APPELLATE CIVIL.

Before Harrison and Addison JJ.

MANGAL SINGH AND OTHERS (DEFENDANTS) Appellants

versus

KHIZAR HAYAT AND OTHERS (PLAINTIFFS)
RAJA GHULAM MURTAZA KHAN AND OTHERS (DEFENDANTS) } Respondents.

1932

Feb. 2.

Civil Appeal No. 2566 of 1926.

Custom—Alienation—Janjua Rajputs *of village Saloi, District Jhelum—whether governed by custom of Jhelum District—Status of sons to challenge their father's alienation* —Wajib-ul-arz.

Held, that the alienor and his family, *Janjua Rajputs* of village Saloi in the District of Jhelum, being agriculturists, are governed by the custom of the Jhelum district, by which an alienation, unless made by an *Awan*, may be challenged by a son or collateral within the recognised degree.

Vaishno Ditti v. *Rameshri* (1), referred to, also Rattigan's Digest of Customary Law, page 7 and the *Wajib-ul-arz* of the Jhelum District.

First appeal from the decree of Sheikh *Abdul Aziz, Senior Subordinate Judge, Lyallpur, dated the 9th August 1926, decreeing the plaintiff's suit.*

MEHR CHAND MAHAJAN and HEM RAJ MAHAJAN, for Appellants.

BADRI DAS and ARJAN DAS, for (Plaintiffs) Respondents.

HARRISON J.—Three sons of *Raja* Ghulam Murtza Khan instituted a suit, with their uncle as their next friend, against three sets of mortgagees and two sets of vendees challenging their father's action in effect- HARRISON J.

(1) (1929) I. L. R. 10 Lah. 86 (P. C.).

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ing three mortgages followed by two sales of their ancestral property in the years 1921-22. The suit has been decreed on the finding that while consideration passed in full there was no necessity for any of the alienations. The mortgagees have combined in one appeal and the vendees have done the same in another.

The consideration for the sale consisted of the previous mortgages and some cash and bonds. Counsel for the vendees has given up all the points urged in his grounds with the exception of the question of whether the alienor and his family are governed by custom. He contends that the matter was never put properly in issue, that it was incumbent upon the plaintiffs to plead definitely what the custom was and that in consequence of the faulty issues drawn there is no clear and sufficient finding on the point. The issues are :

1. Whether the plaintiffs and their father are *Janjua Rajputs*?

2. If so, are they not agriculturists?

and these are the natural result of the pleadings for it was clearly understood by the parties and their counsel throughout the proceedings in the trial Court that if they were agriculturists they were governed by the custom of the district. Counsel has referred us to the last Privy Council ruling on the subject in *Vaishno Ditti* v. *Rameshri* (1), and also to the remarks on page 7 of Rattigan's Digest of Customary Law. In that ruling an earlier ruling of the Punjab Chief Court was quoted with approval and it is quite clear that there is no presumption whatsoever in the matter. It is established that the parties are *Janjua Rajputs*.

(1) (1929) I. L. R. 10 Lah. 86 (P. C.).

The *wajib-ul-arz* of the Jhelum District settles the further question of what law they follow in matters of succession and alienations. In the list of tribes in that volume the name of *Janjuas* appears first and no attempt has been made to deny that they are one of the most prominent tribes of this district. The whole of the volume deals with custom which governs agricultural tribes and the last paragraph lays down that alienations made by any sonless proprietor, unless he be an *Awan*, can be challenged by collaterals. Counsel would have us hold that the converse proposition follows and that if a man has a son he can do as he pleases and his actions cannot be called in question. This, in my opinion, is wholly opposed to the basic principle on which the agnatic law is founded. Sons have the first right to challenge the acts of their fathers. Other descendants of a common ancestor who owned the alienated land follow after them.

I would hold, therefore, that the parties, *i.e.* the alienor and his family, follow the custom of the Jhelum district, which governs the members of all agricultural tribes in the District and lays down that an alienation unless made by an *Awan* may be challenged by a son or a collateral within the recognised degree. This disposes of the vendees' appeal.

So far as the appeal of the mortgagees is concerned, practically the whole of the consideration consisted of cash. Three items are said to have been paid to previous creditors, the first being a sum of Rs. 1,000 paid to one Gurditta. This man was a witness of the first mortgage. He appeared and stated that the money had been paid to him and produced a receipt. He did not produce any accounts The mortgagee did not go into the witness box and it has

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been held, and I think rightly held by the trial Court, that it is not established that the money was due to him, or that the mortgagee made any enquiries and satisfied himself to the best of his ability that any money was due. The other two items relate to sums said to have been advanced by the mortgagees themselves as previous creditors and it was for them to establish necessity for them just as much as for the cash items.

So far as necessity as a whole is concerned, the mortgagees have failed to establish any necessity whatever. The alienor was a retired Military officer. He had some ancestral land in two, if not in three, villages, and in addition he inherited two squares in the first instance and, on the death of a brother, a third square out of his father's estate. Two rival estimates have been given of the income which he enjoyed before alienating any of his property, but no sufficient details have been supplied to enable us to come to an accurate finding on the point. What is clear is that at the lowest estimate he had about Rs. 200 a month, or Rs. 2,400 a year net. He had two wives and three sons and, though he might have had to practise economy at times, there is certainly no necessity shown for raising over Rs. 40,000 in a period of fifteen months in order to live. But, it is said, he built houses and he purchased other land. The necessity for building any house is not shown, for although he himself says that he spent Rs. 8,000 or Rs. 9,000 in building a house in Saloi, his original home, he sold a house in the same place for Rs. 4,500 to his brother. No necessity is shown for the purchase of land in Bhera. As an instance of the evidence led to justify this reckless borrowing the alienor's own statement that he spent Rs. 4,000 in the circumcision ceremony of

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his eldest son is either untrue or shows the most wanton extravagance.

It is unnecessary to go into the question of whether he led a dissolute life and wasted his substance on drink and women, for it is quite clear that the alienees on whom the burden lay, have wholly failed to establish that there was any necessity whatever for any of the mortgages effected.

HARRISON J.

I would, therefore, hold that both appeals fail and must be dismissed with costs.

ADDISON J.—I agree.

ADDISON J.

A. N. C.

Appeals dismissed.

REVISIONAL CRIMINAL.

Before Broadway J.

1932

Feb. 12.

IBRAHIM AND OTHERS (ACCUSED) Petitioners

versus

GURAN DITTA MAL (COMPLAINANT) Respondent.

Criminal Revision No. 1307 of 1931.

Criminal Procedure Code, Act V of 1898, section 436—Further enquiry ordered by Sessions Judge—on revision—whether Revisional Court has power itself to frame a charge and direct Magistrate to try the discharged persons under the charge so framed—High Court—power of revision.

Held, that on a petition under section 436 of the Criminal Procedure Code for revision of an order of discharge, all that the Sessions Judge is empowered to do, if not satisfied with the correctness of that order, is to direct the Magistrate to hold a further enquiry and to proceed then in accordance with law; and that the Sessions Judge had no jurisdiction under the section to frame a charge himself and to direct the Magistrate to try the accused on the charge so framed.