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"The plaintiff claims Rs. 27-14-0 as being due to him on a money bond dated the 2nd of *Kartik Vadya Shake* 1797 (15th November 1875).

[104] "The suit is governed by three years' limitation. The bond contains a native date only, and the claim has been filed on the 12th March 1879. Reckoning the period by the British calendar the suit is in time, but reckoning it by the native one, it is out of time * * *

"The wording of the illustrations to s. 25 of Act XV of 1878 makes me to doubt the otherwise plain construction of the section itself. As cases of this nature are frequently to be met with, I think it advisable, for the ends of justice and removal of any doubt on the subject, to refer this case, under s. 617 of Act X of 1877, as to whether limitation is to be invariably computed according to the Gregorian calendar, though an instrument contains a native date only."

4 B. 103 = 4 Ind. Jur. 580.

Ghanasham Nilkanth, for the plaintiff.

PER CURIAM.

Section 25 of Act XV of 1877 provides that "all instruments shall, for the purposes of the Act, be deemed to be made with reference to the Gregorian calendar." The meaning of this clearly is that the parties to an instrument shall be deemed to have used the terms 'year' and 'month' in the sense which they bear in the Gregorian calendar. Under this view the suit is not barred.

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4 B. 104 = 4 Ind. Jur. 630.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice Kemball.

ADVYAPA, SON OF CHINAPA (*Original Defendant*), *Appellant v.* RUDRAVA (*Original Plaintiff*), *Respondent.** [4th October, 1879.]

Hindu Law—Daughter's right of succession—Incontinence.

Under the Hindu law prevailing in this Presidency a daughter is not debarred by incontinence from succession to the estate of her father.

Smriti writers and commentators on Hindu law and judicial decisions on the question of a daughter's right of succession, referred to and discussed.

[**Appr.**, 31 B. 495 (510) = 9 Bom. L.R. 774 (787); 5 M. 149; **R.**, 23 B. 296 (301); 26 M. 509; 31 M. 100 = 18 M.L.J. 70 = 2 M.L.T. 533; 40 C. 650 = 17 C.L.J. 438 (457) = 17 C.W.N. 679 (693) = 19 Ind. Cas. 129; 4 N.L.R. 31; **D.**, 22 C. 347.]

THIS was a special appeal from the decision of C. H. Shaw, District Judge of Belgaum, reversing the decree of Ramchandra Rao, Subordinate Judge of Saundatti.

[105] The plaintiff Rudrava claiming title as heir of her mother Gorlingowa, who died on the 15th October 1867, brought this suit for the recovery of certain *jirait* lands. The suit was originally against Advyapa, Hanmantgavda and Teyowa, the plaintiff's sister. Five other persons were afterwards joined as defendants.

The defendant Advyapa, a male relative of the plaintiff's father, answered that the plaintiff had been a prostitute for twenty-five or thirty years, and, therefore, could not take as heir. He also alleged that the lands in dispute were undivided ancestral estate, and could not be claimed by the plaintiff. Hanmantgavda pleaded that he was a tenant of Advyapa

* Civil Reference No. 13 of 1879.

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and that the suit was barred, under s. 2 of Act VIII of 1859, by the plaintiff's former suit against him. The defence of Tayowa was that the lands belonged to her father Shivrudra and not to Advyapa, and that she was the sole heir, as plaintiff had been a prostitute for many years, and excommunicated from the caste. The remaining defendants did not file any written statements.

One of the issues laid down by the Subordinate Judge was whether the plaintiff had a right to sue, and he decided this issue in the negative. He found that she had been guilty of adultery, and had lived for many years as a prostitute with one Jinna, a Jain by caste, by whom she had several children. He accordingly dismissed the plaintiff's claim.

Mr. Shaw in appeal reversed the decree of the first Court. He found that the lands in dispute were the self-acquired property of Shivrudra, the plaintiff's father; that he (Shivrudra) was divided in estate from the defendants; and that the plaintiff and Tayowa were each entitled to half of the property in dispute. He held that the plaintiff did not forfeit her right of succession by her criminal intimacy with Jinna.

Advyapa preferred a special appeal to the High Court. None of the other defendants were parties to it.

Shamrao Vithal, for the appellant.—Both the lower Courts have found as a fact that Rudrava was the mistress of Jinna for many years, and had children by him. She was thus an unchaste woman and an outcaste. She was, therefore, incompetent to succeed to the property of her deceased father. The Hindu law strictly [106] enjoins chastity in women. An unchaste widow does not succeed to the estate of her husband: Mitakshara, ch. ii, s. ii, pl. 2; (Stokes' H. L. Books, p. 440). Chastity is expressly made a condition on which her right of succession depends. Among the persons who are excluded from the right of inheritance are outcastes and persons addicted to vice; Mitak., ch. ii, s. x, pl. 1, 3: Vya. May., ch. iv, s. xi, pl. 3, 12. The causes of exclusion from inheritance mentioned in *placita* 1 and 3 of the Mitakshara are made expressly applicable to women, whether mother, wife or daughter. A daughter who is unchaste, or who has abandoned herself to prostitution, is wholly incompetent to inherit the property left by her parents; 2 W. Macn. H.L., pp. 132, 133, Case V. The learned pleader also referred to Shamacharn Sirkar's Vya. Darpan, p. 1016, plac. 663; *Strimuttu Muttu Vizia Ragunada Rani* v. *Dorasinga Tevar* (1); Daya Sangraha, ch. i, s. iii, pl. 1 to 5 (Stokes' H.L. Books, p. 476); Manu, ch. v., para. 149.

