had not been an honest and complete consideration of the evidence." In *Jiwna* v. *Nathu* (1), it was held that important evidence had been ignored. None of these rulings are, therefore, on all fours with the present case. It is clear to us that there is evidence upon which the Lower Appellate Court could come to a finding and that no important evidence of any sort has been ignored. Therefore, in accordance with the well-known ruling of the Privy Council, in *Durga Chowdhrani* v. *Jewahir Singh* (2), the finding of the Lower Appellate Court as to intention of the parties to the deed of sale is final.

The appeal, therefore, fails and is dismissed with costs.

A. N. C.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Martineau and Mr. Justice Harrison.

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April 26.

Mst. SARDAR KHANAM (DEFENDANT)—*Appellant*

versus

AMIR ZAMAN KHAN AND OTHERS (PLAINTIFFS), *Respondents.*

Civil Appeal No. 135 of 1919.

Custom—Alienation—gift by sonless proprietor of ancestral property in favour of his wife—Gakhars *of Malpur, district Rawalpindi*—Riwaj-i-am—onus probandi.

Held, that the entry in the *Riwaj-i-am* of the Rawalpindi district to the effect that among *Gakhars* a sonless proprietor can make a gift of the whole or any part of his ancestral property without the consent of the near male kindred was sufficient to shift the *onus* of proving the contrary upon the plaintiff-collaterals who contested the gift, the custom as stated in the entry being by no means exceptional.

Beg v. *Alla Ditta* (3), *Sher Jang* v. *Ghulam Mohi-ud-Din* (4), *Hassan* v. *Jahana* (5), *Bholi* v. *Fakir* (6), and *Feroz Khan* v. *Amir Muhammad Khan* (7), referred to.

(1) (1917) 38 Indian Cases 587.
(2) (1896) I. L. R. 18 Cal. 23 (P. C.).
(3) 45 P. R. 1917 (P. C.).
(4) 22 P. R. 1904.
(5) 71 P. R. 1904.
(6) 62 P. R. 1906.
(7) 53 P. R. 1902.

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Wazira v. Mst. *Maryan* (1) and *Muhammad Khan* v. *Dulla* (2), distinguished.

Held also, that the defendant-donee had succeeded in proving the existence of the custom among *Gakhars* of the Rawalpindi district establishing the general power of a male proprietor to make a gift of his ancestral property.

Second appeal from the decree of F. W. Skemp, Esquire, District Judge, Rawalpindi, dated the 3rd December 1918, reversing that of H. B. Anderson, Esquire, Subordinate Judge, 1st Class, Rawalpindi, dated the 30th January 1918, and decreeing plaintiffs' suit.

NIAZ MUHAMMAD, for Appellant.

ABDUL RAZAQ, for Respondents.

The judgment of the Court was delivered by—

MARTINEAU J.—Bahadur Khan, a *Gakhar* of Malpur in the Rawalpindi District, executed two deeds of gift in respect of his ancestral property in favour of his wife, one relating to 209 *kanals* 9 *marlas* of land which were given in lieu of dower, and the other relating to 516 *kanals* 17 *marlas* of land and a house. Bahadur Khan died about a month later. The plaintiffs, who are his collaterals, sue for a declaration that the gifts shall not affect their reversionary rights.

The Subordinate Judge found that by custom among *Gakhars* a sonless proprietor was competent to make a gift of his property, whether ancestral or self-acquired, without any restriction and he, therefore, dismissed the suit. On appeal the District Judge held that the *onus* of the issue as to custom had been wrongly placed by the first Court on the plaintiffs, and that the *onus* should have been on the defendant to prove that Bahadur Khan had an unrestricted power of alienation, and he found that the defendant had not discharged the *onus*, and passed a decree in favour of the plaintiffs. The defendant has filed a second appeal, having obtained the requisite certificate from the District Judge.

In the Customary Law of the Rawalpindi District prepared by Mr. Robertson at the second revised settlement it is stated that among *Gakhars* a sonless proprietor can make a gift of the whole or any part of his ancestral property without the consent of the near

(1) 84 P. R. 1917. (2) 57 P. R. 1896.

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male kindred, and the volume of the Customary Law compiled by Mr. Kitchin at the subsequent settlement contains a statement to the same effect. It is contended for the appellant on the strength of these entries that in accordance with the ruling of the Privy Council in *Beg* v. *Alla Ditta* (1), the *onus* is on the plaintiffs to prove that among *Gakhars* a male proprietor's power of alienation is restricted. The lower appellate Court has distinguished the case decided by the Privy Council on the ground that the entry in the *Riwaj-i-am* with which that case was concerned was in accordance with the general custom, and has held, following *Wazira* v. Mst. *Maryan* (2), that as it is not the general custom even among Muhammadan tribes in the west of the Punjab for a sonless proprietor to enjoy an unfettered power of alienation the statement in the *Riwaj-i-am* which is unsupported by instances, is not sufficient to shift the *onus* on to the plaintiffs.

