The construction of section 95 of the Transfer of Property Act (IV of 1882) should not limit its operation to mortgages under which possession passes, and therefore on redemption properly repasses: the better way is to construe it distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow on redemption.

To raise funds for the defence of a relative the plaintiff and defendants jointly executed a bond in the ordinary form, each pledging immovable property as security.

The plaintiff eventually paid off the amount due on the bond and redeemed all the property mortgaged. In a suit in which he claimed the whole sum paid by him on the ground that he had executed the bond only as a surety, the defendants denied that he was a surety and pleaded that he was only entitled to a rateable amount from each of them. *Held* that the plaintiff's failure to prove that he was merely a surety on the bond did not preclude him from recovering a proportionate share from each of the defendants; and that under section 95 of the Transfer of Property Act, he was entitled also to a charge for such amount on the defendants' interests in the property respectively mortgaged by them.

APPEAL from a decree (24th February, 1903) of the High Court at Allahabad which reversed a decree (19th December, 1900) of the Subordinate Judge of Bareilly.*

The main question in the appeal was whether the appellant executed a bond on the 6th October, 1896, as a principal, or as a surety for the respondents against whom he brought the suit out of which this appeal arose, for payment of the original debt which had been discharged by him.

The respondents were the appellant's half-sisters. Their own brother, Sardar Wali Khan, with whom they resided at a village called Adkhata was, in July, 1896, arrested on a charge of murder: on his arrest his mother and sisters came to live with the appellant at Bareilly and stayed there until Sardar Wali Khan was eventually convicted and executed.

To raise funds for his defence, the bond in suit was executed on 6th October, 1896, in favour of one Banarsi Prasad, a money-lender at Bareilly, and the loan, Rs. 10,000, was made jointly to the appellant and the respondents. As security for repayment both the appellant and respondents mortgaged the shares respectively owned by them in certain villages. On the 2nd November, 1896, the appellant paid the amount due on

* *Cf.* I. L. R., 25 All., 337.

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the bond to Banarsi Prasad, who returned the bond as having been discharged.

On the 2nd April, 1900, the appellant instituted the present suit against the respondents to recover the whole amount he had paid on the bond with interest; and claimed a charge on the property of the respondents mortgaged by the bond. In his plaint the plaintiff stated as follows:—

"The firm of Lala Banarsi Prasad Sahu was asked for the aforesaid debt, but the firm did not like to advance money only on the admission of *pardanashin* ladies and the security of their property. Consequently the defendants expressed their desire to the plaintiff that he should help them at that critical moment in this way, *viz.* that he should as a surety join them in the execution of a document, and should also add his property to the mortgaged property. It was, however, agreed upon between the plaintiff and the defendants that he should only be a surety and they should be liable to pay the entire amount of the document."

The defendants denied that there had been any agreement by which the plaintiff became surety for them; and they also denied the execution of the bond by them, and its discharge by the plaintiff.

In evidence it appeared that the defendants had sued the present plaintiff to have the bond now in suit declared a forgery, stating that they had not executed it nor received any consideration under it. That suit was decreed by the first Court on the 23rd March, 1898, but the decree was reversed by the High Court on 8th August, 1899, who held that the ladies had duly executed the bond.

On this evidence and on other evidence which in his opinion showed that the defendants had received the consideration-money of the bond, the Subordinate Judge made a decree in favour of the appellant against the property of the defendants mortgaged in the bond for the full amount of the bond with interest and costs.

On appeal the High Court (SIR J. STANLEY, C.J. and BURKITT, J.) was of opinion that the case of the plaintiff, that he was only a surety on the bond was not true, and that he was not entitled to the relief claimed by him. Before the High Court a contention was put forward that the plaintiff was at all events entitled to a decree for contribution towards the amount

of the debt which was satisfied by him; and to this contention the High Court said :—

"We are unable to accede to this application. To do so would be to change entirely the character of the suit and to enable him to recover moneys contrary to the position which he had taken up in bringing this action and in his defence in the former suit in which he alleged that he was only a surety for his half-sisters. We can show no indulgence to a litigant who comes into Court with a false case. The claim for general relief would not justify us in so doing. He sued merely as a surety and he cannot now turn round and say that though not a surety he was a joint-mortgagor, and as such joint-mortgagor, entitled to contribution from the other co-mortgagors."

