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ORIGINAL CIVIL.

Before Mr. Justice Jardine.

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CASSUMBHOY AHMEDBHOY (*Plaintiff*) v. AHMEDBHOY
HUBIBHOY AND RAHIMBHOY ALLADINBHOY (*Defendants*).*
[16th November, 1887.]

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Khoja Mahomedans, law applicable to—Partition—Right of a son to obtain partition of ancestral property in his father's lifetime without his father's consent—Distinction between ancestral and self-acquired property among Khoja Mahomedans—Custom, proof of—Practice—Evidence—Burden of proof.

Amongst Khoja Mahomedans a son is entitled to obtain partition of ancestral estate in his father's lifetime, without his father's consent.

By the law and customs of Khoja Mahomedans there is a distinction between ancestral and self-acquired property in reference to the power of the owner to devise or make a gift thereof similar to that which obtains under the ordinary Hindu law.

The presumptions of the Hindu law apply to Khoja Mahomedans, and the burden of proving propositions opposed to that law lies on him who alleges them. Therefore in a suit for partition brought by a son against his father who alleged that the customs and usages of the Khoja community in matters of partition were not identical with the Hindu law, and did not confer on a son any right to demand in his father's lifetime a partition of the property in the father's hands whether ancestral or self-acquired,

Held that the burden of proving the issues framed upon these allegations lay upon the defendant.

In considering the question of the alleged custom and usages the Court adhered to the less stringent rule of proof applied in *Hirabai v. Gorbai* (1).

[281] In the same suit where the defendant having failed to establish the existence of the special custom and usages above mentioned, yet resisted the plaintiff's claim to partition on the ground that the property claimed was not ancestral.

Held that the *onus* was on the plaintiff, in the first instance, to give evidence that the property was ancestral. In such cases the amount of evidence required to shift upon the defendant the burden of displacing it, depends on the circumstances of each case.

[R., 19 B. 428 (473) ; 13 Bom.L.R. 1061=12 Ind. Cas. 813.]

THE plaintiff and the defendants in this suit were Khoja Mahomedans resident in Bombay. The plaintiff and the second defendant were sons of the first defendant, the plaintiff being his eldest son. The plaintiff brought this suit against his father and brother to obtain a partition of what he alleged to be the family estate.

The plaintiff alleged that the plaintiff's grandfather, one Hubibhoy Ibrahim (the father of the first defendant), died in 1865, and that under his will, dated the 29th December, 1864, the first defendant came into possession of a large amount of moveable and immovable property ; that the said property had since been largely added to, and was at the date of this suit of the value of about twenty lakhs of rupees. The plaintiff alleged that " by the laws and usages by which members of the Khoja community in Bombay are governed, which in this respect are the same as are applicable to Hindus, the property aforesaid in the hands of the first defendant is ancestral family property, and that the plaintiff on birth became a coparcener therein with an interest equal to that of the said defendant."

* Suit No. 382 of 1884.

(1) 12 B.H.C.R. 294.

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The plaintiff also alleged that the said estate was in danger of being wasted by the first defendant, and submitted that if the Court should hold that he was not entitled to partition provision, should be made to protect the said estate and that a proper maintenance should be paid to him out of the income of the estate.

The plaintiff also alleged that his grandfather, the said Hubibhoy Ibrabimbhoy, prior to the execution of the will of December 1864 already mentioned, had executed another testamentary writing on the 22nd August, 1864, by which he had divided his property into four equal parts and directed that each of his three sons (including the first defendant) should take one part, and that the fourth of such parts should go to his grandson, the plaintiff; that the plaintiff being then a minor, the testator directed that the first defendant should hold the said share in trust for him until he should attain the age of twenty-five years; that the first defendant objected to this arrangement as being invidious, and promised [282] the testator that if the share intended for the plaintiff were added to his, he would carry out the testator's wishes with respect to it; that the testator, being influenced by these representations of the first defendant and relying on his promise, executed the later will from which the bequest to the plaintiff was omitted, and which divided the estate into four equal parts, and gave two of such parts to the first defendant. The plaintiff submitted that if the Court should hold that he was not entitled to partition it ought to be declared that the first defendant was a trustee for the plaintiff in respect to the said one-fourth share in the estate of his grandfather on the terms of the will of the 22nd August, 1864, and that the said defendant ought to render an account of such share, &c. The plaintiff prayed for partition, discovery, and account, &c.

The first defendant in his written statement denied that the property in his hands was ancestral family property, or that the distinction recognized in Hindu law between ancestral and self-acquired property applied to Khoja Mahomedans in Bombay; and he denied that the plaintiff at his birth became a co-parcener. He contended that the said property was solely and absolutely his own, and that the plaintiff had no claim to it or any part of it.

The first defendant also contended that the last will of Hubibhoy Ibrabimbhoy, dated 29th December, 1864, effectually revoked all prior testamentary dispositions which were of no effect, and conferred no estate on the plaintiff; he denied that he had by any representation or inducement procured the said testator to revoke any previous testamentary writing.

The second defendant did not take any contentious part in the suit.

At the hearing the following issues were framed:—

(1) Whether the property in the first defendant's hands, referred to in para. 4 of the plaint, came to the first defendant's hand as ancestral property.

(2) Whether plaintiff on birth or at any time became a co-parcener or sharer in such property.

(3) Whether plaintiff has any estate or interest in such property.

[283] (4) Whether the said property is not the sole and absolute property of the first defendant.

(5) Whether Hubibhoy Ibrahim's will of the 29th December, 1864, did not revoke all prior testamentary writings made by him.

(6) Whether such a revocation was procured or induced by any promise or representation of the first defendant to the said Hubibhoy Ibrahim, as alleged in para. 7 of the plaint.

(7) Whether the plaintiff is entitled to any and what part of the relief claimed.

(8) Whether the property in the hands of Hubibhoy Ibrahim, and devised by his will, was ancestral, or self-acquired property.

(9) Whether by the law and custom of Khojas there is any distinction between ancestral and self-acquired property in respect of the power of the owner thereof to devise or make gift of the same.

(10) Whether the Nicol Spinning Mill at Colaba was acquired by first defendant with ancestral monies; and whether the plaintiff is not entitled to a share therein.

Lang, Inverarity, and Jardine, for the plaintiff.

Macpherson (Acting Advocate General) and *Starling*, for the first defendant.

Vicaji and Telang, for the second defendant.

Lang.—The *onus* of the first and fourth issues is on the first defendant. He must prove the property in his hands to be self-acquired. The Hindu law of inheritance and succession applies to Khojas, and the son at birth is entitled to share in his father's property; *Shivji Hasam v. Datu Mavji* (1). A son is entitled to partition; *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (2). The Court will presume the property to be ancestral and partible. The same rule applies to Kutchi Memons; *Mahomed Sidick v. Haji Ahmed* (3), *Abdul Cadur Haji Mahomed v. C. A. Turner* (4). We do not contest issues 5 and 6 and will give no evidence on them.

[284] *Macpherson*.—The *onus* of proof on the first and fourth issues is on the plaintiff. The plaintiff alleges that the property in suit comes to the first defendant by his father's will which is undisputed. The will declares the property to be the self-acquired property of the testator.

