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here, according to the evidence, it was from the first announced that the ceremonies usually incident to an adoption would take place at a subsequent time.

The title of the defendant being established, their Lordships need not consider whether the will, which is an essential link in that of the plaintiff, has been proved, and they will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. There will of course be no order for costs, the case having been heard *ex parte*.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins and Lattey*.

MONIRAM KOLITA (PLAINTIFF) v. KERI KOLITANI (DEFENDANT).

P. C.*
 1879
 Nov. 28, 29;
 1880
 Mar. 13.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Widow's Estate—Effect of Widow's Unchastity in regard to Estate vested in her.

A widow, who succeeds to the estate of her husband in default of male issue, whether she takes by inheritance or by survivorship, does not take a mere life-estate. The whole estate is, for the time, vested in her; though in some respects for only a qualified interest. She holds an estate of inheritance to herself and the heirs of her husband; and upon the termination of that estate, the property descends to those who would have been the heirs of the husband if he had lived up to and died at the moment of her death.

It has not been established that the estate of a widow forms an exception to the general rule, that the estate of a Hindu once vested by succession, or inheritance, is not divested by any act or incapacity which before succession would have formed a ground for exclusion from inheritance.

The general rule is stated in the *Viramitrodaya*, Chap. viii, "On exclusion from inheritance," paras. 3, 4, and 5. This work, like the *Mitakshara*, may be referred to in Bengal in cases in regard to which the *Dnyabhaga* is silent. A widow, who, not having been degraded or deprived of caste, had inherited the estate of her deceased husband, held not liable to forfeit that estate by reason of subsequent acts of unchastity.

Query as to the effect of her being degraded or deprived of caste for unchastity?

APPEAL by special leave (13th May 1875) from a decree of a Divisional Bench (2nd June 1873), passed in accordance

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

with a decision of a majority of ten Judges of the High Court (9th April 1873), which decree reversed, on special appeal, a judgment of the Deputy Commissioner of Sibsagar in the province of Assam, and restored that of the Munsif of Gholaghat, (24th March 1870).

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Atma and Ghinbora, both deceased, were brothers of the blacksmith caste, inhabiting Mouza Jorehati, in Zilla Sibsagar, in Assam. Atma left a son, Moniram Kolita, the plaintiff in this suit; and Ghinbora left a son, Ghindela, who married Keri Kolitani, the defendant, and died childless in 1866. On his death, Keri Kolitani succeeded to the possession of his ancestral lands in the village (rather more than 23 bigas), and the revenue papers were made out in her name. After her husband's death, the widow began to cohabit with one Mohana, and had a child by him.

The plaintiff claimed the lands as his by inheritance. The defendant alleged her title as widow, and possession from her husband's death. The cohabitation with Mohana was stated as a fact in the Munsif's judgment, which on this point was, that the defendant, as widow of Ghindela, had not lost her rights, there not having been a second marriage.

This decision was reversed on appeal; the Deputy Commissioner holding that a widow's unchastity caused her to lose her estate in her deceased husband's ancestral lands. The defendant then filed a special appeal in the High Court, on the ground that, by the Hindu law, the succession having once devolved upon her, and the property having vested in her, she could not be divested of the same in consequence of her unchastity after her husband's death.

A Divisional Bench of the High Court was of the same opinion as the Deputy Commissioner, but this opinion being opposed to the decision of the High Court in *Srimati Matangini Debi v. Srimati Jaykali Debi* (1) a reference was made by the Judges to a Full Bench, with the result that the decision of the Munsif was restored (2).

An application for leave to appeal to Her Majesty in Council, made to the High Court, was refused on grounds regarding the

(1) 5 B. L. R., 466.

(2) 13 B. L. R., 1.

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smallness of the property, valued only at Rs. 75. Leave to appeal was then granted by order in Council, dated the 13th May 1875.