Ghanasham Nilkanth Nadkarni, for the respondent.—A daughter does not forfeit her right of succession by incontinence. No doubt a widow who is unchaste does not succeed to the property of her husband. The Hindu law expressly requires chastity in a wife, and makes her right of succession to the property of her husband depend upon it: Vya. May., ch. iv, s. viii, pl. 2, 8, 9 (Stokes' H. L. Books, pp. 84, (86); Mit., ch. ii, s. i, pl. 6, 7, 13, 18 (Stokes' H. L. Books, pp. 428, 429, 431, 432). But there is no authority for contending that chastity is a necessary condition of a daughter's right of inheritance. Her right is absolute: Vya. May., ch. iv, s. viii, pl. 10 (Stokes' H. L. Books, p. 86); Mit., ch. ii, s. ii, pl. 2, 3, 4 (Stokes' H. L. Books, 440). The learned pleader also referred to Act XXI of 1850; *Bakubai* v. *Manchabai* (2); *Parvati* v. *Bhiku* (3); *Poli* v. *Narotam* (4).

(1) 6 M.H.C.R. 310.
(2) 2 B.H.C.R. 5.
(3) 4 B.H.C.R. A.C.J. 25.
(4) 6 B.H.C.R. A.C.J. 183.

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JUDGMENT.

WESTROPP, C.J.—The facts, as found by the District Judge, are these—Shivrudra, a Lingayet by caste, separate from his family, died possessed of certain *jirait* lands in the village of Ogargole, taluka Parasgad and Zilla of Belgaum, acquired by himself, and was survived by his widow Gorlingowa and two daughters, Rudrava (the plaintiff), wife of Maleshapa Nisbat [107] Desai, and Tayowa, the wife of Shivlingapa. Gorlingowa, the widow of Shivrudra, succeeded to the lands, and enjoyed them until her death on the 15th October 1867.

The plaintiff brought the present suit against (1) Advyapa, a male relative of Shivrudra; (2) Hanmantgavda, who alleged himself to be the tenant of the lands under Advyapa; (3) Tayowa, the plaintiff's sister, and five other defendants related to Shivrudra. The plaintiff complained that the lands had been wrongfully seized by Advyapa and Hanmantgavda. The defendants Advyapa and Hanmantgavda filed written statements to the effect that the lands were the property of Advyapa, and that Hanmantgavda was his tenant, and that Shivrudra at the time of his death was a member of an undivided family, and the plaintiff, therefore, could not maintain her suit. The third defendant Tayowa in her written statement charged her sister, the plaintiff, with being a prostitute for many years and an outcaste. The Subordinate Judge found that the plaintiff had committed adultery, and lived as a prostitute for tweny-five or thirty years, and on these grounds he rejected her suit with costs.

The District Judge, on appeal, found that Shivrudra was not at his death a member of an undivided family; that Rudrava, subsequently to her marriage, had formed a criminal intimacy with Jinna, a Jain, and by him had several children; that her husband Maleshapa instituted a prosecution against her for adultery, which the Magistrate, Mr. Lockett, dismissed, and he referred Maleshapa to a civil suit if he desired to recover as damages the costs of his marriage to Rudrava; that Maleshapa took no further proceedings against, or in respect of, Rudrava, and she was not expelled from caste. In fact, her son Tikapa had been duly married in the caste. Mr. Shaw was of opinion that Maleshapa's abandonment of all further proceedings against her, and his not having divorced her, amounted to a condonation of her adultery; but there is not any finding that Maleshapa ever resumed cohabitation with her. Under these circumstances the District Judge was of opinion that the right of Rudrava to succeed to a moiety of her deceased father Shivrudra's estate was saved to her by Act XXI of 1850, and that the other moiety descended upon her sister [108] Tayowa. Mr. Shaw found in favour of the plaintiff on a plea of *res judicata* raised by the defendants. That question has not been renewed before us.

The only questions argued before us were—1, whether the incontinence of Rudrava prevented her succession to the property of her father, if uncondoned; and—2, whether there was anything which amounted to a condonation of it.

We doubt that we could concur in the opinion of the District Judge, that the facts which he has found amount, in law, to a condonation of the admitted adultery of Rudrava.

There is not any finding as to whether Tikapa, the son of Rudrava, who, as above stated, was treated as a member of the Lingayet caste by being permitted to marry a girl belonging to it, was the son of Maleshapa, the Lingayet husband of Rudrava, or the son of Jinna, her Jain paramour.

