

be at liberty to present a fresh application, if so advised, after the Commissioner has passed his final orders. We refrain from expressing any opinion as to whether the questions sent back by him for inquiry are questions of law or not.

No order as to costs. The hundred rupees already deposited by the Petitioner may be refunded.
N. F. E.

Petition dismissed.

APPELLATE CIVIL.

Before Sir Shadi Lal, Chief Justice and Mr. Justice Skemp.

FATEH SHER AND OTHERS, Donees (DEFENDANTS)

Appellants.

versus

RAJA (PLAINTIFF) and MST. WALLAN, Donor,
(DEFENDANT) Respondents.

Civil Appeal No. 1736 of 1924.

Custom—Alienation—ancestral land—gift to daughter—Bakhars of village Bakhar, district Shahpur—valid to what extent—Riwaj-i-am.

Held, that by custom among *Bakhars* of village Bakhar, district Shahpur, a father can make to a daughter a gift of part of his immoveable property not exceeding the share that would go to her by inheritance according to the Muhammadan Law, but he cannot, without the consent of the agnates, make a gift to such relative of a larger share than this.

Wilson's Tribal Custom in the Shahpur District, page 72, referred to.

Second appeal from the decree of Khan Bahadur Munshi Rahim Bakhsh, District Judge, Shahpur, at Sargodha, dated the 8th February, 1924, varying that of Makhdoom Muhammad Afzal, Junior Subordinate

1929

RAM PARTAB-
SUKH DIAL

v.
THE COMMIS-
SIONER OF
INCOME TAX,
DELHI.

1929

Jan. 23.

1929

FATEH SHER
v.
RAJA.

*Judge, 2nd class, Sargodha, dated the 28th May 1923,
and dismissing the plaintiff's suit.*

AZIZ AHMAD and M. L. BATRA, for Appellants.
M. A. GHANI, for Respondents.

JUDGMENT.

SHADI LAL C.J.

SIR SHADI LAL C.J.—This second appeal arises out of an action brought by a collateral of one Jowaya, a *Bakhar* of the village Bakhar in the district of Shahpur, to impeach a gift of his estate to his daughter and the daughter's sons. The estate consisted of landed property and a house, and so far as the house is concerned, the suit has been dismissed because it is not proved to be ancestral *qua* the plaintiff.

As regards the land, which has been held by the learned District Judge to be ancestral, the custom, as found by him, is to the effect that "a father can make to a daughter a gift of part of his immoveable property not exceeding the share that would go to her by inheritance according to the Muhammadan Law; but he cannot, without the consent of the agnates, make a gift to such relative of a larger share than this," (*vide* page 72 of the Tribal Custom in the Shahpur District by Wilson). The learned Judge has given effect to this custom, but he has made a mistake in calculating the share to which the daughter is entitled under the Muhammadan Law. The only persons in the present case, who were entitled to inherit the estate of Jowaya, were his widow, his daughter, and the plaintiff who is a residuary of the fourth class. Under the Muhammadan Law the widow would be entitled to one-eighth and the daughter to one-half of the estate. The learned District Judge has upheld the gift to the extent of only two-ninths

share of the land, but his judgment does not show how he has arrived at that share.

The learned counsel for the respondent concedes that as the daughter would be entitled, under the Muhammadan Law, to one-half of the estate of her father, the gift to that extent should be upheld. I would accordingly modify the decree of the District Judge by declaring that the gift is valid to the extent of one-half of the landed estate of Jowaya and also with respect to the house property. The appeal is accepted *pro tanto*, and the parties are directed to bear their own costs in this Court.

SKEMP J.—I agree.

A. N. C.

Appeal accepted in part.

1929

FATEH SHER
v.
RAJA.

SHADI LAL C.J.

SKEMP, J.

APPELLATE CRIMINAL.

Before Mr. Justice Tek Chand and Mr. Justice Agha Haidar.

GHULAM HAIDAR, Appellant,

versus

THE CROWN, Respondent.

Criminal Appeal No. 1334 of 1928.

Indian Evidence Act, I of 1872, section 33—Deposition of witness before committing Magistrate—admission of, at trial, in absence of witness—Procedure—non-compliance with—Accused's consent—whether irregularity cured by.

Held, that before the previous deposition of a witness can be admitted in evidence at the trial under section 33 of the Indian Evidence Act, the Court must decide judicially that a proper effort had been made to secure the presence of the witness, that in spite of that effort he had not been traced and could not be found, or that he was incapable of giving evidence, or was kept out of the way by the adverse party, or his presence could not be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable.

1929

Jan. 23.