The appellant's grounds were, that, upon the correct construction of the Hindu law of the Bengal school, and the authorities relating thereto, it should have been held that a sonless Hindu widow, who by reason of her chastity had obtained the estate of her husband, was entitled to continue to enjoy that estate only so long as the qualification of chastity itself, and the spiritual benefit accruing therefrom to her deceased husband, should continue; also that Act XXI of 1850 had no application to the facts of this case.

Mr. Cowie, Q. C., and Mr. Doyne for the appellant.

The respondent did not appear.

Reference was made to the authorities cited in the argument of the appeal in the High Court, reported in 13 Bengal Law Reports, pp. 30 to 39, especially to the following:

Mitakshara, Chap. II, Sec. I; Colebrooke's Digest of Hindu Law, Book IV, Chaps. III and IV; Strange's Hindu Law, Chap. VII; Macnaghten's Principles of Hindu Law, Vol. I, Chap. II; and Precedents of Hindu Law, Vol. II, Chap. I, Sec. II; *Maharanee Husunt Koomaree v. Maharanee Kummul Koomaree* (1), *Radamoni Raur v. Nilmoni Das* (2), *Saunoney Dossee v. Nemychurn Doss* (3), *Parvati v. Bhihu* (4), *Srimati Matangini Debi v. Srimati Jaykali Debi* (5), *Nehalo v. Kishen Lal* (6), *Hurrydoss Dutt v. S. M. Upoornah Dossee* (7), *Coswinath Bysack v. Hurrosoondery Dossee* (8).

Their Lordships' judgment was delivered by

SIR B. PEARCE.—This is an appeal from a decision of a Full Bench of the High Court of Judicature at Calcutta. It was admitted by virtue of a special order of Her Majesty in

- (1) 7 Sel. Rep., 144; New Ed., 168. (6) I. L. R., 2 All., 150.
 (2) Montrieux's H. L. Cases, 314. (7) 6 Moore's I. A., 433.
 (3) 2 Taylor and Bell, 300. (8) Morton's Decisions, edition of
 (4) 4 Bom. H. C. Rep. A. C., 25. 1841, p. 85.
 (5) 5 B. L. R., 466.

Council, whereby the appellant had leave to appeal in the form of a special case upon the following questions, *viz.* :—

1st.—Whether, under the Hindu law as administered in the Bengal school, a widow, who has once inherited the estate of a deceased husband, is liable to forfeit that estate by reason of unchastity? and

2nd.—Whether the forfeiture, if any, is barred by Act XXI of 1850?

The appeal was admitted on account of the importance of the questions submitted for determination, and the great interest which the Hindu community take in it.

The case came in the first instance upon special appeal before a Division Bench, consisting of Mr. Justice Bayley and Mr. Justice Dwarkauath Mitter, who were of opinion that the defendant had, by reason of unchastity, forfeited her right in her husband's property; but in consequence of a contrary ruling of the High Court, referred the two questions above mentioned to a Full Bench, with their remarks thereon.

The Full Bench consisted of the Chief Justice and nine other Judges, and the majority held that the widow, having once inherited the estate, did not forfeit it by reason of her subsequent unchastity. Three of the Judges however, *viz.*, Mr. Justice Kemp, Mr. Justice Glover, and Mr. Justice Dwarkanath Mitter, dissented from the opinions expressed by the majority of the Court. The case is fully reported in the 13 Bengal Law Reports, p. 1.

The subject has been very elaborately discussed by the Chief Justice and the other Judges of the Full Bench, and it has also been fully argued before their Lordships on behalf of the appellant. The respondent did not appear.

The opinion of Mr. Justice Mitter, who was himself a learned and accomplished Hindu lawyer, and those of the other two Judges who were in the minority, are entitled to very great weight; but having considered and weighed all their arguments, their Lordships are unable to concur in the opinions which they expressed.

The earliest case in which the subject was fully discussed in the High Court is the case of *Srimati Matangini Debi v.*

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Srimati Jayhali Debi (1), which was the cause of the reference.