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In the absence of a distinct finding or evidence that Tikapa was not, and could not have been, the son of Maleshapa by reason of the non-access of the latter to Rudrava, we should have much difficulty in assuming that Tikapa was not the son of Maleshapa, who never divorced Rudrava. There is evidence, indeed her own admission, that she had illegitimate children by Jinna; but whether Tikapa was one of them, does not appear. Were it not for the view which we take of the succession of a daughter in this Presidency, albeit incontinent previously to, and at the time of the opening of, the succession, the question of Tikapa's legitimacy might be important in this suit. If he were legitimate, it might perhaps be contended that, even according to the Bengal law, she, by producing a son capable of making the necessary oblations to her father, had satisfied the condition essential to her succession. On that question we offer no opinion.

The contention on the part of the defendant and appellant Advyapa (Tayowa has not appealed) that Rudrava's want of chastity, previously to, and at the death of, her mother Gorlingowa, disqualified Rudrava from taking her deceased father's estate, was mainly rested on the general importance which the Hindu law is said to attribute to chastity in women and on inferences sought to be deduced from the Daya Bhaga and Daya Krama [109] Sangraha, works of high authority in Bengal, but not so accepted here.

No case decided at this side of India has been cited to us, and we do not know of any in this Presidency, in which it has been held that incontinence disqualifies a daughter from taking her father's estate.

The Daya Bhaga (1), the Mitakshara (2), the Daya Krama Sangraha (3), and the Mayuka (4), all following Yajnyavalkya, admit that on the failure of issue male and of the widow of a separated deceased Hindu, his daughters succeed to his property.

The Daya Bhaga (ch. xi, s. ii, pl. 1.) quoting Manu and Narada, and noting the observation of the latter, that the daughter inherits because she, as well as the son, is a cause for prolonging the father's line, proceeds thus:—

"The author states the circumstance of her continuing the line as a reason of the daughter's succession (5); and the line of descendants here intends such descendants as present funeral oblations; for one, who is not an offerer of oblations, confers no benefits, and, consequently, differs in no respect from the offspring of a stranger or no offspring at all;" and in pl. 3 it adds:

"Therefore the doctrine should be respected which Dikshita maintains, namely, that a daugther, who is mother of her male issue, or who is likely to become so, is competent to inherit; not one who is a widow, or is barren, or fails in bringing male issue, as bearing none but daughters, or from some other cause." Then (pl. 4, 5), quoting Paracara and Devala, the Daya Bhaga proceeds to give the unmarried daughter the preference (6), and on failure of her, quoting (pl. 8) Brihaspati (*alias* Vrihaspati), places next the daughter who have or are likely to have male issue. In pl. 15 is it said that "a daughter's right of succession to the property of her father is founded on her offering funeral oblations by means of her son," and in pl. 17 this proposition is, by the author, confirmed by a [110] text cited from

(1) Ch. xi, s. i, pl. 4. (2) Mit., ch. ii, s. i, pl. 2. (3) Ch. i, s. ii, pl. i.
(4) Ch. iv, s. viii, pl. i. (5) *Et vide* 3 Dig., p. 491, Bk. V, ch. viii, pl. ccccxix; Narada (by Jolly), pt. II, xiii, 50. (6) Sec. 2, W. Macn. H. L. 39.

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Brihaspati. The result is that a daughter, who is a sonless widow, at the time the succession opens, cannot under the Daya Bhaga inherit from her father (1), to which perhaps we, having regard to the Hindu Re-marriage Act (XV of 1856), should add if she be beyond the period of child-bearing.

In the Digest (Book V, ch. iv, pl. ccxxiv), is a passage of three clauses purporting to be the Smriti of Brihaspati (Vrihaspati), and relating to the succession of the daughter and her son. The second clause of that passage, as rendered by Mr. Colebrooke, runs thus: "Married to a man of equal class, virtuous, delighting in submission (2), she shall inherit her father's estate, whether she be expressly appointed or not *to raise male issue to him.*" Our learned friend Mr. K. T. Telang, who has rendered to us valuable assistance, has examined a copy in his possession of the institutes of Brihaspati, but has not been able to discover this clause in it. It is, however, quoted at length in the Daya Bhaga, ch. xi, s. ii, pl. 8, in the Smriti Chandrika (3); also in the Vira Mitrodaya, and in all three is attributed to Brihaspati. It is likewise quoted in the Daya Krama Sangraha (ch. i, s. iii, pl. 4), but the name of the writer is not there given. Mr. Telang informs us that the Sanskrit word, which, in the translation of the Daya Bhaga [ch. xi, s. ii, pl. 8] is by Colebrooke rendered "virtuous," is in a Sanskrit copy of the Daya Bhaga in the library of the Bombay Branch of the Royal Asiatic Society, "*sadhvi*," which is the feminine form of "*sadhu*." In Monier Williams' Sanskrit and English Dictionary (4) *sadhvi* is rendered thus: "a chaste or virtuous woman; a saintly woman; a faithful wife" (5). It is most important to observe that, although the second clause of the text of Brihaspati containing the word "*sadhvi*" is found in the Bengal treatises Daya Bhaga and Daya Krama Sangraha, in the Madras treatise Smriti Chandrika and in the [111] Benares treatise Vira Mitrodaya it has not been adopted or quoted in either of the treatises of the Marathi school of law, the Mitakshara and Mayukha, and this omission is notably consistent with other peculiarities relating to the succession of a daughter, which we shall notice in the Mitakshara and Mayukha, as well as with the absence of any precedent at this side of India imposing upon the daughter, as a preliminary condition of succession to her father's property, that she shall be chaste. It is especially remarkable in the case of the Mitakshara that the second clause of the passage from Brihaspati is ignored, as Vijnyanesvara does refer to and adopt the first clause of the text of Brihaspati (6).