The High Court consequently reversed the decree of the Subordinate Judge and dismissed the suit on this appeal.

H. Cowell, for the appellant, contended that the evidence proved that the appellant executed the bond as surety for the respondents, and that he had paid the full amount due on the bond. It was also proved that the respondent received the whole of the consideration-money, and it was not alleged that any of it was given to the appellant. He was therefore, it was submitted, entitled to recover the whole amount he had paid on the bond with interest. If, however, he was held not to be a surety, he was a co-mortgagor with the respondents and had paid off the whole of the joint debt due on the mortgage and each of them was consequently (under section 95 of the Transfer of Property Act) liable to pay him one equal third share of that amount with interest: such two-thirds share to be charged on the property mortgaged by them. To make such a decree was not inconsistent with the character of the suit as held by the High Court, whose decision should be reversed.

DeGruyther, for the respondents, contended that the evidence in support of the appellant's case that he signed the bond only as a surety was not sufficient to prove the agreement he alleged was made between himself and the respondents, to the effect that he should give his name on the bond as surety to enable them to obtain the loan. At any rate it was not enough to create an enforceable liability against the respondents, two *parda-nashin* ladies, sisters of the appellant, living with him, and deprived of all independent advice. In a suit for contribution the plaintiff might, in accordance with section 69 of the Contract Act (IX of 1872), have obtained a decree for the shares of the

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respondents, his co-mortgagors' debt, which he had paid off. This, it was submitted, the High Court had rightly held he could not obtain in this suit for the reasons they had given.

Cowell replied.

1906, *March* 21*st*.—The judgment of their Lordships was delivered by SIR ARTHUR WILSON.—

This is an appeal from a decree of the High Court of Allahabad of the 24th February, 1903, which set aside the decree of the Subordinate Judge of Bareilly of the 19th December, 1900.

The plaintiff, Malik Ahmad Wali Khan, is brother of the half-blood of the two ladies who are defendants. In the year 1896 a criminal charge was pending against Sardar Wali Khan, a half-brother of the plaintiff and whole brother of the defendants; and the various members of the family took steps to procure funds for the defence of the accused man.

On the 6th October, 1896, the plaintiff and the defendants executed a mortgage bond of the ordinary kind for the sum of Rs. 10,000 in favour of Banarsi Prasad, by which the plaintiff hypothecated certain property belonging to him and the defendants certain property belonging to them.

On the 2nd November, 1896, the plaintiff paid off the mortgage, the sum actually paid for principal and interest being Rs. 10,025.

On the 2nd April, 1900, the plaintiff filed his plaint in the present case, in which he alleged that he had joined in the mortgage only as surety for his half-sisters, the defendants, and claimed to recover from them the whole amount of what he had paid, with interest. The defendants in their written statements denied having been parties to the borrowing at all, but it was added: "The plaintiff can claim only the rateable amount which he may prove to have given to the answering defendants."

At the trial before the Subordinate Judge the plaintiff himself gave some evidence, chiefly during his cross-examination, of an express agreement between him and his half-sisters that he should be a mere surety for them in the matter of the mortgage bond. Neither of the Courts in India appear to have given credence to that evidence, and their Lordships think those Courts were right.

The Subordinate Judge, however, made a decree in favour of the plaintiff on the ground that the mortgage-money was shown to have been handed to the defendants in the presence of the Registrar, and was not shown to have been returned by them to the plaintiff. The handing of the money to the defendants was carried out by arrangement on the part of the plaintiff and the ladies were at the time living in his house where the payment was made. The learned Judges of the High Court considered that these circumstances were quite insufficient to prove that the plaintiff was a mere surety in the matter of the mortgage, and their Lordships agree in this view.