Lang.—The recital in the will is no evidence; *Mohomed Sidick v. Haji Ahmed* (3). We rely on the will only to show what the property was. It is for the defendant to show that Hindu law does not apply; *Raj Bahadur v. Bishen Dayal* (5).

(JARDINE, J.—I think the burden of proof as to issues 1 and 4 rests on the defendant.)

Jardine for the plaintiff.—Ordinary Hindu law applies to Khojas and Memons except a custom to the contrary is shown as to Khojas, *Khojahs and Memons' Case* (6); *In the Goods of Mulbai* (7); *Shivji Hasam v. Datu Mavji* (1); *Rahimabai v. Hirabai* (8). As to Kutchi Memons, *Abdul Cadur Haji Mahomed v. C. A. Turner* (4), *Mahomed Sidick v. Haji Ahmed* (3), Hindu law presumes union. The defendant alleges a custom to the contrary. As to proof of custom, *Bhagvandas Tejmal v. Rajamal* (9); *Mahomed Sidick v. Haji Ahmed* (3); *Jugmohundas Mangaldas v. Sir Mangaldas Nathubhoy* (2).

Starling, for the first defendant.—If Hindu law applies to the Khojas, which school of Hindu law will the Court apply. Counsel referred to Manu, cl. Q, sl. 104; 2 Colebrook, 196. The Khoja law is Hindu law modified by custom; *In the Goods of Mulbai* (7).

(1) 12 B. H. C. R. 281 (294). (2) 10 B. 528 (540).
 (4) 9 B. 158. (5) 4 A. 343.
 (7) 2 B. H. C. R. 276. (8) 3 B. 34.

(3) 10 B. 1.
 (6) Perry's Or. Cas. 110.
 (9) 10 B.H.C. R. 241.

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JUDGMENT.

JARDINE, J.—The plaintiff Cassumbhoy is the eldest son of the first defendant Ahmedbhoy Hubibhoy; the 2nd defendant Hosseinbhoy, a minor, is another son of Ahmedbhoy. The parties belong to a family of Khojas who have for several generations carried on mercantile business in Bombay. The plaint was filed [285] on the 9th October, 1884. In the first three paragraphs it alleges that Ahmedbhoy's father, one Hubibhoy, son of Ibrahim, died in A. D. 1865, whereupon, and under Hubibhoy's will, dated the 29th December, 1864, Ahmedbhoy came into possession of a large amount of property, moveable and immoveable, which said property in his hands has been largely added to by the accretions thereof and aggregates, as plaintiff estimates, about 20 lakhs. In para. 4 the plaintiff says that "according to the laws and usages by which members of the Khoja community in Bombay are governed, and which, in this behalf, are the same as are applicable to Hindus, the property aforesaid in the hands of the said defendant is ancestral family property, and that the plaintiff on birth became a co-partner therein with an interest equal to that of the said defendant." The plaintiff goes on to say that there have been disagreements between plaintiff and Ahmedbhoy, and that he is no longer willing that the latter "should remain in the possession and management of the said family estate, but desires that the same should be partitioned between the plaintiff and the defendants, which partition the plaintiff submits he is entitled to enforce." Plaintiff further states that he fears Ahmedbhoy may waste the property, and therefore he asks the Court to secure to him his share if the Court should hold that he is not entitled to a partition of the estate or any portion thereof. "The plaintiff further submits that in such event this Honourable Court should direct that a sum proportioned to the plaintiff's interest in the said estate remaining undivided should be paid out to him from the income thereof by way of maintenance." Then follow paras. 7 and 8 relating to a claim to a fourth part of Hubibhoy's residuary estate based on the circumstances under which an earlier will of Hubibhoy's (Ex. 64), dated the 22nd August, 1864, bequeathing such a share, was revoked. No evidence has been given on this part of the claim to which the 5th and 6th issues relate. The plaintiff concludes with a prayer:—(a) for an account and partition of the said family estate in equal shares among plaintiff and the defendants; (b) for a discovery of the property come to Ahmedbhoy's possession from Hubibhoy and of all accretions of the same; (c) for directions to preserve plaintiff's share if partition is refused; (d) for [286] maintenance in the like event; (e) for relief in the matter of the revoked will; (f) for proper directions; and (g) for costs.

The defendant Ahmedbhoy, in his written statement, admitted the correctness of paragraphs 1, 2, and 3 of the plaint except as to the estimated value of the property. He then "denies the allegation contained in the 4th para. of the plaint that the property now in the hands of this defendant, as in the same paragraph stated, is ancestral family property according to the laws and usages governing the Khoja community in Bombay. This defendant denies that the distinction according to Hindu law between ancestral and self-acquired property has any application to, or has ever been recognized, or acted on by any Khojas in Bombay, and this defendant says that the plaintiff did not on birth, or at any time become a co-partner, or share to any extent in the said property with this defendant. This defendant says that the said property is his solely and

absolutely, and that the plaintiff has no estate nor interest whatever therein." Ahmedbhoj further states that the disagreements were caused by plaintiff's misconduct, denies mismanagement and waste and the right of plaintiff to interfere, denies plaintiff's rights to anything under the revoked will, and finally denies that plaintiff is entitled to any portion of the relief claimed.

The defendant Hosseinbhoj, a minor, has appeared by his guardian *ad litem*, who has left plaintiff's claims entirely to the judgment of the Court.

The following issues were raised at the first hearing on the 22nd March, 1887:—1. Whether the property in the first defendant's hands, referred to in para. 4 of the plaint, came to first defendant's hands as ancestral property. 2. Whether plaintiff on birth or at any time became a co-partner or sharer in such property. 3. Whether plaintiff has any estate or interest in such property. 4. Whether the said property is not the sole and absolute property of the first defendant. 5. Whether Hubibhoj Ibrahim's will of the 29th December, 1864, did not revoke all prior testamentary writings made by him. 6. Whether such revocation was procured or induced by any promise or representation of the first defendant to the said Hubibhoj [287] Ibrahim, as alleged in para. 7 of the plaint. 7. Whether the plaintiff is entitled to any and what part of the relief claimed. The following were raised on the 4th April to elucidate the first issue:—8. Whether the property in the hands of Hubibhoj Ibrahim and devised by his will was ancestral or self-acquired property. 9. Whether by the law and custom of Khojas there is any distinction between ancestral and self-acquired property in respect of the power of the owner thereof to devise or make a gift of the same. On the 30th April the following issue was raised:—10. Whether the Nicol Spinning Mill, at Colaba, was acquired by first defendant with ancestral monies and whether the plaintiff is not entitled to a share therein. The learned counsel for plaintiff stated to the Court that he did not contest the 5th issue. He has offered no evidence on the 6th issue, and it has been arranged between the parties that the matter of the 10th issue shall be left to the Commissioner in the event of the Court decreeing a partition and account.