The law, as laid down in the Daya Krama Sangraha in relation to the succession of daughters and the reason for it, accords completely with the Daya Bhaga (7).

The Smiriti Chandrika also gives, as a reason for the succession of daughters, their power of prolonging the father's line (8); but admitting their inferiority to the father of the deceased *propositus* in their capability to confer spiritual benefits on the deceased, nevertheless prefers a daughter

(1) 1 W. Macn. H. L. 21; 2 *id.* 44, 49, 58; *Raj Chunder Das* v. *Mussumat Dhunmunee*, 3 S.D.A. Rep. 361, 362.

(2) In the Daya Bhaga, ch. xi, s. ii, pl. in lieu of "delighting in submission" we have "devoted to obedience" (*surush-anerata*).

(3) Iyer's translation, p. 176, ch. xi, s. 11, pl. 26.

(4) Page 1105, near the top of column 2.

(5) See Vyav. Darpana (2nd ed.), pp. 27, 28.

(6) Mitak., ch. ii, s. ii, pl. 2; 3 Dig., Bk. V, ch. iv, pl. ccxxiv, cl. i.

(7) Daya Krama Sangraha, ch. i, s. iii, pl. 1 to 5.

(8) Sm. Chand by Iyer, ch. xi, s. ii, pl. 9, 10.

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to him—deeming not only herself but also her son to be more closely-connected with the *propositus* in point of consanguinity than the father of the latter (1). The same work excludes altogether from succession the childless or barren daughter (2). We need scarcely say that the Smriti Chandrika, though of high authority in Southern India, does not give the law to Western India.

The Mitakshara (ch. ii, s. ii, pl. 2) runs as follows :—

"Thus Katyayana says: 'Let the widow succeed to her husband's wealth, provided she be chaste; and, in default of her, let the daughter inherit, if unmarried.' Also Vrihaspati: The wife is pronounced successor to the wealth of her husband, and, in her default, the daughter. As a son, so does the daughter of a man proceed from his several limbs. How, then, should any other person take her father's wealth?'" (3) In that passage [112] the chastity of the widow is made the express condition on which she can take, and there is no such provision as to the daughter. This would, *prima facie* at least, appear to be an instance for the application of the rule *exclusio unius est exclusio alterius*. The Mitakshara then explains the reason for the preference of the unmarried daughter:

"3. If there be competition between a married and an unmarried daughter, the unmarried one takes the succession under the specific provisions of the text above cited (in default of her, let the daughter inherit if unmarried)."

Here is a direct divergence from the doctrine of the Daya Bhaga, which had placed the heirship of the daughters on the funeral oblations to be offered by their sons, and on that ground excluded childless widowed daughters. This divergence is noticed by Sir Thomas Strange (4) and by Mr. Colebrooke (5). The Mitakshara then proceeds:

"4. If the competition be between an unprovided and an enriched daughter, the unprovided one inherits; but on failure of such, the enriched one succeeds, for the text of Gautama is equally applicable to the paternal as to the maternal estate. 'A woman's separate property goes to her daughters, unmarried or unprovided.'"

We have not here one word as to the daughter taking, because she may have a son to offer funeral oblations, or because she can perform any ceremonies herself, or one word as to her chastity, or as to her capacity to inherit depending upon her having or being likely to have sons, as in the Daya Bhaga and Daya Krama Sangraha. The author of the Mitakshara draws a contract between married and unmarried daughters in favour of the latter, simply because the text of Katyayana specified the unmarried daughter, and he also contrasts the unprovided and the enriched daughter, but does not exclude the childless or barren widowed daughter. And this seems to be the doctrine of the Benares and Mithila schools also (6).

[113] The Mayukha is in accordance with the Mitakshara. It prefers the unmarried, to the married, and amongst the married daughters, the unprovided to the provided, but makes no distinction between those who have or are likely to have children and those who are and

(1) Sm. Chand. by Iyer, ch. xi, s. ii, pl. 12, 13, 14 15.
(2) *Ibid.* pl. 21. (3) 3 Dig., Bk. V, ch. iv, pl. ccxxiv, cl. i.
(4) 1 Stra. H.L., 138, 139. (5) 2 Stra. H.L., 242.
(6) 1 W. Macn. 22; Vivada Chintamani by Tagore, p. 293, and see *per* Sir J. Colvile in *Srimati Uma Deyi* v. *Gokulanand Das Mahapatra*, L. R. 5 Ind. App. 40 (46).