That case was originally tried before Mr. Justice Markby, who delivered a judgment, in which he showed much research and great knowledge of the subject. The case was appealed to the High Court, and heard before the then Chief Justice and Mr. Justice Macpherson, who affirmed the judgment of Mr. Justice Markby.

Their Lordships will, in the first instance, advert to the judgments of the dissentient Judges, and in particular to the opinion expressed by Mr. Justice Mitter on referring the case, and to his judgment after the argument in the Full Bench. Reasoning from the general notions of the Hindu commentators, touching the frailty and incapacity of women, and the necessity for their dependence upon and control by some male protector, and from the origin and nature of a widow's interest in the property which she takes in succession to her husband, he arrived at the conclusion that she is, as he expresses it, "a trustee for the benefit of her husband's soul;" that inasmuch as, by reason of unchastity subsequent to her husband's death, she becomes incapable of performing effectually the religious services that are essential to his spiritual welfare, she ceases to be capable of performing her trust, and must therefore be taken to have broken the condition on which she holds the property, and to have incurred the forfeiture of her estate. It may be remarked that the other two dissentient Judges differed from Mr. Justice Mitter's view of the nature of a Hindu widow's estate, and, therefore, from a good deal of the reasoning upon which his conclusion is founded. But, however that may be, their Lordships entirely concur with the Chief Justice and the majority of the Judges in rejecting the somewhat fanciful analogy of trusteeship.

Mr. Justice Glover's judgment is founded upon the express texts, and upon the ground that by reason of unchastity a widow becomes incapable of performing those religious ceremonies which are for the benefit of her husband's soul. He

draws a distinction between a widow and a son, and says (1) :—

“The theory of the Hindu law of inheritance is, the capability by the heir of performing certain religious ceremonies which do good to the soul of the departed, and he takes who can render most service. The sons down to the third generation could do most, offer most oblations, and confer the greatest benefits, therefore they are first in the line of heirship. *The widow comes next, as being able to confer considerable, though less, benefits, and it is only because she is able to do this that she is allowed to take her husband's share.*

“It would seem, therefore, to be a condition precedent to her taking that estate, that she should be in a position to perform the ceremonies, and offer the continual funeral oblations, which are to benefit her deceased husband in the other world; and in this respect her position is very different from that of a son. The son confers benefits upon his father from the mere fact of being born capable of performing certain ceremonies. His birth delivers him from the hell called *put*; and, whether in after-life he offer the funeral oblations or no, *he succeeds to his father's inheritance from the fact of being able to offer them.* With the widow it is not so; she can only perform ceremonies and offer oblations so long as she continues chaste, and directly she becomes unchaste, from that moment her right to offer the funeral cake ceases.”

These reasons do not appear to be sufficient to support the learned Judge's conclusion that a widow forfeits her estate when she ceases to be able to perform the necessary religious ceremonies. It is admitted that she may by law hold the estate without performing them, and that she may give, sell, or transfer the estate to another for her own life. Nor does there appear to be any sufficient reason for the distinction attempted to be drawn between a son or other heirs and a widow with reference to the forfeiture of the estate when the person who has succeeded to it has become incompetent to perform the duties which he or she ought to perform. The proprietary right of a son by inheritance from his father is expressly ordained, because the wealth devolving upon sons benefits the deceased (Dayabhaga, Chap. XI, Sec. I, v. 38), and the right of succession of other heirs to the property is also founded on competence for offering oblations at obsequies (18th verse);

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see also v. 32. But a son, even if by the mere fact of his birth he delivers his father from the hell called *put*, is, according to the Dayabhaga, excluded for certain causes from inheritance in the same manner as other heirs (*see* the Dayabhaga, Chap. V, paras. 4, 5, and 6); but, if he once succeeds, the estate is not divested for anything less than degradation, though causes which would have excluded him if they had existed before succession arise after the estate has descended. This is admitted by Mr. Justice Mitter (1).