It was contended, however, before the High Court, and again before their Lordships, that the plaintiff was nevertheless entitled to recover from the defendants a proportionate share, that is to say two-thirds, of the amount he paid to the mortgagee. The High Court rejected this contention on the ground that the Court could "show no indulgence to a litigant who comes into Court with a false case." It appears to their Lordships that the question is hardly one of indulgence, and that the plaintiff in this case ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount of what he actually paid, to which he is undoubtedly entitled, a claim which the pleadings are wide enough to cover.

It was further contended that, under section 95 of the Transfer of Property Act (IV of 1882), there ought to be a decree giving the plaintiff a charge on the interests of the defendants in the mortgaged property. That section says that—

> "Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and therefore, on redemption properly repasses. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption.

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Their Lordships will, therefore, humbly advise His Majesty (1) to discharge the decrees of the High Court and Subordinate Judge; (2) to declare that the plaintiff is entitled to recover against the defendants two-thirds of the sum of Rs. 10,025 paid by him to redeem the mortgage, with interest at 6 per cent. per annum from the date of the institution of the suit, and that he is entitled to a charge in respect thereof upon the defendants' interests in the mortgaged property; (3) to remit the case to the High Court to determine the amount due from the defendants and the time within which it should be paid by them and to give all necessary directions as to the retransfer or realization of the mortgaged property of the defendants, and otherwise to give effect to His Majesty's order; and (4) to order that inasmuch as the costs of the case in the two Courts in India appear to have been occasioned substantially by the untrue cases set up on the one side and on the other, no costs in either of these Courts should be given. For the same reason there will be no order as to the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Ranken, Ford, Ford and Chester.*

Solicitors for the respondents—*T. L. Wilson & Co.*

J. V. W.

P. C. 1906 *February* 19. *April* 9.

LALI (DEFENDANT) *v.* MURLIDHAR (PLAINTIFF).

[On appeal from the High Court of Judicature at Allahabad.]

Wajib-ul-arz—*Declaration recorded in* wajib-ul-arz—*Construction of will—Document of testamentary nature as to wishes respecting the succession to property on death—Whether bequest was to person irrespective of his adoption, or whether valid adoption was a condition of inheriting the property—Regulation VII of* 1892—*Act No. XIX of* 1873.

The value as evidence, the importance as records, and the misuse by proprietors, of *wajib-ul-arzes* under Regulation VII of 1822 and Act No. XIX of 1873, which repealed that regulation in the North-Western Provinces, commented upon. *Lekhraj Kuar* v. *Mahpal Singh* (1) and *Uman Parshad* v. *Gandharp Singh* (2), referred to.

A recital in a *wajib-ul-arz* may operate as a will [see *Mathura Das* v. *Bhikhan Mal* (3)]. The weight to be given to a statement of that nature must

Present :—Lord DAVEY, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) (1879) L. R. 7 I. A. 63, I. L. R., 5 Calc., 744.

(2) (1887) L. R. 14 I. A. 127; I. L. R., 15 Calc., 20.

(3) (1896) I. L. R., 19 All., 16.

depend in each case on the circumstances in which it was originally made, and the corroboration it receives from extrinsic evidence.

A village proprietor in 1877 caused the following declaration to be made in the *wajib-ul-arz* of the village recorded under Act No. XIX of 1873:—

"I am the only zamindar in this village. I am a Marwari Brahman. Seven years ago I adopted my sister's son, Murli. He is my heir and successor *(malik)*. If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son. If more than one son are born to me the property would be equally divided among them, including the adopted son, as brothers. I have two wives now: they will receive their maintenance from him (Murli)."