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must remain childless (1), and accordingly it is in this Presidency well-settled law, in conformity with the Mitakshara and Mayukha, that, as between married daughters the circumstance of having a son does not give the married daughter having a son a prior claim to inheritance of her parent's property over the married daughter not having a son; *Bakubai* v. *Manchabai*(2), *Poli* v. *Narotum* (3). It was in the former of these cases argued, on behalf of the daughter who had a son, that Hindu succession depended here, as in Bengal upon the capacity to perform funeral ceremonies, and a Bengal case (4) was cited in support of that view; but the argument was not accepted by the High Court, which held that sonship is not a test applicable at this side of India. The author of the Mitakshara, by his abovementioned quotation from Brihaspati—"as a son, so does the daughter of a man proceed from his several limbs"—appears to rest her heirship on consanguinity. That remark of Brihaspati is an allusion to a passage of the Veda quoted by Baudhayena. It is addressed by a father to his son, and is: "From my several limbs thou art distilled; from my heart thou art produced; thou art indeed self, but denominated son; may thou live a hundred years"(5). If Vijnyanesvara, by that extract from Brihaspati, intended, as it would appear, to ground the daughter's right of succession on consanguinity, such intention would be in complete harmony with his general doctrine and that of the Mayukha, that *sapindaship* is based on [114] the community of particles (6) rather than on the offering or capacity to offer funeral oblations. We say "general," not exclusive, doctrine of the Mitakshara, for in the sixth *placitum* of ch. ii, s. iii, Vijnyanesvara quotes a text attributed to Vishnu giving as a reason for the daughter's son's right to inherit on failure of daughters, that, "in regard to the obsequies of ancestors, daughter's sons are considered as son's sons." Mr. Colebrooke in the note observes that this text is not to be found in Vishnu's institutes, but is cited under his name in the Smriti Chandrika (7). Vijnyanesvara in the same *placitum*, in support of the right of the daughter's son, also quotes a text of Manu nearly to the same effect as that of Vrihaspati. But these quotations in *placitum* 6 bear upon the daughter's son only, and we have seen that Vijnyanesvara and Nilakantha do not assign any such reason for the succession of the daughter, and permit the childless and barren daughters to succeed.

The Mayukha in respect of the daughter's succession quotes Manu: "The son of a man is even as himself, and the daughter is equal to the son: how, then, can any other inherit his property, but a daughter who is, as it were, himself"(8), and Nilakantha adds: "If there be more daughters than one, they are to divide (the estate) and take (each a share)." He then, for the proposition that, "where some are married, and some unmarried, the unmarried ones alone (succeed)," quotes the same text of

(1) Vyav. May., ch.iv, sec. viii, pl. 10 to 12.
(2) 2 B. H. C. R. 5. (3) 6 B. H.C. R. 183.
(4) *Mussamut Lukhimony Dosi* v. *Taramoni Goptea* (1 Ind. Jur. 22). See also *Sibchunder Mallick* v. *Sreemati Trepura* (Fulton's Rep. 98) and 1 Morley's Dig., p. 319, pl. 107 to 111.
(5) Colebrooke's note to the Daya Bhaga, ch. xi, sec. ii, pl. 14.
(6) Achara Kanda of Mitak. *Lalluvai* v. *Mankuvarbai*, 2 B. 423. Sauskara Mayukha, *ibid.* 425. Nanda Pandita Datt. Mim., sec. vi, pl. 6. West and Buhler, 2nd ed. 174 *et seq.*; *Lakshmibai* v. *Jairam Lari*, 6 B. H. C. R. 152 A.C. J; *Lallubhai* v. *Mankuverbai*, 2 B. 388.
(7) K. Iyer's Trans. Sm. Chand., ch. xi, sec. ii, pl. 15.
(8) Vyav. May., ch. iv, sec. viii, pl. 10; Manu, ch. ix, 130; 3 Dig., Bk. V. ch. iv, pl. ccx, p. 166.

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Katyayana as that cited by the Mitakshara, in which text the chastity of the widow is emphatically imposed as a condition of her succession, and no such condition is required of the daughter(1). Next he adopts the distinction between daughters who are unprovided for and those who are provided for(2), but takes no distinction between those who are chaste and those who are unchaste. Lastly, in support of the son of the daughter, he cites the same supposed text of Vishnu as that quoted by Vijnyanesvara. In fine, Nilakantha's doctrine, as to the succession of daughters and their sons, is in complete uniformity with that of the Mitakshara.

[115] Hitherto we have spoken of those portions of the Mitakshara and Mayukha which relate to the succession of daughters. Turning now to such portions of those works as relate generally to exclusion from inheritance, we fail to discover incontinence in the three first *placita* of ch. ii, sec. x, of the Mitakshara, where the general causes of exclusion are enumerated (3). The only causes there mentioned which, it might be contended, comprise or may comprise within them incontinence, are vice and expulsion from caste. With respect to the former, it should be observed that there are different readings of the text of Narada, whence the words "addicted to vice" have been taken by the Daya Bhaga (ch. v, pl. 13) and the Mitakshara (ch. ii, s. 10, pl. 3). Of these readings one is "addicted to vice," and the other is "expelled from society," as stated by Mr. Colebrooke in his note to the Daya Bhaga, (ch. v, pl. 13). Dr. Jolly in his recent translation of Narada II, pl. 13, p. 97, has preferred the latter. But the Daya Bhaga (ch. v, pl. 6) quotes a text of Manu (ch. ix, pl. 214) rendered by Colebrooke and Sir William Jones, in which occur the words "addicted to vice." As regards "expulsion from caste," the plaintiff is unaffected: first because the District Judge has found as a fact that she has not been expelled from her caste, which finding binds this Court on special appeal; and, secondly, because, even if she had been so expelled, Act XXI of 1850 would protect her from what, before it came into force, would have been the legal consequences of deprivation of caste; *Doe d Sanmoney Dossee* v. *Nemi Churn Doss* (4), *Parvati* v. *Bhiku* (5), *Srimati Matangini Debi* v. *Srimati Jaykali Debi* (6). These were cases of incontinence by a widow subsequent to the vesting of her deceased husband's property in her, and in that respect differ from the present case, which is one of the incontinence of a daughter prior to the opening of the succession to her father's estate. We only quote them here on the question **[116]** of the proper construction of Act XXI of 1850. As regards "vice," it is true that it and all of the other grounds of exclusion, enumerated in the three first *placita* of ch. ii, s. 10, of the Mitakshara, are by the 8th *placitum* rendered applicable to women, including "the wife, the daughter and the mother," as well as to men. But we do not know of any instance in which a man has, on the ground that incontinence is a vice, and therefore a legal disqualification for inheritance and that he had been guilty of that vice, been excluded from