At the first hearing I ruled after argument that in the absence of proof of special custom the presumptions of the Hindu law of inheritance applied, and that the burden of proving under the first four issues propositions opposed to that law was at starting on the defendants. It was urged by Mr. Starling for the first defendant (whom I will hereafter call the defendant) that the plaint required amendment, being based on the assumption that what passed by Hubibhoj's will was Hubibhojs' self-acquired property, yet became ancestral and subject to partition at Hindu law in the hands of Ahmedbhoj, according to the opinion generally held before the case of *Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoj* (1), decided in 1886. I held that no amendment was necessary as the language of the plaint did not confine the right alleged to relief to any particular view of the mode whereby the property of Hubibhoj became ancestral in defendant's hands. That case decided that at Hindu law "a son to whom his father leaves his self-acquired property by will takes the property under the will, and not by inheritance; and that as property received by will is held by Hindu law to be [288] received by gift, such property is self-acquired in the hands of the son, and is not subject to partition." Plaintiff's claim in the present

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suit is confined to the property received by defendant under his father Hubibhoy's will and the accretions made thereof. The endeavour of the defendant as shown by the evidence produced and the arguments advanced by his counsel has been to gain the advantage of the above ruling by showing on the facts that Hubibhoy's wealth was self-acquired without a nucleus of ancestral property, and thus not subject to partition under the Hindu law on which plaintiff and his counsel have based the claim; and, in any event, whatever may be the finding of the Court as to Hubibhoy's property having been in his hands ancestral or self-acquired, it is urged for defendant that this Hindu law, or at any rate the Hindu law now generally applicable in Bombay, is not identical in matters of partition with the laws and usages governing the Khojas in Bombay, which laws and usages, or customs, it is urged, do not confer on a son any right to demand in the father's lifetime any partition of the property in the father's hands whether ancestral or self-acquired, the distinction between these kinds of property at Hindu law never having been recognised or acted upon by any Khojas in Bombay. Mr. Starling, as counsel for the defendant, argues that these variations from the ordinary Hindu law of the Mayukha and Mitakshara originate in an older form of Hindu law, which in the peculiar conditions, local and religious, of the Khoja community has been in these matters retained and followed by them as custom. On the other hand, Mr. Jardine, as counsel for plaintiff, argues that the decisions of this Court and of the Supreme Court have made the ordinary Hindu law applicable to Khojas, except where a contrary custom is proved. It is admitted that the questions whether among Khojas, a son has a right to demand partition during his father's lifetime, and whether there is any difference in respect of the father's power to alienate ancestral and self-acquired property have never yet received judicial decision. The determination of these questions is of general importance to the Khoja community, among whom, as the evidence shows, they have been discussed some years ago in connection with a legislative proposal of the Government of [289] India. The subject is part of the wider question as to how far what the parties call the laws and usages of the Khojas are based on the law of their origin, *i. e.*, the Hindu law, and for this reason, and to enable the Court to deal with the questions of *onus probandi* and to estimate the legal circumstances existing when such matters of evidence occurred, as acts done or acquiesced in, or pleadings in older suits, it is convenient here to examine the cases cited to show the extent and limits within which the Courts have held the Khojas to be governed by ordinary Hindu law. The cases relating to Memons, who, like the Khojas, are Hindus in origin and have become Mahomedans in religion, will also be noticed as bearing on the same subject.

The first reported decision is that of Sir E. Perry, Chief Justice of the late Supreme Court, in the *Khojahs' and Memons' Case* (1) in 1847 in which it was ruled that "if a custom, as to succession, is found to prevail amongst a sect of Mahomedans and be valid in other respects, the Court will give effect to it, although it differs from the rule of succession laid down in the Koran." It was held that a custom excluding daughters from a share in a deceased father's property was valid, and the daughter's claim against the father's brother's representatives was rejected. Sir E. Perry's report states that "at the trial at the Bar of these Equity suits on *viva voce* evidence, both the Khojas and the Memon Kutchi were proved to

(1) Perry's Or. Cas. 110.

be settled for the most part in Hindu countries, principally Kutch and Kathiawar, and the belief amongst themselves was, that they had been converted from Hinduism about three or four hundred years ago. The rule of succession, which prevailed amongst them was nearly analogous to the Hindu rule of succession." One witness was Hubibhoy Ibrahim, defendant's father, who deposed as follows about the Bombay Khojas, (Ex. 133):—"It is said they came originally from Bhavnagar and Kutch. Our grandfathers used to say they were originally Hindus and became Mahomedans long ago. We do not regulate inheritance in our caste by the Mahomedan law, but according to the customs prevailing from time immemorial in our caste. I believe it is according to Hindu customs." In his judgment [290] in the *Aga Khan Case*, (1) Sir J. Arnould observes that this litigation divided the Khojas of Bombay into two hostile parties, the Aga trying to uphold the rule of inheritance as laid down in the Koran, while Hubibhoy Ibrahim and his partizans took an active part on the other side. In 1863 the case of *Gangbai v. Thavar Mulla* (2) was decided by the Supreme Court on the Equity side by Sausse, C.J., who remarked that "the Khoja caste, although Muhammadan in religion, has been held to have adopted, and to be governed by, Hindu customs and laws of inheritance." The next case is that of *In the Goods of Mulbai* (3) decided by Couch, C.J., on the Ecclesiastical side of this Court in February 1866. The learned Chief Justice followed Sir E. Perry's ruling giving effect to custom. There was a question whether by the custom of Khoja Mahomedans when a widow dies intestate and without issue, property acquired by her from her deceased husband descended to her own blood relations or to the relations of her deceased husband. The Court thought the balance of testimony to be greatly in favour of the existence of a custom which excludes the relations of the widow. Sir R. Couch went on: "What may be the origin of this custom among the Khojas I shall not now inquire. It is very possible that it arises from some analogy to be found in the Hindu law. I agree with the observations of the counsel for the caveator, that the law by which the Khojas are governed is not, properly speaking, Hindu law, but probably that law modified by their own peculiar customs; and I think it has been sufficiently established that there is a Khoja custom which excludes the wife's relations from succeeding to property such as this." In November, 1866, Arnould, J., delivered his long and interesting judgment in the *Aga Khan Case* (1) in which he answers the question "Who and what are the Khojas? He says: "From the evidence adduced in this case, the more probable conclusion, I think, is that the Khojas were originally Hindus of the trading class, inhabiting the villages and towns of Upper Sind. Their language is Sindi or Kutchi—a cognate [291] dialect, and such ancient religious works as they possess are written in the Sindi language and character. Sind, an early Mahomedan conquest, has long had a large Mahomedan population, but a considerable portion both of the retail and wholesale business of the country has always remained in the hands of the Hindus. The position and circumstances of these remote and isolated Hindu traders were manifestly such as to favour their conversion to some form or other of Mahomedanism. That they were so converted by Pir Sadardin, about 400 years ago, is admitted by both the contending parties in the Khoja community. . . . From Sind the Khoja conversion would appear to have spread into

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(1) 12 B.H.C.R. 323 (343 & 344).
(3) 2 B.H.C.R. 276 (284).

(2) 1 B.H.C.R. 71 (73).

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Kutch, thence into Kathiawar, and through Gujarat to Bombay. In the present time, Khoja communities are to be found in almost all the large trading communities of Western India and on the sea-board of the Indian Ocean. The Khojas are all, as a rule, engaged either in retail trade or commerce and frequently prosecute both with considerable success."