The declarant died in 1885 leaving a natural-born son, who died childless in 1887. In 1896 the respondent (the "adopted son" mentioned in the declaration) brought a suit claiming to be entitled to the property therein mentioned on the strength of his adoption and also on the terms of the declaration which he contended was a will. Under a ruling of the Privy Council in 1899, the adoption of a sister's son was held to be invalid; and both courts in India found that a family custom which would have validated such an adoption was not established in this suit. The High Court held that the respondent was entitled to succeed irrespective of the adoption. *Held* by the Judicial Committee, assuming that the *wajib-ul-arz* might be treated as a will, that the words "adopted son" in the declaration were descriptive only, and not the "reason and motive of the gift." The intention was to give him the property as an adopted son capable of inheriting by virtue of the adoption, and, as his adoption was invalid by Hindu law, and not warranted by family custom, it gave him no right to inherit, and the gift did not take effect.

Fanindra Deb Raikat v. *Rajeswar Dass* (1) followed. *Bireswar Mukerjee* v. *Ardha Chander Roy* (2) and *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (3) distinguished.

APPEAL from a decree (21st December, 1901) of the High Court at Allahabad, which modified a decree (18th January, 1897) of the Subordinate Judge of Agra.

The property in suit originally belonged to one Dhanraj, a Bohra Brahman, who died on 3rd April, 1885, leaving the appellant one of his widows, another widow, Sundar, who died without issue, and a son by the appellant, named Nand Lal, who died childless in November, 1887.

The plaintiff (respondent) in his suit brought on 26th September, 1896, against the appellant as defendant alleged that he was adopted by Dhanraj in 1870, before the birth of Nand Lal, and was brought up and maintained by Dhanraj; that at

(1) (1885) L. R. 12 I. A. 72; I. L. R., 11 Calc., 463.

(2) (1892) L. R. 19 I. A. 101; I. L. R. 19 Calc., 452

(3) (1876) L. R. 3, I. A., 253.

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the settlement of 1877 Dhanraj made a will, which he caused to be recorded in the *wajib-ul-arz* of the village, to the effect that on his death the plaintiff should be his heir, and, if a son should be born to him (Dhanraj), that son and the plaintiff should hold the property in equal shares; and that after the death of Dhanraj, the defendant did not allow the plaintiff's name to be entered in the revenue papers, but got her own name entered, and some two years after the death of Dhanraj she turned him out of the house. The plaintiff claimed to be entitled to the whole property in dispute according to Hindu Law "by right of adoption and under the will made by Dhanraj."

The defendant denied the alleged adoption, and also denied that Dhanraj made the will on which the plaintiff relied; and she asserted that the plaintiff, being the sister's son of Dhanraj, could not legally be adopted by him. She also pleaded that the suit was barred by limitation.

Issues were raised, the second issue being whether the plaintiff was in fact adopted, and the Subordinate Judge eventually decided them all in favour of the plaintiff, and gave him a decree for the whole of the property claimed.

On appeal by the defendant, the High Court (BANERJI and AIKMAN, JJ.) differed from the Subordinate Judge as to the adoption, and held that the plaintiff had failed to prove the performance of the ceremonies necessary for a valid adoption. On a question which was raised as to the effect of the statement which Dhanraj had had recorded in the *wajib-ul-arz*, on which no issue had been raised, and no finding arrived at by the Subordinate Judge, the High Court came to the conclusion "that it was Dhanraj's intention to make a bequest in favour of the plaintiff of a half share, and that this bequest was not contingent upon the adoption being in all respects a valid adoption."

The High Court therefore allowed the appeal in part, and varying the decree of the Subordinate Judge, made a decree in the plaintiff's favour for half the property claimed.

The judgment of the High Court in which the whole case is stated, and the material portion of the statement in the *wajib-ul-arz* is set out, is reported in I. L. R., 24 All., 195.