(1) Vyav. May., ch. iv, sec. viii, pl. 11. (2) *Ibid.* pl. 12.

(3) Nor is it mentioned by Manu. ch. ix, pl. 201, amongst the grounds of exclusion; nor by Yajnavalkya, II, pl. 140, 3 Dig. Bk. V. ch. v. pl. cccxxix, cccxxxi; nor by Narada (by Jolly), II, xiii, pl. 21, 22; nor in the Daya Bhaga, ch. v; nor in the Daya Krama Sangraha, ch. iii.

(4) 2 Taylor and Bell, 300. (5) 4 B.H.C.R. A.C J. 25.

(6) 5 B.L.R. 466, 49, overruling *Raj Koomwaree Dassee* v. *Goolabee Dassee*, 14 S.D.A. (1858) 1895 = Vyav. Darpana (2nd ed,) 1025.

succession to an estate to which he would have been otherwise entitled. If, then, men be not so disqualified by incontinence *sub nomine* "vice," no more can women be so. Again, we find Vijnyanesvara, in the 14th and 15th *placita* of the same chapter, treating as "a distinct maxim" the maintenance, enjoined in those *placita*, of the wives of disqualified persons and their deprivation of it if they be "unchaste"; and although he, following Yajnyavalkya (1) also, lays down "a special rule" in *placitum* 12 "concerning the daughters of disqualified persons" to the effect that they must be maintained "until they are provided with husbands," he refrains from applying to them "the distinct maxim" which, in the immediately following *placita* (13 and 14) as to the consequences of unchastity, he prescribes for the wives of disqualified persons. The same remark may be made as to Narada (2). These provisions in relation to maintenance furnish a perfect parallel to the distinction, which we have already noticed in the text of Katyayana quoted by the Mitakshara and Mayukha, between the case of a wife and a daughter in the succession to property, where chastity is expressly made a condition of the succession of the wife, and conspicuously omitted as to the succession of the daughter. We regard as very important, and founded upon commonsense, the remarks of Mr. Colebrooke quoted by Sir Thomas Strange at p. 159 of the first volume of his work: "In regard to the causes of disinheritance, discussed in the Digest, Bk. V, ch. v, s. i, corresponding with the fifth chapter of Jimuta Vahana and the tenth section [117] Chap. II, of the Mitakshara, I am not aware that any can be said to have been abrogated, or to be obsolete. At the same time I do not think any of our Courts would go into proof of one of the brethren being addicted to vice, or profusion, or of being guilty of neglect of obsequies and duty towards ancestors. But expulsion from caste (3), leprosy and similar diseases, natural deformity from birth, neutral sex, unlawful birth resulting from an uncanonical marriage, would doubtless now exclude; and I apprehend it would be so adjudged in our Adalats." Sir T. Strange, in his note to these remarks of Mr. Colebrooke, refers, in relation to disinherison on the ground of vice, to the case of *Mehervanji Ruttonj* v. *His brothers Poonjeeabhai and Dadabhai, sons of Ruttonji Manekji Parak* (4), which is also mentioned by Mr. Mayne in his treatise, pl. 513; but, in addition to the remarks made by the latter, which would tend to deprive that case of importance as a precedent of disinherison amongst Hindus on the ground of vice, it is open to the conclusive observation that it was a case amongst certain Parsis, inhabitants of Surat (which town has a large Parsi population), and not amongst Hindus. A Bombay ear or eye at once detects that the names of the parties are those of Parsis. The *vyavasthas* given by Messrs. West and Buhler as to vice (5) are open to the qualifying reference which the learned editors have made to Sir Thomas Strange's work, including Mr. Colebrooke's opinion already quoted by us; and the *vyavasthas* which they give as to adulteresses and incontinent widows (6) were all in cases where wives claimed to succeed to the property of their husbands, and,

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(1) 3 Dig, Bk. V, ch. v, pl. cccxxxiv, and Roer and Montriou, ch. ii, pl. 141, 142.
(2) Narada by Jolly, Pt. II, ch. xiii, pl. 26, 27 p. 98. See also the Daya Bhaga, ch. v, pl. 19 : Daya Krama Sangraha, ch. iii, pl. 17.
(3) It must be recollected that these remarks of Mr. Colebrooke were written about half a century before Act XXI of 1850 was passed.
(4) 1 Borr. pp. 141,144 (1st ed.) and p. 159 (2nd ed.).
(5) W. & B. (1st ed.), pp. 294 to 297; (2nd ed.), 218 to 280.
(6) *Ibid*, (1st ed.), pp. 297 to 302; (2nd ed.), pp. 280 to 284.