The foregoing decisions are discussed in *Shivji Hasam v. Datu Mavji*, (1) decided by Westropp, C.J., and West, J., in 1874. It was contended that Khojas are not regulated by the law applied to Hindus who are undivided in family and estate. Westropp, C. J., says: "The traditionary doctrine of the Supreme Court and of the High Court has, for upwards of, at least, twenty-five years, been that, in the absence of proof of special usage to the contrary, the law applicable to Khojas is, in matters relating to property, succession, and inheritance, the Hindu Law as administered in this presidency No evidence has been given to the effect that the ordinary rule in Bombay, viz., that of the Hindu law, is not applicable to Khojas at Thana. We think, therefore, that we are bound to apply to them the Hindu law." In 1875 all these cases and others were considered by Sargent, J., in *Hirbai v. Gorbai* (2). His conclusions were as follows:—"This summary of the decisions of this Court, as well as of the cases disposed of by the Registrar in the non-contentious business, explained by the remarks of Sir M. Sausse [292] in *Gangbai v. Thavar Mulla* (3) satisfactorily shows, I think, that the Khojas, have, for the last twenty-five years at least, been regarded by the Court, in all question of inheritance, as converted Hindus who originally retained their Hindu law of inheritance, which has since been modified by special customs, and that a uniform practice has prevailed during that period of applying Hindu law in all questions of inheritance, save and except where such a special custom has been proved. It may be said that no express decision can be cited in support of either of the two propositions that the Khojas were originally Hindus who were converted to Muhammadanism, retaining their Hindu laws and customs, or that this Court will always apply the Hindu law of inheritance in their case in the absence of special custom; but the uniform course of practice, extending over the last twenty-five years has assumed the truth of the first proposition, and has never, I believe, deviated from the rule enunciated by the latter. Lastly, I may add that in a special appeal recently decided by Sir M.R. Westropp, C.J., and West, J., a question of inheritance having arisen as to the estate of a Khoja, the Court held that, in the absence of proof of a special custom, Hindu law must be administered. I need scarcely say that the opinion of the Chief Justice from his long experience in the ecclesiastical business of this as well as of the late Supreme Court, is especially valuable on a question of this nature. Under these circumstances this Court cannot but throw upon those who dispute the right of the widow to administer (a right which would be clearly hers under Hindu law) the burden of proving the existence of a custom inconsistent with that right." In appeal the views of the learned Judge are affirmed by Westropp, C.J., "It has here been generally assumed that, in the absence of proof of custom to the contrary, the law of succession and inheritance amongst the Khojas is the law of their origin, viz., Hindu. This has generally been assumed to be the rule, and was so expressly laid down in a *dictum*, by Saussee, C.J., in the case of *Gangbai v. Thavar Mulla* (3).... In this state of the authorities we think

(1) 12 B.H.C.R. 281, (292 and 293).

(2) 12 B.H.C.R. 294 (304, 305 and 321).

(3) 1 B. H.C.R. 71.

that our brother Sargent was right in placing the burden of proof on the [293] mother and the distant male relations of the deceased intestate, as they were setting up customs not in conformity with Hindu law, whereas the widow's claim was completely consonant with Hindoo law."

In *Ashabai v. Haji Tyeb* (1), a case among Kutchi Memons, Sargent, C. J., lays down that "so far as Khojas are concerned the decision of the Court of appeal in *Hirbai v. Gorbai* (2), must be taken as conclusively deciding that the *onus* of proving a custom of inheritance not in conformity with Hindu law lies upon those who set it up." On similar principles, the Mayukha, "a very high authority in Bombay," was referred to by the learned Chief Justice in determining a question regarding *stridhan*.

In *Hirbai v. Gorbai* (2) the Court of Appeal laid down a rule on the evidence of a custom among Khojas in the following terms:—"It is, however, evident from what has been said, that the Khojas are not as firmly bound in matters of succession and inheritance by the Hindu law as Muhammadans proper are by the Muhammadan law, or Hindus by the Hindu law, and hence it is that it would not be reasonable to require such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law, as from a Hindu . . . Though the evidence at large is not such as in the case of Muhammadans proper or Hindus would suffice to establish an ancient and invariable custom, we think we must hold that it is sufficient to establish a custom in a community, such as this, placed midway between Muhammadans and Hindus. We think that, under such circumstances, the Court ought to act upon satisfactory proof that the custom has existed for a considerable time, and has been generally accepted by the great majority of the Khoja community." In *Rahimatbai v. Hirbai* (3) the tendency of the relaxation of the rule to encourage litigants to set up false customs is remarked upon. In the appeal, Westropp, C. J., said:—"We consider that in *Hirbai v. Gorbai* we have gone quite as far as we can properly go in applying a less stringent rule with regard to the evidence required to prove a [294] custom in the case of Khoja Muhammadans than we should do in the case of Hindus or Muhammadans proper. . . As it is now a settled rule that, in the absence of proof of a special custom to the contrary, Hindu law must regulate the succession to property amongst Khojas, it is clear that the burden of proving such special customs lay upon the defendant Rahimatbai who put them forward. . . It was, however, admitted by the defendant's counsel that she had not adduced in evidence a single instance in which this alleged custom had taken effect. There is then nothing before the Court but the opinion of certain members of the Khoja community upon the two points in question, and we consider that if we were to decide in accordance with that opinion, contrary, as it is to Hindoo law, we should be assuming legislative powers." The cases cited show that Kutchi Memons are treated by this Court as following the Hindu law of inheritance except where special custom is proved; *Ashabai v. Haji Tyeb* (1), *Abdul Cadur Haji Mahomed v. C. A. Turner* (4), *Mahomed Sidick v. Haji Ahmed* (5). In the last of these the question, whether Kutchi Memons by a special usage recognize no difference in the power of

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(1) 9 B. 115 (120, 126).
(3) 3 B. 34 (39).
(5) 10 B. 1.

(2) 12 B.H.C.R. 294 (321, 322).
(4) 9 B. 158.

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alienation between ancestral and self-acquired property, was decided in the negative by Mr. Justice Scott.