Their Lordships will proceed to consider the principal texts upon which the learned Judges who were in the minority founded their judgments.

Mr. Justice Mitter, in his judgment (2) says:—

“Of all the authorities above referred to, the Dayabhaga of Jimutabahana, the acknowledged founder of the Bengal school, is undoubtedly the highest; and it is therefore to the Dayabhaga that I shall first direct my attention. I do not wish, however, to go over all the texts quoted and relied upon by the author of that treatise in discussing the widow's right of succession. I will refer to two of those texts only,—namely, the texts of Vrihat Manu, cited in v. 7, Sec. I, Chap. XI of Mr. Colebrooke's translation of the Dayabhaga; and that of Catyayana, cited in v. 56 of the same section and chapter. These two verses are as follow:—

‘(1.) The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share.’

‘(2.) Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.’”

With regard to the former of the texts above cited, although the present participle is used, it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently. It cannot mean up to the time of her presenting the funeral oblation; for, notwithstanding the order of the words, the meaning of the text is, that having obtained the husband's share, the *patni* or widow should perform those ceremonies conducive to the spiritual benefit of

(1) 13 B. L. R., 7.

(2) *Id.* 40.

her husband and herself, which can be accomplished by wealth, and which a female is competent to perform; see *The Viramitrodaya*, Chap. III, Part I, s. 2; and the *Smriti Chandrika*, Chap. XI, Sec. I, vv. 13, 16, and 20. In this view the text would run thus,—“The widow of a childless man having kept unsullied her husband’s bed, and persevered in religious observances, shall obtain his entire share, and present his funeral oblation.”

Mr. Justice Glover points to the words “persevering in religious observances,” to prove that the whole text applies to a period subsequent to the husband’s death, and as referring to a continually abiding condition, because he assumes that a wife cannot perform religious observances during her husband’s life, and that, therefore, those words must have relation to a period after her husband’s death. But the assumption does not appear to be correct, for in the *Smriti Chandrika*, Chap. XI, Sec. I, v. 17, the meaning of the words, “persevering in religious observances” are thus explained,—“practising religious ceremonies even during the lifetime of the husband, with the husband’s permission,” &c., whence the inference is drawn, in v. 18, that a *patni*, to inherit her husband’s estate, must be a pious woman. And again in v. 12, a virtuous woman is “one that lives with her husband, associating with him in the performance of rites ordained by *Ṛuti* and *Smriti*, and observing fastings and other religious ceremonies.”

The second of the texts relied upon is that of *Catyayana*.

It is important to see for what purpose the text was cited, and with that view to refer to the verses immediately preceding those in which the text is cited, for there is nothing more likely to mislead than to read a single paragraph from the *Dayabhaga* or *Mitākshara* alone without studying the whole chapter, and in some cases, even, without studying several chapters of the same treatise.

In Chap. XI, Sec. I, the author of the *Dayabhaga*, v. 54, sums up his argument in support of the widow’s right to succeed to the entire property of her husband, for which purpose he had cited the text of *Vrihat Menu*. He says:—

“By the term ‘his share’ is understood the entire share appertaining to her husband, not a part only,” (the translator adds the words “sufficient for her support.”)

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And then in v. 55 he concludes :—

“Therefore the interpretation of the law is right as set forth by us,” *viz.*, that “the widow’s right must be affirmed to extend to the whole estate of her husband” (v. 6).

He then proceeds, in v. 56, to deal with the mode of enjoyment, and to show that, notwithstanding a widow takes the entire estate, she is not entitled to make a gift, sale, or mortgage of it, to the exclusion of her husband’s heirs. He says :—

“But the wife must only enjoy her husband’s estate after his demise; she is not entitled to make a gift, mortgage, or sale of it.”

And then, in support of that proposition, he refers to the second text cited, and proceeds :—

“Thus Catyayana says :—‘Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. *After her death* let the heirs take it.’”

