay costs.]

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[3 Mad. 264.]

APPELLATE CIVIL.

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The 8th September, 1881.

PRESENT :

MR. JUSTICE INNES AND MR. JUSTICE TARRANT.

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Anantharama Patter.....(Second Defendant) Appellant

*versus*

Madhava Paniker.....(Plaintiff's Representative) Respondent. \*

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*Appeal from decree passed ex-parte—Defendant placed ex parte after filing written statement at first hearing—Civil Procedure Code Sections 540, 108.*

Under Section 540 of the Civil Procedure Code an appeal lies from decrees passed *ex parte*. If a defendant appears at the first hearing and files a written statement, he should not be placed *ex parte*.

THE facts and arguments in this case appear sufficiently for the purpose of this report from the judgment of the Court (INNES and TARRANT, JJ.).

A. Ramachandrayyar for Appellant.

The Respondent was not represented.

**[265] Judgment.**—The District Judge has dismissed the appeal on the ground that no appeal lies for the reason that the appellant, second defendant, was not present at the final hearing of the suit and was declared *ex parte*. He thought that the only course open to the appellant in this case was to apply to the Court under Section 108, *Civil Procedure Code*. Section 540 allows an appeal from decrees in all cases unless when otherwise expressly provided. The District Judge was of opinion that the provision in Section 108 was an express provision for a particular mode of procedure which precluded an appeal.

The Section in the old Code, corresponding to Section 108 in the Code of 1877, contained an express provision that there should be no appeal from a decree

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\* Second Appeal No. 264 of 1881 against the decree of F. C. C. Gomm, District Judge of Coimbatore, confirming the decree of T. V. Ponnusami Pillai, Subordinate Judge of South Malabar, dated 17th December 1880.

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.