Wazira v. Mst. *Maryan* (2), which the lower appellate Court has followed related to an entry in the *Riwaj-i-am* of the Gujranwala District according to which collaterals were entitled to succeed to non-ancestral land in preference to daughters. Such a custom is not only opposed to the general custom, but is a very exceptional one, and it was found also in that case that the *Riwaj-i-am* of Gujranwala had been imperfectly compiled. On the other hand in the *Riwaj-i-am* of the Rawalpindi District, which the learned District Judge admits was not imperfectly compiled, the power of a sonless proprietor to make a gift of his property without restriction is stated to exist not only among *Gakhars* but also among many other tribes, and there are many decisions of this Court in which the extensive powers of alienation of Muhammadan proprietors of the western districts of the Punjab have been recognised, for example *Sher Jang* v. *Ghulam Mohi-ud-Din* (3), *Hassan* v. *Jahana* (4), and *Bholi* v. *Fakir* (5), so that the custom which is alleged to exist in the present case is by no means exceptional. In this connection we may cite the following passage from *Bholi* v. *Fakir* (5).

(1) 45 P. R. 1917 (P. C.)
(2) 84 P. R. 1917.
(3) 2 P. R. 1904.
(4) 71 P. R 1904.
(5) 62 P. R. 1906, p. 230.

"If in the case before it the Court found that the parties belonged to a tribe who, for one reason or another, did not accept the agnatic theory in its entirety, and that it recognised far wider powers of alienation in the case of sonless proprietors than were conceded by other tribes to such proprietors, if, for example, the parties were members of a Muhammadan endogamous tribe who were well known to favour the rights of daughters and daughters' sons the initial presumption against the validity of (*e.g.*) a gift in favour of a daughter might well be regarded as so weak as to be rebutted by the mere fact of the tribe being endogamous. But even if in any such case the Court would not be justified in going so far, we think it might well hold that the *onus* had been shifted as soon as the donee had been able to refer to entries in the *Riwaj-i-am* (and *a fortiori* in the *Wajib-ul-arz*) in favour of the validity of such gifts."

In our opinion the ruling of the Privy Council applies to the present case, and the *onus* is on the plaintiffs to rebut the entry as to the custom contained in the *Riwaj-i-am*.

Further, even if the *onus* is on the defendant we think that the first Court was right in holding that she had succeeded in proving the existence of the custom she alleges. The learned Subordinate Judge has analysed very fully the instances of gifts of which evidence has been given. There are 28 instances mentioned by the witnesses of gifts of ancestral property made to various relations, wives, daughters, nephews, nieces, sisters, etc. and the learned District Judge accepts the conclusion of the first Court as to the truth of the oral evidence on this point, which is supported in some instances by mutations, deeds of gift, and copies of judgments. In several instances gifts have been made in the presence of sons, who have not objected to them. In several instances also the gifts have comprised the entire property of the donors. Suits were brought by collaterals to contest three of the gifts, but all failed. It is true that among the instances cited very few are of gifts to wives, but what the evidence appears to establish is the general power of a male proprietor to make a gift of his ancestral property. Some of the plaintiffs' own witnesses admit the existence of the power to make a gift. P. W. 1 says that a proprietor may make a gift to his wife provided that it is not a gift of the whole of his property, while P. W. 4 goes further and says that a *Gakhar* may make a gift of the whole of his ancestral property to his wife.

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With regard to the documentary evidence produced by the plaintiffs the learned District Judge admits that it is all irrelevant with the exception of a judgment given by Mr. leRossignol, Additional Divisional Judge of Rawalpindi in 1905. That case seems to have been one of a gift to a nephew. It would appear from the judgment, which is a brief one, that the instances cited were only of gifts to sons-in-law or daughters' sons, and the Additional Divisional Judge, after referring to the fact that no instances of gifts among *Gakhars* were mentioned in Robertson's Customary Law, held that the gift then in question was not shown to be valid. That decision is not of much assistance in the present case.

There are two rulings of this Court relating to *Gakhars*, namely *Muhammad Khan* v. *Dulla* (1) and *Feroz Khan* v. *Amir Muhammad Khan* (2), both being cases from the Jhelum District. In the former case it was held in a very brief judgment that a gift to a sister's son was invalid in the presence of near collaterals. Only two judicial decisions were referred to, one given by a Tahsildar in 1884, and one given by Mr. Parker, Divisional Judge, in 1894, which it was held was not sufficient to establish the custom alleged. The later ruling *Feroz Khan* v. *Amir Muhammad Khan* (2) favours the appellant, it having been held in that case that a gift by a sonless proprietor of his ancestral land to his daughters and their husbands in the presence of a first cousin was valid.

We have no hesitation in holding on the evidence, in agreement with the first Court, that among *Gakhars* of the Rawalpindi District a sonless male proprietor has power to make a gift of his property, whether ancestral or self-acquired, to whomsoever he pleases without restriction. It is unnecessary to deal with other questions raised in the grounds of appeal.

We accept the appeal, reverse the decree of the Lower Appellate Court, and restore that of the Court of first instance dismissing the suit. Plaintiffs will pay the defendant's costs throughout.

C. H. O.

Appeal accepted.

(1) 57 P. R. 1896. (2) 53 P. R. 1902.