Mr. Justice Mitter, in his judgment, remarks, at p. 41, that the author of the Dayabhaga cited that text, not for the purpose for which he cited that of Vrihat Menu, *viz.*, that of establishing a widow’s right to succeed to the entire estate of her deceased husband, but for that of defining the nature and extent of the interest which devolves upon her by virtue of that right.

In his remarks made on referring the case, however, he reasons upon it as an isolated text, and says (1) :—

“This passage shows clearly, not only that the widow’s right is a mere right of enjoyment, the word ‘enjoyment’ being understood in the sense explained above, but that the exercise of that right is absolutely dependent on her ‘preserving unsullied the bed of her lord.’ *The participial form* of the word ‘preserving,’ *i.e.*, continually preserving, which is also the form used in the original (*patayanti*), proves conclusively that the injunction is one in the nature of a permanently abiding condition, which a widow is bound at all times, and under all circumstances, to satisfy; and the right of enjoyment conferred upon her being expressly declared *to be subject to such a condition*, every violation of it must necessarily involve a forfeiture of right.”

Mr. Justice Glover also, at page 57, expresses a similar opinion, and he refers to the present participle “preserving”

(1) 13 B. L. R., 16.

as denoting continuance, and as referring to the time after the widow has taken the property originally; and he adds besides, if the words "keeping unsullied" refer only to past time, what is to be made of the other part, which he assumes to import a condition, viz., "living with her venerable protector." "She cannot," he says, "live with him until she is a widow, and "while she lives with him she is to keep unsullied her husband's "bed." It is by treating the words "living with her venerable protector" as constituting a condition that he endeavours to add force to his argument that the words "keeping unsullied the bed of her lord" also express a condition (1). But that argument fails, inasmuch as it has been expressly held by the Privy Council, in the case of *Cossinauth Bysack v. Hurrosoondery Dossee* (2), that the words "abiding with her venerable protector" do not create a condition of forfeiture in case of her refusing to abide with him. Referring to that decision, Mr. Justice Mitter says, that it lends in an indirect way considerable support to his view, inasmuch as that particular case was decided expressly upon the ground that the widow had not changed her residence for unchaste purposes. Their Lordships, however, are of opinion that the words "abiding with her venerable protector" do not, under any circumstances, create a condition, or a limitation of a widow's right to enjoy the property of her husband to the period during which she abides with her protector. They agree with the Chief Justice in the opinion which he expressed at p. 82, that neither the words "preserving unsullied the bed of her lord," nor the words "and abiding with her venerable protector," import conditions involving a forfeiture of the widow's vested estate (3); but even if the words were more open to such a construction than they appear to be, their Lordships are of opinion that what they have to consider is not so much what inference can be drawn from the words of *Catyayana's* text taken by itself, as what are the conclusions which the author of the *Daya-*

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(1) 13 B. L. R., 57.

Supreme Court), 2 *Morley's Digest*,(2) *Vayavastha Darpana* by Shama- 198; S. O., *Morton's Decisions*, Edn. churn Sircar, 97, and (judgment of of 1841, p. 85.

(3) 13 B. L. R., 82.

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bhaga has himself drawn from them. It is to that treatise that we must look for the authoritative exposition of the law which governs Lower Bengal, whilst on the other hand nothing is more certain than that, in dealing with the same ancient texts, the Hindu commentators have often drawn opposite conclusions. Now how has Jimutabahana dealt with this particular text? It has been seen for what purpose he cited it; but how does he comment on it in the rest of the section in which it occurs? He comments on the words "venerable protector" (v. 57); he defines who are intended to take after the demise of the widow under the term "the heirs" (vv. 58 and 59); glances at her duty to lead an abstinent, if not an ascetic, life, and to avoid "waste" (vv. 60 and 61), and deals with her power of alienation, and the limitations upon it (vv. 62, 63, and 64). But he nowhere says one word from which it can be inferred that, in his opinion, the text implied continued chastity as a condition for the duration of her estate, or that a breach of chastity subsequent to the death of her husband would operate as a forfeiture of her right. It can scarcely be supposed that a commentator so acute and careful as Jimutabahana, if he had drawn from the text of Catyayana the inference that a widow was to forfeit the estate if she should become unchaste after her husband's death, would not have stated that inference clearly by saying, in v. 57, "let her enjoy her husband's estate during her life, or so long as she continues chaste," instead of using only the words "during her life" and stating that "when she dies" the daughters and others are to succeed.