The decisions which apply Hindu law to matters of property and inheritance in the absence of special custom appear to assume that the Hindu law applicable is the ordinary Hindu law, although this is not expressly stated, no contention having apparently been raised heretofore that any other form of Hindu law should be applied. Mr. Starling has argued, however, that there is a probability that the Khojas coming originally from Sind and Kutch, followed a more ancient form of Hindu law than prevails now. Assuming this to be probable, he wishes antecedent probability to be conceded to the customs set up, *viz.*, the absence of distinction between ancestral and self-acquired property and the non-existence of any right of a son to a partition of family property during the lifetime of the father. He quotes Manu. C. 8, 416, [295] C. 9, 104, and the texts of Devala, Sancha, Lichita and Harita found in 2 Colebrooke's Dig. 196, 199, 203 and 205. It is no doubt the opinion of jurists that there was a time when the distinction between ancestral and self-acquired property was not found. "Self-acquired property in the earliest state of Indian society did not exist. So where the family was of the purely patriarchal type, the whole of the property was owned by the father, and all acquisitions made by the members of the family were made for him, and fell into the common stock." (Mayne's H. L., s. 212). "It is quite certain that in the earlier period of Hindu law, no son could compel his father to come to a partition with him. Manu speaks only of a division after the death of the father, and says expressly that the brothers have no power over the property while the parents live." (S. 217). "We learn from the Smritis that a father might castigate, sell, cast off, give away and disinherit any of his sons at will, and that all acquisitions made by a son had to be given up to the father. The hereditary property may be disposed of at will by the head of the family." (Jolly's Tagore Law Lectures, 1883 pp. 81 and 82). Mr. Justice West in the following passage states his opinion of the changes which the Hindu law has undergone:—"The father appears in the earliest form of the law to have had unqualified administrative power and to have had complete dominion over the family." The rights of the manes at the same time made an alienation of the ancestral estate unlawful, and the interest felt in a son as a continuator of the family *sacra* to be celebrated with indispensable offerings out of the patrimony (See Vishnu, Transl. 189) raised him first in religion and then in law to a joint ownership with his father. It became recognized far earlier than at Rome that the "*patria potestas in benignitate non in atrocitate consistit*" as the highly affectionate character of the Hindus readily admitted sons to a position of secure equality in title, though not till afterwards in administration. Then followed the right of interdiction to guard against impious waste, and, lastly, the right to partition as a logical consequence of co-ownership. The archaic law has in part been revived by recent cases." West and Bühler's Hindu Law, pp. 713 and 714 (note), (3rd Edition). Again, as Mr. Mayne points out, the advance of [296] civilization and commerce affected the older law of Baudhayana and Apastamba and self-acquisitions were recognized. (Varishta, XVII, 51; Manu, IX 206 to 209). Doubtless, as remarked by Mr. Mayne in s. 395, the son's right to partition during the life of the father was very slowly recognized both before and after the establishment of English Courts, especially as regards ancestral moveable property. The decision of the Court of Appeal in *Jugmohandas Mangaldas v. Sir*

Mangaldas Nathubhai (1) deals with the subject, treating as authority as to ancestral immoveable property the judgment of the Privy Council in *Suraj Bansi Koer v. Sheo Prasad* (2), where Sir J. Colvile says:—"But it seems to be settled now in the Courts of the three presidencies that a son can compel his father to make a partition of ancestral immoveable property." As to ancestral moveables Sargent, C.J., after reviewing the authorities and the Hindu texts bearing on the question, comes to the conclusion that "no distinction between moveable and immoveable property can be satisfactorily drawn as regards the right of a son in an undivided family governed by the Mitakshara law to partition in the lifetime of the father."

By these interpretations of the ordinary law by the Court of Appeal, I am of course bound, although so eminent a jurist as Sir H. S. Maine in his "Early Law and Custom," p. 122, follows Mr. Nelson, the author of a "View of Hindoo Law" (p. 37), and "Indian Usage and the Judge-made Law in Madras" (p. 207), in holding that the texts do not "lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of the father." Dr. Jolly admits that these interpretations of the Courts may be strangely opposed to the strong sense of the deference due to elders, which pervades the Indian Law and which was evident in many of the relations of the witnesses in this case. But his learned examination of the Sanskrit original of the Mitakshara texts induces him to conclude that Vijnaneswara establishes the right of the son to a partition of the ancestral immoveable property at least, at any time. Jelly's Tagore Law Lectures, 1883, pp. 111 and 125. Whether or not the ancestors [297] of the Khojas in Sind and Kutch before their conversion to Muhammadanism followed the Mitakshara law, the practice of enforcing partition against the father's will, as well as the opposing moral sentiment, belongs according to eminent scholars to the far earlier period of the Dharmasutras or "Aphorisms on the Sacred Law." The date of none of the Dharmasutras can be fixed by direct historical evidence, but their remote antiquity is sufficiently proved by the fact that they belong distinctly to the Vedic period of Sanskrit literature (Jolly's Tagore Law Lectures, 1883, p. 36). Dr. Jolly agrees with Dr. Bühler in treating the institutes of Gautama as the oldest of the existing works on the sacred law (p. 37), older than Baudhayana and Apastamba and long anterior to Manu and Yajñvalkyā. The relation of the Sutras to the Vedic schools and the secondary Smritis, and the connection with the customary law are matters discussed by both these learned scholars. "In spite of the undue prevalence of the religious and scholastic elements which have stunted the growth of Indian law from the very outset, there is no reason to doubt that the legal rules of the Dharmasutras are based on a large superstructure of customary law." (Jolly's Tagore Law Lectures, 1883, p. 39). "Minute as the Dharmasutras generally are on the majority of the topics connected with the moral duties of Aryas, their arrangement of the rules is frequently unsystematic, and their treatment of the legal procedure, the civil and criminal law, with the exception of one single title, the Dayavibhaga, *i. e.*, the law of inheritance and partition, extremely unsatisfactory. With respect to the other titles, the Dharmasutras give nothing more than a few hints, intended to indicate the general principles, but they never proceed systematically, and always show most embarrassing omissions. From

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(1) 10 B. 528 (570, 574).

(2) 6 I. A. 88 (100).

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the standpoint of the Vedic schools, a more detailed and orderly treatment of these matters was, of course, irrelevant, as their chief aim was to point out the road to the acquisition of spiritual merit, and to guard their pupils against committing sin. Though some of their members might be called upon, and no doubt actually were destined in later life to become practical lawyers, as Dharmadhikarins, *i. e.*, legal advisers of kings and chiefs, or as judges, and to settle the law between man and man, the few [298] general principles which they had learnt during the course of instruction would suffice for their wants. For the details were settled according to the law of custom, which, as the Dharmasutras themselves indicate, was in ancient times even a greater power in India than it is in our days." (Bühler's Laws of Manu, Introduction LIII.) The rules of Gautama on the son's right to partition are thus stated by Dr. Jolly :— "The Dharmasutra of Gautama, while declaring in one place (XXVIII. 2) the assent of the father as absolutely necessary to a partition by the sons, refers in another place (XV. 19) to sons who have enforced a division of the family estate against their father's wish. Such sons shall be excluded from funeral repasts, which shows that division against a father's wish, though not precisely illegal, was reputed *contra bonos mores*. This appears to have been the true feeling in the Smriti epoch about a partition enforced by the sons, and this feeling continued to subsist in spite of the important rights that were gradually accorded to the sons over ancestral property." (Jolly's Tagore Law Lectures, 1883, p. 99). "From this Sutra it would appear that sons could enforce a division of the ancestral property against their father's will, as Yajnavalkya also allows (see Colebrooke, Mitakshara I, 6, 5-11), and that this practice, though legal, was held to be *contra bonos mores*." Bühler's Gautama, p. 255. The text of Gautama (XV. 19) excluding from the funeral feasts is thus translated by Dr. Bühler. "Nor (sons) who have enforced a division of the family estate against the wish of their father." Sir H. S. Maine differs from Dr. Jolly and Dr. Bühler in their view of the meaning. He writes, "There are a few texts which have been thought to imply that the son of an aged father could compel his retirement. Gautama (XV. 19), while condemning such a practice, perhaps admits its existence. But, whatever be the meaning of these texts, I cannot allow that they lend any countenance to an opinion that sons could compel a partition of the family property at any time against the will of their father. I regard them as exclusively applying to the case of a father who has reached an age at which it has become a religious duty for him to abandon secular life. The fulness of the ancient Hindu *Patria Potestas* may be safely inferred from the veneration which even a living father must [299] have inspired under a system of ancestor-worship" (Early Law and Custom, p. 122). But, as the same learned writer admits, there were causes operating from an early time which tended to dissolve the family.