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On this appeal, which was heard *ex parte*—

Ross, for the appellant, contended that the statement in the *wajib-ul-arz* did not constitute a will; and that, even if the statement were regarded as of a testamentary nature, there was no bequest to the respondent apart from, and irrespective of, his adoption, and a valid adoption was the condition upon which the alleged bequest depended. Reference was made to *Bireswar Mookerjee* v. *Ardha Chander Roy* (1); *Fanindra Deb Raikat* v. *Rajeswar Dass* (2); *Uman Parshad* v. *Gandharp Singh* (3); *Superunddhwaja Prasad* v. *Garuraddhwaja Prasad* (4); and *Mathura Das* v. *Bhikhan Mal* (5). It was also contended that the adoption of the respondent by Dhanraj, if made, would be illegal, as a sister's son could not be legally adopted. *Bhagwan Singh* v. *Bhagwan Singh* (6) was referred to. Even if it were held that the High Court judgment was right as to the construction of the *wajib-ul-arz*, the mention by name of the respondent as the adopted son only appeared in the *wajib-ul-arz* of one village, and therefore that judgment was not applicable to the other villages.

1906, *April 9th*.—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE:—

The suit in this case was brought by Murlidhar, the present respondent, against Musammat Lali, the present appellant, for possession of immovable property belonging to the estate of one Dhanraj, deceased. The appellant is the widow of Dhanraj, and the respondent claimed the property under a double title; first, as the adopted son of Dhanraj, and secondly, under the terms of a will contained in a *wajib-ul-arz* alleged to have been duly recorded, in relation to a village forming part of the property, by Dhanraj during his life-time. The result of the litigation in India was to set aside the adoption as invalid according to Hindu law; but the High Court at Allahabad gave the plaintiff a decree for half the property claimed, on the ground that the clause in the *wajib-ul-arz* upon which the

(1) (1892) L. R. 19, I. A. 101 (104, 106); I. L. R., 19 Calc., 452.
(2) (1885) L. R. 12, I. A. 72 (89); I. L. R., 11 Calc., 463 (484).
(3) (1887) L. R. 14 I. A. 127 (134); I. L. R., 15, Calc., 20 (29).
(4) (1893) I. L. R., 15 All., 147 (166).
(5) (1896) I. L. R., 19 All., 16.
(6) (1899) L. R. 26 I. A. 153; I. L. R., 21 All., 412.

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plaintiff relied was "a document of a testamentary nature," under which it was the intention of Dhanraj to make a bequest in favour of the plaintiff of a half-share in his property, and that this bequest was not contingent upon the validity of the adoption. No appeal has been filed against so much of the judgment of the High Court as relates to the adoption, but the defendant has appealed on two grounds—first, that the clause in the *wajib-ul-arz* does not constitute a will; and secondly, that if it does, there was no bequest to the plaintiff apart from and irrespective of his adoption, and a valid adoption was the condition upon which the alleged bequest depended.

The term *wajib-ul-arz* in the North-Western Provinces is applied to what is considered to be the most important document contained in the official records relating to the village administration. Entries therein, properly made and authenticated by the signatures of the officers who made them, have been held by this Committee in the case of *Lekraj Kuar* v. *Mahpal Singh* (1) to be admissible in evidence under section 35 of the Indian Evidence Act in order to prove a family custom of inheritance, or, under section 48, as the record of opinions as to the existence of such custom by persons likely to know of it. In giving their judgment their Lordships say these *wajib-ul-arzes*, or village papers, are regarded as of great importance by the Government. They were directed to be made by Regulation VII of 1822, the 9th section of which enacts that—

> "It shall be the duty of collectors and other officers exercising the powers of collectors, on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property of the soil, or vested with any heritable or transferable interest in the land."

and it was specially ordered that—

> "The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature."

(1) (1879) L. R. 7 I. A. 63; I. L. R., 5 Calc., 744.

As this Regulation was passed at the time of the introduction of a regular settlement of the land revenue into "the Ceded and Conquered Provinces," under which designation the districts afterwards known as "the North-Western Provinces" were at that time included, the object of the Government appears to have been to obtain a body of reliable contemporary evidence, upon matters which might afterwards come into controversy not only between the landholders and the Government, but between rival claimants to estates.