The right to receive maintenance is very different from a vested estate in property, and therefore what is said as to maintenance cannot be extended to the case of a widow's estate by succession. However, the texts cited in regard to maintenance show that, when it was intended to point out that a right was liable to resumption or forfeiture, clear and express words to that effect were used. Jimutabahana, in Chap. XI, Sec. I, v. 48, of the Dayabhaga, refers to a text of Narada, in which he says,—“Let them allow a maintenance to his women for life, provided they keep unsullied the bed of their lord. But if

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“they behave otherwise, the brother may resume that allowance.” How different are those words from those used in the text of *Catyayana*.

Mr. Justice Mitter, in order to get rid of the argument that a daughter, becoming a sonless widow, or unchaste after having succeeded to the estate of her father, does not forfeit the estate, argues that the texts to which he refers are applicable to a daughter as well as to a widow, and he refers to v. 31, Sec. II, Chap. XI of the *Dayabhaga* to show that the text of *Catyayana* is applicable to all women. (See 13 B. L. R., pp. 45 and 46, 48 and 49).

It seems clear, however, that though an unchaste daughter is excluded from inheriting her father's estate, or an unchaste mother that of her son, it is not by virtue of either of the above-mentioned texts of *Vrihat Meou* or that of *Catyayana*. Those texts have reference to the bed of the deceased owner of the estate. The words, “his funeral oblation,” and “his share,” and “the property,” have reference to the oblation, the share, and the property of the lord or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of a daughter or mother, as the case may be, of the deceased owner, who, in default of a widow, may be next in succession to inherit his estate.

Verse 31, Sec. II, Chap. XI, only extends to other women the rule applicable to a wife, that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule which is included in the words “keeping unsullied the bed of her lord.” This is made clear by s. 30, in which it is said :—

“Since it has been shown by a text cited (Sec. I, v. 56) that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit his property if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore, the same rule (concerning the succession of the former possessor's next heirs) is inferred *à fortiori* in the case of the daughter and grandson (meaning a daughter's son), whose pretensions are inferior to the wife's.”

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Then comes s. 31, which is in the words following :—

“ The word ‘ wifo ’ in the text above quoted (Sec. I, v. 56) is employed with a general import, and it implies that the rule,” (meaning the rule referred to in Ch.p. XI, Sec. II, and para. 30) “ must be understood as applicable generally to the case of a woman’s succession by inheritance.”

Their Lordships have dwelt at some length upon the two texts that have been considered, since it is upon them that the arguments of the dissentient Judges are mainly founded. For the reasons above stated, they are of opinion that these texts, neither expressly nor by necessary implication, affirm the doctrine that the estate of a widow, once vested, is liable to forfeiture by reason of unchastity subsequent to the death of her husband.

The judgments of the High Court have so exhaustively reviewed the later authorities upon this question that their Lordships do not think it necessary to go through the same task. It is sufficient to say that, in their opinion, those authorities, though in some degree conflicting, greatly preponderate in favour of the conclusion of the majority of the Judges of the High Court.

In their Lordships’ view it has not been established that the estate of a widow forms an exception to what appears to be the general rule of Hindu law, that an estate once vested by succession or inheritance is not divested by any act which, before succession or incapacity, would have formed a ground for exclusion from inheritance (1).

The general rule is stated in the *Viramitrodaya*, a book of authority in Southern India (2) (see 12 Moore’s Indian Appeals,

(1) This sentence, which is, as above, in the printed copy of the judgment, should probably run thus: “ is not divested by any act or incapacity, which, before succession, would have, &c.”—Ed.