The causes whereby partition grew into a practice are manifold. The advocacy of partition as a means of acquiring spiritual merit is as old as Gautama. (See Mayne's Hindu Law, s. 216). But the motive which induces a man who earns more wealth than his brethren to get rid of their claims on his industry has also operated in all advancing societies and, as Mr. Mayne supposes, earlier than the desire of spiritual merit. In pointing out the close resemblance of the House Community of the South Slavonians to the Joint Family of the Hindoo in a most suggestive chapter of his "Early Law and Custom," Sir H. S. Maine remarks at p. 252 on the causes and effects of the recognition of separate property—

“The *peculium* seems to be always an actively dissolving force. It had this effect to some extent with the Romans, but with the Hindoos it is the great cause of the dissolution of the joint families.” “The adventurous and energetic member of the brotherhood is always rebelling against its natural communism. He goes abroad and makes his fortune, and strenuously resists the demand of his relatives to bring it into the common account. Or perhaps he thinks that his share of the common stock would be more profitably employed by him as capital in a mercantile venture” (p. 264). “Where, as in Turkey, the local usage is left to its unchecked operation, one of the systems of succession commonly followed has a great deal of interest for us. Each son of the family as he grows up and marries leaves his father’s house-hold, taking with him the share of its possessions which under developed law would have devolved upon him at his father’s death and he goes elsewhere, often into a far country, to seek a new fortune” (pp. 259-260 ?) These informal divisions are mentioned by Mr. Nelson as common now-a-days: “It is an undoubted fact that year by year thousands of so-called Hindu families resident in the Madras Province are in effect permanently broken up by one or more members going to a distant place or to distant places, he or each of them hoping to make a fortune for himself solely.” (View of Hindoo Law, p. 37).

[300] These general observations help to explain much of the recorded evidence. Sometimes too when the property is small, the son seems to go out with a nominal share, or such an amount as the other members were willing to part with (Cf. Mayne’s Hindu Law, s. 217), to which the wife’s ornaments or *peculium* is often added. Witness 23 states that a Khoja often takes a portion of the family property and sets up for himself. It has not been necessary to investigate the facts, but there are indications that the son so departing and starting a separate trade does not as a rule account to his brethren left behind, whereas he sometimes gets a share of the family property on the father’s death. Another cause of partition very evident among Khoja families is the second marriage of the father, an event treated as of great importance in the Thesawalame and in the Buddhist versions of the Manava Shaster followed in Burma. The sons, grown up and assisting the father in the business, cannot brook the interference and influence of the step-mother; their share in the property is diminished as new children are born, while the father and the stepmother perhaps afraid that the new family may be left orphans, are naturally anxious to provide for them out of the estate, a share which the elder sons are inclined to think more than is due. The quarrels among the women seem also to be a very common cause of separation; and probably these homely causes, as well as the fear of the father wasting the property, have operated from one generation unto another. It may also be the fact that the Muhammadan religion and habits as well as the spirit of commercial enterprise and the frequent emigrations among the Khojas have been more effectual and for a longer time in sapping the sentiments which uphold the joint family and the paternal headship than among the Hindoos.

The above investigation, tracing what has now become the rule of Mitakshara law to a practice close upon the Vedic period, seems to me to invalidate Mr. Starling’s learned argument that there are antecedent reasons for presuming that the Khojas excluded it in favour of the opposing rule of conduct. The respect for parental authority may have kept down the number of enforced partitions and a corresponding feeling on the father’s [301] part may have caused great reluctance and delay in giving the son a share ;

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but as Mr. Justice Scott argues in *Jagmohandas Mangaldas v. Sir Mangaldas Nathubhoy*, if a custom against partition had existed as the customary law of these ancient Hindoos, why did not the father avail himself of it? and I may ask, why was it necessary to express moral disapproval if the fathers' legal right could be asserted?

Mr. Justice West (West and Buhler's Hindu Law, pp. 659, 660, 3rd Ed.) mentions however among the many exceptions to the Mitakshara law which arise from the caste law of the parties that "amongst 82 of the 101 castes, from whom information was obtained by Mr. Steele at Poona, it was found that partition could not be enforced by a son against his father unless the father had acted improperly as manager. It would seem therefore that in the usage of a large minority, at least of the people of the Dekhan, the rule of Baudhayana is still received as law. 'While the father lives the division of the estate takes place (only) with his permission.' In Gujarath the castes, almost without exception or qualification, answered Mr. Borradaile's inquiries by denying the right to partition of a son against the wish of his father . . . Uniformity of the law is so desirable that the Courts will naturally desire to abide by the Mitakshara and the Mayukha, whose doctrine has been adopted by the Judicial Committee (*Suraj Bunsee Koer's Case* (1), but it is only fair to point out that custom does not appear to have more than partially accepted these authorities on the point now in question. On the one side are the Sastris whose opinions are entitled to respect; but on the other are the answers given by the representatives of the castes themselves. With reference to these remarks Mr. Jardine has suggested that however carefully Mr. Borradaile may have done his work, the persons consulted were probably the elderly and rich members of the castes, who were likely to be biassed by their position, and to be reluctant to go against the general feeling, especially as their doing so would suggest to their sons that they might make claims. Judging from the way witnesses make statements about custom, it may, I think, reasonably be supposed that the heads of castes sometimes gave [302] mere opinion without reference to facts as in the matter of adoption among Jains, *Bhagvandas v. Rajmal* (2) or from their not having heard of one of the rare instances as in *Jagmohandas Mangaldas v. Sir Mangaldas Nathubhoy* (3) or from their wish to establish a conformity with religion as in *Mahomed Sidick v. Haji Ahmed* (4).

The authorities quoted in an earlier part of this judgment establish clearly that the burden of proving a special custom lies on the party alleging it, although in *Hirbai v. Gorbai* (5) less stringent proof was required than in ordinary cases, Sargent, J., considering it sufficient if, in the language of the Jurist Thibaut, "a majority, at least, of the community look upon the rule as binding, and it be established by a series of well known, concordant, and, on the whole, continuous instances." It is, I think, open to argument whether in the present case where the special custom is alleged to be the Hindu law at another and older stage this rule of proof is applicable. The defendant seeks a modification of the ordinary Hindu law of Gujarat and the Island of Bombay, viz., Manu, the Mayukha and the Mitakshara. *Lallubhai Bapobai v. Mankwarbai* (6), *Shakaram Sadashiv Adhikari v. Sitabai* (7); *Murarji Gokuldas v. Parvatibai* (8) and if the parties were not Khojas but Jains or other Hindus, he would have under the ruling of the Privy Council in *Ramalakshmi Ammal v.*

(1) 6 I. A. 88 (100).

