Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Burjore and Bhawani Pershad v. *Mussumat Bhagana, from the Court of the Judicial Commissioner of Oude; delivered November* 23*rd*, 1883.

Present:

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR ARTHUR HOBHOUSE.

THIS was a suit brought by Mussumat Bhagana against the Defendants for the purpose of recovering a certain mouzah. The only question in the case was this, whether the Mussumat, who was the grandmother of one Pirthi Pat, succeeded to the real property of Pirthi Pat, or whether the male descendants collateral to her husband, succeeded to that property? The parties were both represented by Counsel, and they agreed to this issue: "Is "Plaintiff, as a female, excluded from inheri- "tance by the custom of the family and tribe? "On Defendants." It appears to their Lordships that, this issue having been settled by the learned Judge by the consent of Counsel, and the cause having been tried upon it, it is the only issue now before us; and the question to be determined is whether, the two Courts, that of the Subordinate and of the Judicial Commissioner, having found as a fact that the Defendant had not sustained the burden of proof laid upon him, viz., that the Plaintiff, as a female, was excluded from the inheritance, that finding shall or shall not be affirmed.

Ra 9831. 125.—12/83. Wt. 5011.

The question of the custom, or no custom in the family is substantially one of fact. If their Lordships could see that any proposition of law was mixed up with it they might be disposed to review it, but no such proposition arises upon the evidence, and further they are disposed to say that the conclusion of the Courts upon the evidence seems to them to have been right. The evidence was in substance that of a great number of members of the family, and strangers, of whom more might have been called, to the effect generally that there was such a custom in the family, which is a mere assertion by the witnesses of the question to be tried in the cause. But it would appear that all the witnesses founded their opinion upon one particular case; viz., that upon the death of Baijnath, the father of the husband of the Plaintiff, instead of his widow or mother taking, his uncles and nephews took. The Courts say that that, being the only instance in the family, does not sufficiently prove custom. Further it is to be observed that that evidence was in a great degree contradicted by a paper called a "Wajibularz," which was put in, whereby the general contention of the Defendants, which was that no female whatever could succeed, was, to a certain extent at all events, modified. The Wajibularz is in these terms: "If "the deceased have two or more wives, law- "fully married, then the property left by the "deceased would be divided among the number "of wives in this way: that if there be one "son from one wife, and two or more from "the other, then the one son from the former "would take one half, and the two or more from "the latter would take the other half, sub- "dividing it equally among themselves; but a "wife having no male issue shall receive no "share; she shall, however, receive maintenance "from the sons of the other wives who have "inherited a share. In our family the custom

" is to give no share to daughters. If none of " the wives lawfully married to a deceased co- " sharer have any issue, in such a case of course " the childless widow shall have possession of " the share of the deceased. If a widow being " childless desire to adopt a son, she can adopt one " of the nearest male members of her deceased " husband's family. She shall not be competent " to adopt her brother or brother's son. Women " not lawfully married, and their issue, provided " they bear good moral character, will be " entitled to receive only food and clothing, but " shall not receive a share." This Wajibularz seems very much indeed to qualify the general statement of the witnesses that no female could succeed in the family; for it distinctly states that under some circumstances wives and widows succeed, although it does not distinctly state that grandmothers do.

On the whole, therefore, it appears to their Lordships that the finding upon this one issue, which was settled by both the parties and by both Courts, is right.

It should be stated that it appears in this case that Pirthi Pat had a daughter about seven years old, but by consent of both parties that daughter is excluded from consideration in the case; and the case has been treated as if that daughter had not existed. Their Lordships think it right to say that that daughter, being no party to this suit, is in no way bound by this decision, and they give no opinion with respect to what her rights may be.

Under these circumstances their Lordships are of opinion that the judgement appealed from was right; and they will humbly advise Her Majesty to affirm that judgement with costs.

It only remains to state that a preliminary point was raised as to whether the Judicial Commissioner had a right to extend the time for giving security in this Appeal. Their Lordships

upon that point have to say that they concur in the view which was taken by the full bench of the Court in Calcutta, that the words in the Act which have been quoted relating to the giving of security are directory only; and, although not to be departed from without cogent reason, in this particular case it seems to them that the Commissioner has exercised a right discretion. Under these circumstances their Lordships do not give weight to the objection against the admission of the Appeal.