(2) The following is in the judgment in *Girdhari Lal Roy v. The Bengal Government*, 12 Moore’s I. A., 466; 1 B. L. B., F. C., 52:—

“ Adhering to the principles which this Board lately laid down in the case of *the*

The Collector of Madura v. Mootoo Ramalinga Sathupathy, 12 Moore’s I. A., 397 and 438, their Lordships have no doubt that the *Viramitrodaya* which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an expositor of what may have been left doubtful by the *Mitakshara*, and declaratory of the law of *Afit Benares school*.”—Ed.

466; and Mr. Colebrooke's Preface to the *Dayabhaga*), and which may also, like the *Mitakshara*, be referred to in Bengal in cases where the *Dayabhaga* is silent. It is there said, in para. 3 of the Chapter on Exclusion from Inheritance* (Chap. VIII), "amongst them, however, an outcast (*patita*) and addicted to vice (*upa patdhi*) are excluded if they do not perform penance;" and then in para. 4 the exclusion again of these takes place if their disqualification occur previously to partition (or succession), but not if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares. In para. 5 it is said that the masculine gender in the word "outcast," &c., is not intended to be expressive of restriction, and that the law of exclusion based upon defects excludes the wife or the daughters, female heirs as well.

Mr. Justice Jackson has ably pointed out the great mischief, uncertainty, and confusion that might follow upon the affirmation of the doctrine that a widow's estate is forfeited for unchastity, particularly in the present constitution of Hindu society, and the relaxation of so many of the precepts relating to Hindu widows. The following consequences may also be pointed out.

According to the Hindu law, a widow who succeeds to the estate of her husband in default of male issue, whether she succeeds by inheritance or survivorship—as to which see the *Shivagunga case* (1)—does not take a mere life-estate in the property. The whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest. Her estate is an anomalous one, and has been compared to that of a tenant-in-tail. It would perhaps be more correct to say that she holds an estate of inheritance to herself and the heirs of her husband. But whatever her estate is, it is clear that, until the termination of it, it is impossible to say who are the persons who will be entitled to succeed as heirs to her husband (2). The succession does not open to the heirs of the husband until the termination of the widow's estate. Upon the termination of that estate the property descends to those who would have been the heirs of

(1) 9 *Maore's J. A.* 604.(2) *Id.*, 604.

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the husband if he had lived up to and died at the moment of her death (1).

If the widow's estate ceases upon her committing an act of unchastity, the period of succession will be accelerated, and the title of the heirs of her husband must accrue at that period. Suppose a husband dies leaving no male issue and no daughter, mother, or father, but leaving a chaste wife, a brother, a nephew, the son of the surviving brother, and other nephews, sons of deceased brothers. The wife succeeds to the estate, and the surviving brother is her protector. (See Dayabhaga, Chap. XI, Sec. I, v. 57.) If he survive the widow, he, according to the Bengal school, will take the whole estate, as sole heir to his deceased brother, and the nephews will take no interest therein; for brothers' sons are totally excluded by the existence of a brother (Dayabhaga, Chap. XI, Sec. I, v. 5; *id.*, Chap. XI, Sec. VI, vv. 1 and 2). The surviving brother may be advanced in years; the widow may be young. The probability may be that she will survive him. If her estate were to cease by reason of her unchastity, the benefit which he would derive from her fall would give him an interest in direct conflict with his moral duty of shielding her from temptation. But, further, the widow has a right to sell or mortgage her own interest in the estate, or in case of necessity to sell or mortgage the whole interest in it. (Dayabhaga, Chap. XI, Sec. I, v. 62.) If her estate ceases by an act of unchastity, the purchaser or mortgagee might be deprived of his estate if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.