(2) 10 B.H.C.R. 241 (263).

(3) 10 B. 528 (542).

(4) 10 B. 1 (14).

(5) 12 B.H.C.R. 294 (317).

(6) 2 B. 388 (418, 419, 420).

(7) 3 B. 353.

(8) 1 B. 177.

v. *Sivanantha Perumal* (1) to prove by clear and unambiguous evidence that the special usage is ancient and invariable. See also *Shidojirav v. Naikojirav* (2) and *Bhagvandas Tejmal v. Rajmal* (3).

In the present case there is a large quantity of evidence of the usual varieties, opinions, acts, acquiescences and interferences. In dealing with it I will adhere to the less stringent rule of proof applied in *Hirbai v. Gorbai* (4). Many witnesses have been examined and many documents filed; and I will now approach the discussion of this evidence. In weighing the testimony [303] of witnesses the Court has to proceed with caution because the Khoja community in both its Shia and Suni sections some years ago applied itself to consider what its law about inheritance, partition, marriage and other matters ought to be, and a commission whereof the late Sir M. Melvill, when a Judge of this Court, was President and Ali Aga Shah, Mr. Spencer, a Judge of the Small Cause Court, Mr. R. M. Sayani, Mr. Dharmasi Punjabhai, Mr. Jairajbhoj Peerbhoj, and the defendant were members, considered a project of law which was to be submitted to the Government of India with a view to legislation. This proceeding has evoked a number of expressions of opinion and has been in some ways tantamount to a rehearsal of the questions of Khoja custom which I have to decide. The statements of such people as witness 15 (see also Ex. A. 38) show how little unanimity of opinion exists on many questions. These facts add I think to the relative weight to be given to wills, deeds, and other formal acts of Khojas, falling within an earlier period, and for this reason and because the examination of this part of the evidence will furnish some test of the oral testimony as in the examination of witness 15 about Kasim Natha's disposition of property. I will take it first in appraising the evidence to the alleged customs. The absence of documents disclosing uncontrolled dealings with property on the part of heads of families has been commented upon for the plaintiff; and this argument is met for defendant with the observation that disherison is a very uncommon circumstance in any community and such documents are therefore uncommon. (His Lordship then discussed the evidence of usage given by the defendant, and continued).

I have now discussed all the various evidence whereby defendant seeks to prove the existence of usages modifying the ordinary Hindu law. I do not think that it proves that the father may dispose of ancestral property with the same freedom and indifference to the rights of undivided sons as in the case of self-acquired property. No will nor conveyance has been produced which purports so to do; whereas several wills recite that the property bequeathed is self-acquired, and the ordinary language of the Khojas is proved to contain words and phrases indicating [304] the distinctions so well known to the Hindu law. Where unequal distributions are proved to have been made, in some cases there was no ancestral property, or none was proved to exist; in others where there was ancestral property, the excluded son is proved to have acquiesced, or joined, in the special mode of distribution, after consultation; in others this concurrence may easily be inferred. Sons often wish to do the right thing, and do not trouble themselves about their strict rights at law, which they are willing to waive when the mother's comfort or the maintenance of younger brothers is concerned, and especially if the father expresses his wishes. The Court cannot infer that no right exists when under special circumstances

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(1) 14 M.I.A. 570.
(3) 10 B.H.C.R. 241.

(2) 10 B.H.C.R. 228.
(4) 12 B.H.C.R. 294.

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it is not exercised, or a special contract is made. The case of witness 69, the son of witness 5, is that of a son who has become so wealthy that he does not care to enforce partition. No perfect instances of deliberate claim to partition finally refused has been proved. A great number of cases of alleged turning out of sons have been brought forward, in order to induce the Court to draw the inference that if the son had had any right to claim partition he would have made a claim on being turned out. In many of these cases there was no ancestral property proved, and therefore they are not in point. In many others the expression "turning out" was a misuse of language; where, as in the cases of nine sons what happened was their setting up in business, and in those of three or four more the change to a separate abode or a relation's house added to their comfort. Several of the "turned out" sons are on the best of terms with their fathers, and it does not appear that they usually are disinherited; rather, that they get a share on the father's death. Some of them were disobedient sons, in whose favour those elderly or respectable gentlemen who compose the Jamat were not at all likely to interfere on social or moral grounds. If maintenance was claimed, the action of the Jamat in refusing aid to such children might perhaps be justified by the considerations mentioned by Mr. Justice Pinhey in *Ramchandra S. Vagh v. Sakharam G. Wagh* (1) (See too West and Bühler's Hindu Law, p. 583 (3rd ed)). I am, for these reasons, of opinion that the so-called turnings out do not afford ground for [305] inferring that the sons knew they could not claim partition from the father of the ancestral property. The evidence does not appear to me to satisfy Thibaut's rule about proof of custom. It does not seem that a majority looks on the alleged special customs as binding, or that the instances have been well known, concordant, and continuous.

The evidence given on behalf of plaintiff has now to be examined. It appears to me to negative the existence of the special customs set up. Plaintiff has not given much evidence as to the customs at Bombay. Witness 67 deposes to a partition enforced by a son against the will of the father, the property being self-acquired. Witness 59 tells of a partition in the family of one Rajan, but as his account differs from that of Sundarji, witness 65, I hold the proof to fail. Witness 55 deposes to several partitions among Bombay Khojas at places in the Persian Gulf. I attach no weight to them, as he is contradicted by plaintiff's witness 78, and as it is likely enough that what may have occurred were only dissolutions of partnerships. Exhibit 88 is a formal registered document of 1879, in Marathi, whereby Abdula, the son of the witness 53, a Khoja of Malad, in the neighbouring island of Salsette, in consideration of property given to him, his wife, and his son, by witness 53, relinquishes all right to the remaining joint ancestral and self-acquired property and future acquisitions. Witness 53 has not heard of ancestral property being alienated away from the son in a Khoja family; but he professes ignorance of the legal question involved, and says he yielded a share to Abdula, a bad fellow, through fear of his otherwise doing him serious injury. Now, though he may have been glad to get rid of him, it is doubtful whether he would have given him a share, unless he thought partition were compellable; the fact at least remains that the son induced the reluctant father to give him a share. Witness 71, Gangji, whose family comes from Sinugara, near Anjar, in Cutch, deposes to one of the sons of his relation,

(1) 2 B. 346.

