Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nandi Singh and another v. *Sita Ram and another, from the Court of the Judicial Commissioner of Oude; delivered* 1*st December* 1888.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR RICHARD COUCH.
MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Sir Richard Couch.*]

The Appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the Appellants, and Sheo Bakhsh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter, Mithana Kunwar, who was married to Sita Ram, the 1st Respondent. Mithana Kunwar died on the 18th March 1878, leaving a daughter, Musammat Maharaja, the 2nd Respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the Appellants, to recover possession of land in the village Babu Rajmau, Pargana Harha, District Unao, which was the share of Sheo Bakhsh in the property inherited by him and his brother, the Plaintiffs claimiug to be his heirs according to Hindu law, and entitled to succeed to his estate on the death of his widow. It was not disputed that the Plaintiffs would be entitled if the ordinary

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law was applicable. The defence was rested upon a custom of the village of Babu Rajmau as to the right to inheritance, and a deed of gift dated the 7th March 1870, executed by Bichan Kunwar.

The wajibularz which governs the right of succession to the property in dispute is as follows:—

"Extract from Wajibularz, of village Babu Rajmau Pargana Harha, paragraph 4, of right to inheritance.

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several children over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitahshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not as the Appellants contended limited to that interest. Both the Lower Courts

have understood descendants as meaning male and female in any degree.

On the 7th March 1870 Bichan Kunwar executed a deed of gift of the property in dispute to Musammat Mithana and Sita Ram, the words of gift being followed by "I promise and agree "in writing that the donee may, from the date "of execution of this instrument, take pro- "prietary possession similar to mine over the "gifted property. There has been left no claim "right dispute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the Appellants in the Lower Courts and before their Lordships was that the gift, being invalid as regards Sita Ram, was also invalid as regards Mithana. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Musammat Mithana. Their Lordships are of this opinion. The gift is to the two donees jointly, and in Humphrey *v.* Tayleur, Ambler's Reports, 138, Lord Chancellor Hardwicke said,— "If an estate is limited to two jointly, the one "capable of taking, the other not, he who is "capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.