Again, if the surviving brother should die in the lifetime of the widow, all the nephews would succeed as heirs of their deceased uncle; but if the son of the surviving brother could prove that the widow's estate had ceased, by reason of an act of unchastity committed in the lifetime of his father, and that consequently the estate had descended to his father in his lifetime, he would be entitled to the whole estate as heir to his

(1) Moore's I. A., 601.

father, to the exclusion of the other nephews. Thus the period of descent to the reversionary heirs of the husband might be accelerated by an act of unchastity committed by the widow; the course of descent might be changed by her act, and persons become entitled to inherit as heirs of the husband, who if the widow had remained chaste would never have succeeded to the estate; and others who would otherwise have succeeded would be deprived of the right to inherit.

In the case of *Srimati Matangini Debi v. Srimati Jayhali Debi* (1), the following remark was made by the then Chief Justice. He said:—

“In the case of *Katama Natchier v. The Rajah of Shivagunga* (2), it was held that a decree in a suit brought by a Hindu widow binds the heirs who claim in succession to her; but that can only be in a suit brought by her so long as she holds a widow's estate. It would cause infinite confusion if a decree in a suit brought by a widow could be avoided, if it could be shown that she had committed an act of unchastity before she commenced the suit. But if the rule contended for is correct, and the estate which a widow takes by inheritance is merely an estate so long as she continues chaste, all the acts which a Hindu widow could do in reference to the estate might be avoided by raking up some act of unchastity against her. Inconvenience would not be a ground for deciding a case like the present, if the law were clear upon the subject; but it is an argument which may be fairly adduced when the authorities in favour of the opposite view are merely the expressions of opinion by Hindu law officers, or by European or modern text-writers, however eminent, or even decisions of a Court of Justice, when they are in conflict with the decisions of other Courts of equal weight.”

Upon the whole, then, their Lordships, after careful consideration of this question, and of the authorities bearing upon it, have come to the conclusion that the decision of the majority of the Judges was the correct one, and it is important to remark that the High Court at Bombay, in the case of *Parvati v. Bhiku* (3), and the High Court in the North-Western Provinces, in the case of *Nehalo v. Kishen Lall* (4), have given judgments

(1) 5 B. L. R., 466, at p. 490.

(2) 9 Moore's I. A., 539.

(3) 4 Bom. H. C. R., A. C., 25.

(4) I. L. R., 2 All., 150.

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to the same effect as that of the Full Bench at Calcutta in the present case.

The widow has never been degraded or deprived of caste. If she had been, the case might have been different, subject to the question as to the construction of Act XXI of 1850; for upon degradation from caste, before that Act, a Hindu, whether male or female, was considered as dead by the Hindu law, so much so that libations were directed to be offered to his manes as though he were naturally dead. See Strange's Hindu Law, 160 and 261; Menu, Chap. XI, s. 183. His degradation caused an extinction of all his property, whether acquired by inheritance, succession, or in any other manner. Dayabhaga, Chap. I, paras. 31, 32, and 33. The opinion of Mr. Colebrooke in the *Trichinopoly* case is founded on the distinction between mere unchastity and degradation.

It is unnecessary to determine what would have been the effect of Act XXI of 1850, if she had been degraded or deprived of her caste in consequence of her unchastity.

Their Lordships, for the above reasons, will humbly advise Her Majesty to affirm the judgment of the High Court.

Appeal dismissed.

Agents for the appellants: Messrs. *Barrow & Rogers.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

BEMOLA DOSSEE (PLAINTIFF) v. MOHUN DOSSEE AND OTHERS
(DEFENDANTS).

*Hindu Law—Joint Family—Dayabhaga—Joint Family Business—Power of
Managing Member to bind Members of Partnership.*

Adult members of an undivided Hindu family, governed by the law of the Dayabhaga, who have an interest in a family business carried on by the managing member of the family, and who are maintained out of the profits of such business, must, in the absence of evidence, be taken to possess the knowledge, that the business might require financing, and to have consented to such financing.

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July, 22
and Mar. 9.