Regulation VII of 1822 was repealed, as regards the North-Western Provinces, by Act No. XIX of 1873, and it is to be observed that this Act, while providing, in the 62nd and following sections, for the maintenance of a careful "record of rights," in each mahal, no longer included a record of "local usages connected with landed tenures" among the particulars to be entered. It was probably considered that, during the fifty years which had elapsed between the passing of the Regulation and the Act, such usages had been sufficiently ascertained, and that it was desirable that reference should be made to the earlier records when the existence of any such usage was asserted. For it is clear from a subsequent judgment of this Committee in the case of *Uman Parshad* v. *Gandharp Singh* (1) that, in later years, at any rate, attempts have been made by some proprietors to use these records as an indirect means of giving effect to their wishes with regard to the nature of their tenure, or the mode of devolution of their property after their death. When this has been the case, as Lord Hobhouse observes (*ubi supra*, p. 135) these records are "worse than useless, they are absolutely misleading.

The *wajib-ul-arz* relied on in this case appears to have been verified by Dhanraj on the 2nd of July, 1877, and was therefore recorded under Act No. XIX of 1873. It relates to a village called Daidana. Under the head of "Inheritance, second marriage, and adoption," the 10th paragraph contains the following statement:—

"I am the only zamindar in this village. I am a Marwari Brahman. Seven years ago I adopted my sister's son, Murli. He is my heir and will be the owner. If, after this agreement, a son is born to me, half the property will be received by him and half by the adopted son. If more than

(1) (1887) L. R., 14, I. A. 127, I. L. R., 15 Calc., 20.

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one son are born to me, the property will be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli) during their life-time. If there are several sharers in future, each sharer shall be at liberty to marry a second wife in face of the existence of his first wife. No limit is fixed. After the death of a sharer his estate will be divided in equal shares with reference to the number of brothers and not with reference to the number of wives. If one widow has children and the other childless, the latter will receive a necessary maintenance. If a sharer dies without issue, his widow will be the owner of his property. If there are two widows both of them will receive equal shares, and on their death the brothers and nephews of their husband will own the property according to their rights. A widow shall be competent to adopt a near relative in the family of her husband. There is no need for a will by a husband. After the death of that widow her adopted son will be the owner of her property. If a widow marries again, she would be entirely excluded from inheritance. A sharer shall be at liberty to adopt his sister's son, or brother's son or daughter's son, whomsoever he may like, and after his death his adopted son will inherit his property.

Dhanraj died on the 3rd April, 1885, without having made any other disposition of his property, and leaving him surviving, beside the adopted son, Murlidhar, a natural-born son, named Nand Lal, who died childless in November, 1887. No question now arises as to the family custom with regard to adoption alleged in the *wajib-ul-arz*, both Courts in India having held that the evidence adduced by the plaintiff fell far short of establishing such a custom. Moreover it was decided by this Committee, in the case of *Bhagwan Singh* v. *Bhagwan Singh* (1), that under the general Hindu law applicable to the twice-born classes, the adoption of a sister's son is wholly void. The plaintiff's title to succeed as an adopted son to the property of Dhanraj is no longer suggested.

The only point remaining for consideration is whether the clause in the *wajib-ul-arz* can be treated as a will, under which the respondent is entitled to take, as a *persona designata*, independently of the adoption. It is unnecessary, and it would be incorrect, to lay down, as a general proposition, that a recital in a *wajib-ul-arz* cannot operate as a will in the case of a Hindu. In *Mathura Das* v. *Bhikan Mal* (2), where the *wajib-ul-arz* contained these words, "Musammat Sohni, wife of my son, Salig Ram, shall be regarded as the owner *(malik)* after my

(1) (1899) L. R., 26 I. A., 153; I. L. R., 21 All., 412.