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therefore, are not in point in the present case. That the Smriti writers as well as the commentators knew how to render chastity an essential element of the right to inherit, is manifested in the case of the widow. Almost invariably when her right to inherit is mentioned, it is expressly qualified by the condition that she must be 'chaste,' *i.e.*, in Sanskrit '*avyabhicharini*' (which is compounded of '*a*' not [118] and '*vyabhicharini*,' unchaste), or 'not unchaste,' or that she must be 'faithful,' or 'not unfaithful,' or must preserve unsullied the bed of her husband (1), and in not a solitary instance in either of the two treatises of authority in this Presidency do we find any one of these terms employed in relation to the succession of a daughter.

Section xi of ch. iv of the Mayukha, on exclusion from inheritance, affords precisely the same inferences as those which we have already drawn from the Mitakshara. Vice and expulsion from caste are, but incontinence is not, enumerated as a general cause of exclusion from inheritance (2). The special rule as to daughters of disqualified persons, *viz.*, that they shall be maintained until married, and special rule as to the wives of such persons, *viz.*, that, if conducting themselves aright, they shall be maintained, but, if unchaste, they shall be expelled, found in the section on exclusion in the Mitakshara, are also forthcoming in the Mayukha (3), and yield the same conclusion.

It has been said(4) that prior unchastity prevents an estate vesting in a mother, but subsequent unchastity does not divest it, and for those propositions *Mussamat Deokee* v. *Sookhdev* (5) is quoted. An examination, however, of that case has satisfied us that the first proposition, *viz.*, that prior unchastity prevents an estate vesting in a mother, is not to be found in it. The question there for determination was—"is the estate, which a mother has inherited from her son, divested by reason of her subsequent unchastity?" and that question was determined by Turner, Officiating C.J., and Turnbull, J., in the negative. They gave no opinion that previous unchastity would have prevented the estate from vesting in her. One remark, which they did make, rather tends in the opposite direction. It was this: "The pleaders of the respondent have been unable to adduce any text or precedent which is in point" (*i.e.*, on the effect of subsequent [119] unchastity). "The only texts or cases which they have cited, refer to the disinherison of widows, and it appears to us that the right of the widow and the right of the mother to inherit rest on different grounds, and that it would be dangerous to apply to the one case texts and precedents which might be pertinent to the other"(6). In the subsequent case of *Mussamat Ganga Jati* v. *Ghasita* (7) it was held in 1875 by a Full Bench of the High Court, N.-W. P., that unchastity in a woman does not incapacitate her from inheriting *stridhan* from her grandmother. It was there argued that "the rules which exclude from inheritance apply generally to all property. A man who is an outcaste cannot inherit. A woman who is unchaste becomes an outcaste." But Turner, Officiating C.J., said: "It appears to me immaterial whether the property in suit

(1) Mitak., ch. ii, sec. i, pl. 6, 18, 29, 30, 39; sec. ii, pl. 2 Vyav. May, ch. iv, sec. viii, pl. 2, 4, 9, 11. Daya Bhaga, ch. xi, sec. i, pl. 7, 43, 56. Daya Krama Sangraha, ch. i, sec. 2, pl. 3. 3 Dig. p. 458, Bk. V, ch. viii, pl. cccxcix, Vrihaspati *ibid*, p. 478, pl. ccccviii, Vridha Manu.
(2) Vyav. May., ch. iv, sec. xi, pl. 3, 4, 8, 10. (3) *Ibid*, pl. 12.
(4) W. & B. (1st ed.), pp. 294 to 297; 2nd ed.
(5) *Ibid.* (1st ed.), pp. 297 to 302; (2nd ed.). (6) 2 N.W.P.H.C. 363.
(7) 1 A. 46.

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was or was not the *stridhan* of the grandmother. In either case I am of opinion that the daughter is not deprived by her unchastity of her right of succession under the law administered by our Courts. The objection to her succession is only based on the general rule embodied in the text of Narada cited in the Mitakshara (ch. ii, s. x), and again in the Daya Krama Sangraha (ch. iii) and in the Daya Bhaga (ch. 5, s. 13), that a person addicted to vice does not inherit. No doubt, this rule is cited and treated as well established by the author of the Mitakshara, but for many years it has not been enforced in our Courts." Pearson, J., referred with approbation to Mr. Colebrooke's remark already quoted by us from Strange and said: "Since this remark was recorded by Mr. Colebrooke, more than half a century has elapsed, and it may perhaps be doubted whether such causes of disinheritance as those indicated by him" (addiction to vice) "have not become obsolete in practice. It is less probable now than it was then that our Courts would recognize any one of those causes as a sufficient ground for declaring any man incapable of inheriting property; and if this be so, one would hardly be justified in depriving the defendant of her maternal grandmother's estate." And Oldfield, J., said of unchastity that "it is not expressed among the causes of exclusion from inheritance in ch. ii, s. 10, Mitakshara: and whether it would become so when accompanied by deprivation [120] of caste, is not the question before us. There is a text of Narada in Mitakshara, ch. ii, s.10, v. 3, to the effect that one who is addicted to vice takes no share of the inheritance; but the Courts would not give effect to a text of this nature, vague in itself and obsolete in practice." The foregoing observations of the Judges are relevant here, although the case itself having been a question of the right of an unchaste woman to inherit her grandmother's, not her father's property, is not so directly. Turner, Officiating C. J., as has been already mentioned, thought that whether the property was *stridhan* or not, made no difference.

