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LAKHMI CHAND v. GATTO BAI.

to the date of the death of the elder brother, the first adopted son; so that if the elder brother has left no widow or child who would succeed him to the exclusion of his younger brother, a second adopted son succeeds as heir to the father.

This view seems to us to be the reasonable and necessary consequence of the fiction that the widow, by adoption, makes the adopted son the son of the deceased husband, and it appears to be in accordance with that taken by the Privy Council in the case of *Sheo Singh Rai* v. *Dukho* (1), and with the statement of the customs of the Jains as declared by Seth Raghunath Das and the other lay witnesses for the plaintiff. It is true there is a difference of opinion on the question of the custom among the expert witnesses, but in our opinion that of the lay witnesses is of infinitively more value on this point; and for these reasons we think that the defendant had power to make a valid adoption to her husband a second time, and that the adoption of the plaintiff was valid and effective.

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*May* 4.

*Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.*

IDU (APPLICANT) v. AMIRAN (OPPOSITE PARTY.)*

*Muhammadan law—Custody of children—Act IX of* 1861, *s.* 5—*Appeal.*

The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which the father's title to the custody of his children subsists from the moment of their birth, while, under the Muhammadan law, a mother's title to such custody remains till the children attain the age of seven years.

An application was made by a Muhammadan father under s. 1 of Act IX of 1861 that his two minor children, aged respectively 12 and 9 years, should be taken out of the custody of their mother and handed over to his own custody. The application having been rejected by the District Judge, an appeal was preferred to the High Court as an appeal from an order. It was objected to the hearing of the appeal that, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and should have been made under the rules applicable to a regular appeal.

*Held* that, looking to the peculiar nature of the proceedings, the objection was a highly technical one, and as all the evidence in the case was upon the record and was all taken down in English, it would only be delaying the hearing of the appeal upon very inadequate grounds, if the objection were allowed.

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* First Appeal No. 45 of 1886, from an order of W. H. Hudson, Esq., Judge of Jaunpur, dated the 20th February, 1886.

(1) I. L. R., 1 All. 688; L. R., 5 Ind. Ap. 87.

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*Held* also that, according to the principles of the Muhammadan law, the appellant was by law entitled to have the children in his custody, subject always to the principle, which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury, and that (without saying that this exhausted the considerations that might arise warranting the Court in refusing an application for the custody of minors) there was nothing in the record in this case which disclosed any proper ground to justify the refusal of the application.

The facts of this case are sufficiently stated in the judgment.

Mr. *W. M. Colvin*, for the appellant.

Mr. *T. Conlan* and Munshi *Hanuman Prasad*, for the respondent.

STRAIGHT, Offg. C. J.—This is an appeal from an order passed by the Judge of Jaunpur, on the 20th February last, rejecting an application made by the present appellant under s. 1 of Act IX of 1861. The parties are respectively husband and wife, and the minors, in regard to whom the application was made, are Yusaf Ali and Basit Ali, respectively aged 12 and 9 years, they being the sons of the appellant and respondent. At present they are in the possession of the respondent, and the application was to have them taken out of such custody and handed over to the appellant, their father. The Judge refused the application, and hence this appeal. It has been urged as an objection to our hearing the appeal that it has been preferred as an appeal from an order, whereas, in view of s. 5 of Act IX of 1861, the appeal should have been as from a decree, and it should have been made under the rules applicable to a regular appeal. Looking to the peculiar nature of the proceedings, it seems to me that this is a highly technical objection, and as all the evidence of the case is upon the record and is all taken down in English, it is clear that we should be only delaying the hearing of the appeal upon very inadequate grounds were we to accede to the learned Munshi's contention. We have therefore heard the case, and have no doubt whatever that upon the materials disclosed in the record, the learned Judge was wrong in rejecting the application made to him by the appellant. The Muhammadan law takes a more liberal view of the mother's rights with regard to the custody of her children than does the English law, under which, if my memory serves me rightly, the father's title to the custody of his children

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subsists from the moment of their birth; whilst, under the Muhammadan law, a mother's title to the custody of her children remains until they attain the age of 7 years. I may observe in passing that this principle of Muhammadan law was enunciated by my brother Mahmood, J., very recently in the determination of first appeal No. 129 of 1885 (1). *Primâ facie*, therefore, the appellant, who is the father of the two boys, was by law entitled to have them in his custody, subject always to the principle which must govern a case of this kind, that there was no reason to apprehend that by being in such custody they would run the risk of bodily injury. I do not say that this exhausts the considerations that might arise that would warrant the Courts in refusing an application for the custody of minors; but it is enough to say, in regard to the present case, that there is nothing in the record which discloses any proper grounds to justify the Court below in refusing to grant the application which the appellant made. Under these circumstances, the appeal is decreed with costs, the rejection of the application of the appellant is set aside, and his application is granted; and it is ordered that the respondent do, within one month from the date on which this order reaches the Court below, deliver up the two boys, Yusaf Ali and Basit Ali, into the custody of their father, the appellant; and it is further ordered that, in the event of respondent failing so to do, coercive measures to enforce this order, as provided in s. 260 of the Civil Procedure Code, may be adopted.

TYRRELL, J.—I concur.

*Appeal allowed.*

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1886
*May* 5.

*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

SITA RAM (PLAINTIFF) *v.* AMIR BEGAM AND OTHERS (DEFENDANTS). *

*Muhammadan Law—Alienation by widow—Rights of other heirs—Minor—Mother—Guardian—Mortgage—First and second mortgagees—Suit by first mortgagee for sale of mortgaged property—Second mortgagee not made a party—Act IV of 1882 (Transfer of Property Act), ss. 78, 85—Res-judicata—Civil Procedure Code, s. 13—Meaning of "between parties under whom they or any of them claim."*

Upon the death of *G*, a Muhammadan, his estate was divisible into eight shares, two of which devolved upon his son *A*, one upon each of his five daugh-

* First Appeal No. 129 of 1885, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 23rd April, 1885.

(1) See next case.