(2) (1896) I. L. R., 19 All., 16.

death," both parties agreed that the statement amounted to a testamentary bequest in favour of Sohni, and the High Court gave effect to it. The weight to be given to such statements must depend, in each case, on the circumstances in which the entries were originally made, and the corroboration they receive from extrinsic evidence.

Looking at the words used in the *wajib-ul-arz* in the present case, and assuming for the moment that it should be treated as a will (in order to take the point of view most favourable to the respondent, who was not represented by counsel at the hearing of this appeal), their Lordships have to consider whether it was the intention of Dhanraj to make the boy whom he had adopted his heir irrespective of adoption, or whether "the assumed fact of his adoption was not the reason and motive of the gift, and indeed a condition of it" (*Fanindra Deb Raikat* v. *Rajeswar Dass* (1). "The distinction," as Sir Richard Couch observes, in giving the judgment of this Committee in the case just quoted, "between what is description only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances."

In the present case, their Lordships have come to the conclusion that the words used are descriptive only. The right of Murlidhar to inherit is based entirely on the fact that he was an adopted son, adopted seven years previously in virtue of a special custom which is thus stated: "A sharer shall be at liberty to adopt his sister's son or brother's son or daughter's son, whomsoever he may like, and after his death his adopted son will inherit his property." This is not a similar case to that of *Bireswar Mookerjee* v. *Ardha Chunder Roy* (2), in which the will was made prior to adoption, and the bequest was to the lad by name, for reasons independent of adoption though likely to lead to it; nor does it come within the ruling of this Committee in the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (3) in which it was held that there was a gift of his property by the testator to a designated person (the words being "I declare that I give my

(1) (1885) L. R., 12 I. A., 72, at p. 89; I. L. R., 11 Calc., 463 (484).

(2) (1892) L. R., 19 I. A., 101; I. L. R., 19 Calc., 452.

(3) (1876) L. R., 3 I. A. 253.

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property to Koibullo whom I have adopted"), and that this gift was not dependent on the performance of certain ceremonies by his widows. In the present case, their Lordships are of opinion that it was the intention of Dhanraj to give his property to Murlidhar as his adopted son capable of inheriting by virtue of the adoption; and that, as the adoption was invalid according to the general Hindu law, and not warranted by family custom, it gave no right to inherit, and the gift therefore had no effect upon the property.

The learned Judges of the High Court appear to have been influenced in coming to their decision by the fact that, under the *wajib-ul-arz*, Murlidhar was to get half the property, and that this was "more than a validly-adopted son would get." "This is an indication," they say, "that the adoption was not the reason or motive of the bequest." But what are the words used? "If, after this agreement a son is born to me, half the property will be received by him, and half by the adopted son." This is not a gift to Murlidhar personally, but a division of the estate according to the family custom which Dhanraj was endeavouring to establish, and according to which the adopted son was to take an equal share with natural-born sons.

In the opinion of their Lordships the claim of Murlidhar wholly fails, and they will humbly advise His Majesty that the appeal ought to be allowed, and that the decrees of the Subordinate Judge and the High Court ought to be reversed, and the plaintiff's suit dismissed, with costs in both the lower Courts. The respondent must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Pyke and Parrott.*

J. V. W.

P. C. 1906 *February* 22, 23. *April* 10.

HUB ALI (DEFENDANT) *v.* WAZIR-UN-NISSA AND ANOTHER (PLAINTIFFS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Muhammadan law—Marriage—Ghair kuf *wife—Custom of exclusion from inheritance—Proof of custom—Entry in* wajib-ul-arz *—Mortgage by conditional sale—Mortgagee taking possession without foreclosure proceedings—Trespasser—Suit for ejectment without redeeming—Regulation XVII of* 1806.

In a suit by a Muhammadan lady to recover possession, as her husband's heir, of his immovable property, the question arose whether she was a *ghair kuf*

Present:—Lord DAVEY, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.