In Case V, 2 Macnaghten's Hindu Law, pp. 132, 133, which was a Bengal case arising in the zilla of the Twenty-four Parganas, it is said that a daughter who has given herself up to prostitution or one who is unchaste is wholly incompetent to inherit the property left by her parents. No authorities are quoted for that *vyavastha*. In *Kery Kolitany* v. *Moneeram Kalita* (1), where it was held in a Full Bench, by a majority of nine to three, that, under the Bengal law, a widow, who has once inherited the estate of her husband, is not liable to forfeit it by reason of her subsequent unchastity, Mr. Justice Mitter, who was one of the minority, said it was the admitted law of the land that an unchaste daughter has no right of succession to the property of her father. He did not cite any decision to that effect, and, strictly speaking, his remark was extra-judicial. He made it, however, to meet the argument against the divesting of the widow's estate by incontinence subsequent to its vesting, founded on the circumstance that although, under the Bengal law, a sonless widowed daughter is not, amongst Hindus, entitled to inherit her father's estate, a daughter, who has once succeeded to that estate, does not forfeit it by reason of her afterwards becoming a sonless widow (2). He referred to Daya Bhaga, ch. xi, s. 1, pl. 56, which is as follows:—

"But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale [121] of it. Thus Katyayana says: 'Let the childless widow, preserving unsullied the bed of

(1) 13 B. L.R. 1 (49). (2) *Aumirtollal* v. *Rajoneekant*, 2 I. A. 113.

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her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it.' "

The whole of that passage relating to the widow (including the direction to preserve the bed of her husband unsullied) Mr. Justice Mitter seemed to think was extended by ch. xi; s. ii, pl. 31, to the succession of women generally. But, in the first place, the author of the Daya Bhaga puts that as an alternative suggestion for that in the preceding *placitum* (30); and, in the next place, it seems very doubtful, when we refer to the immediately preceding *placitum*, whether the subject of chastity was at all within the contemplation of Jimuta Vahana when he wrote pl. 31; and, lastly, even if it were so, his book is not authority at this side of India, and rests the succession of daughters on a different basis from that laid down in the Mitakshara and Mayukha, which are the chief authorities accepted here. It may be that the *vyavastha* in Macnaghten and the *dictum* of Mitter, J., would be sustainable in Bengal in consequence of the special reason for which the daughter is in the Bengal treatises made an heir, and the suggestion contained in them, that she should be virtuous (*sadhvi*). But we have shown that neither of those grounds of decision is applicable in this Presidency.

It has been said by Her Majesty's Privy Council that "the duty of an European Judge, who is under the obligation to administer Hindu law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage" (1). And in a Bengal case relating to incontinence, where the question was whether property inherited from a Hindu by his widow was forfeited by her subsequent unchastity, and, therefore, differing from the present question, which is whether a daughter is prevented by her incontinence from inheriting the estate of her father, Sir Richard Couch, C. J., made a remark which, we think, is as applicable [122] here as in the case which the Full Bench in Calcutta was then deciding. He said: "I think we are not at liberty to declare a doctrine, which is not shown to have been received and sanctioned by usage, to be the law, because it may seem to be analogous to a doctrine that has been received" (2). No doubt both here and in Bengal it is the recognized law that, "according to the Hindu law of inheritance, a wife who commits adultery during the lifetime of her husband loses her right to inherit her husband's estate, unless the act is condoned by her husband, or expiated by penance" (3), her chastity being the express condition of her succession (4). But if, as is the fact, there be neither text nor case which shows that, according to the law as it prevails in Western India, a daughter is, by her incontinence, debarred from succession to the estate of her father, we do not think that the analogy derivable from the case of the widow would justify us in imposing such a disqualification upon the daughter.

For the foregoing reasons we affirm the decree of the District Judge with costs, and direct the appellant Advyapa Chinapa to pay the costs of this appeal.

Decree affirmed with costs.

(1) 12 M I. A. 436.
(2) 13 B.L.R. 90, in *Kery Kolitany* v. *Moneeram Kolita*, commencing *ibid*, p. 1.
(3) 5 B. L. R. 488 (489) *per* Peacock, C. J.
(4) Mitak., ch. ii, sec. i, pl. 6. 18. 29, 30, 39; sec. ii, pl. 2; Vyav. May. ch. iv, sec. viii, pl. 2, 4, 9, 11; W. & B. (2nd. ed), 280, *et seq.*