Hasam Chakpal, obtaining partition of property in Bombay; but this property had been earned in a trade in wood, which the sons, as well as the father, carried on. There is no reason to suppose it [306] was ancestral; but witness 63 confirms this witness as to Hasam having inherited houses and other property in Cutch. It may have been joint property. Most of the instances of partitions enforced by sons, on which plaintiff relies, are alleged to have occurred in the kingdom of Cutch, and in the different principalities of the Kathiawad peninsula. Many of the Khoja families in Bombay have migrated from those regions: many still keep up a connection with them. Defendant's family was settled a few generations back at Bhavnagar. Some of the partitions in evidence took place among the peasants, or petty craftsmen in quiet rural districts: in others, more or less family connection with Bombay had begun; but, as a rule, these families are in different circumstances to those of the Bombay Khojas, whose mercantile enterprise opens up great businesses with places far across the seas, like Zanzibar or Hongkong or Bandar Abbas, where branches of these wealthy firms are started and new trading colonies begin. The change of circumstances producing different needs, and the contact with other communities and customs doubtless produce variations in dealings with family property, independent of the special contracts where convenience often varies the general rule. The evidence also relates to the acts of several generations. But it discloses, speaking generally, the existence of old institutions; even to this day the Khojas dwelling under the Darbars of Cutch and Kathiawad have suffered less interference of Courts and law than the Khojas in Bombay. The feudal landowner, the headmen of the village and the authorities of the Khoja community, all appear as influencing and determining the settlement of disputes about partition. Thus the Court has better material than the hypothesis of a form of Hindu law more archaic than the Mitakshara for determining what constraining notions about the power of disposal of property the Khojas of Bombay brought from their ancient homes. The defendant wished for a commission to examine witnesses in those principalities, but did not press the application. A number have been called, some for defendant, many for plaintiff, and examined in Court, where the long and rather tedious cross-examinations enabled me in several instances to estimate to a certain extent their demeanour and [307] animus. I will first take the cases occurring in Cutch. [His Lordship examined the evidence of custom in Cutch and Kathiawad and proceeded.]

Having set forth the evidence produced by plaintiff, I must state my conclusion, which is that the opinions given and instances proved combine to show that the customs of the Khojas as to partition of ancestral property are substantially identical with the ordinary Hindu law, as might have been expected seeing that in other matters this identity has already been affirmed by decisions of learned judges passed after inquiry into the facts. Nearly everything trustworthy in the evidence admits of explanation by ordinary Hindu law. By the partition of so-called "self-acquired" property in the families of small traders and cultivators was probably meant that of accretions by the joint family of the patrimony, to which *Unrithnath Chowdry v. Gowrinath Chowdry* (1) applies. See, too, West and Bühler's Hindu Law, p. 723, 3rd Ed.. The use by a co-parcener of part of the joint funds for his own profit, the gift within

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moderate limits of a sum sufficient to start a son in business, the segregation of a share advanced for a like purpose, the provision at partition of maintenance, or a share for the father and mother are matters familiar to students of the Hindu law. We shall have to inquire later how far the conduct of Hubibhoy in proposing to settle this property on his sons, contenting himself with a maintenance, and in afterwards awarding shares to two of them and taking releases from them, and thereafter describing them as separate and devoid of interest in his estate is explainable in the same way.

The conclusion at which I have arrived after much consideration of the evidence and arguments is adverse to defendant's contention about custom in the present case. But I have the satisfaction of knowing that it follows a long current of judicial decisions, and that it coincides with the views defendant solemnly expressed in the affidavits of 1870. The ordinary rule of Hindu law which he, a member of a leading family, then wished to be treated as the custom of the Khojas in Bombay, is now proved to be the rule followed also by those who have [308] remained in Kutch and Kathiawad. The well-known distinction of Hindu law between ancestral and self-acquired property in respect to power of alienation is affirmed by a great number of the witnesses as accepted by the Khojas, while those who testify that no such distinction exists fail to prove instances indicating an unlimited power of disposal. In many of the partitions proved to have occurred in Kutch and Kathiawad the father did not assent to the claim of the son until after some pressure had been applied. In others, the witnesses, who are candid enough, state that there was willingness on the part of the father to assent to the son's claim. But, as a rule, these witnesses say clearly that the son has a right to make the claim, and so say some of the Bombay witnesses. I am therefore of opinion on this evidence that the consent of the father, whether given reluctantly or willingly, is given under the impression that he consents not merely to exercise an option or to do what he merely ought to do, or what it may be convenient or courteous to do, but to what the son may enforce him to do. "Thus by frequent iteration and multiplication of the act a custom is constituted, and, being used for a time, obtains the force of law." (Case of Tanistry, Sir J. Davys's Rep. at p. 32, quoted in Mr. Justice West's Note to *Mathura Naikin v. Esu Naikin*) (1). The result of the foregoing consideration of the case is that I find on the questions of law and custom in favour of the plaintiff, the special customs contrary to the Mitakshara law not being proved, but customs conformable to that law being shown to be followed by the Khojas.

The Court has now to turn to the more difficult question whether the wealth which Hubibhoy left by will to defendant had been acquired by means of a nucleus of property inherited by Hubib from his father Ibrahim. The evidence extends over four generations. I will take it as nearly as possible in order of time. [His Lordship stated the evidence and proceeded.]

Before discussing *seriatim* the value of this evidence on the points, whether Hubibhoy received property from his father Ibrahim, which became ancestral in his hands, and whether this [309] property was the *nucleus* of the fortune Hubibhoy bequeathed to defendant, it will be convenient to refer to the rules about burden of proof and the cases

establishing them. For reasons already given, I start with the conclusion that in the matters under discussion the Khojas are in substantially the same circumstances as the Hindus. There being no evidence nor suggestion that Hubibhoy ever made partition with Ibrahim, it must be presumed that up till Ibrahim's death they two lived in joint family, *Nalkristo Deb Barmona v. Bir Chandra Thakur*(1); *Taruck Chander Poddar v. Jodeshur*(2), and that the whole of their property was joint, even though purchased in the name of one member (*Gopekrish Gosain v. Gungapersad Gosain* (3)) or acquired jointly in trade, *Rampersad Tewarry v. Sheochurn Doss*(4), and when not bequeathed by will (and there is no suggestion that Ibrahim made a will) became ancestral in the hands of Hubibhoy. *Jagmohandas Mangaldas v. Sir Mangaldas Nathooobhoy* (5) ; *Mahomed Sidick v. Haji Ahmeda*(6) ; *Chatturbhuj Meghji v. Dharmasi Naranji* (7). See also West and Bühler's Hindu Law, pp. 709, 710, 716, 717, Ed. 3rd and Mayne's Hindu law, ss. 248 and 249. In the present case, the defendant denies that the property to which the suit relates is ancestral, and that the plaintiff has any estate or interest therein. His case as unfolded in evidence and arguments, is that Hubibhoy received no property from Ibrahim, which became the *nucleus* of Hubibhoy's wealth. I have not been able to find any authority dealing with the question of *onus* at the exact point we have reached ; but having come to a conclusion on the issues about special custom, and having now to deal with evidence recorded, I do not think this question of much importance. Following Mr. Mayne's reasoning in s. 263, I think there was *onus* on plaintiff to offer evidence ; but that the amount of evidence to shift upon defendant the burden of displacing it depends upon the particular circumstances, and that the duty of the Court is the ordinary duty of coming to conclusions on the evidence. The discharge of that duty in the [310] present case is more than usually difficult, as Ibrahim died in 1816 and and Hubibhoy died in 1865. There are few witnesses remaining who can speak to the transactions of 1850 and 1844, and hardly any to those of 1820 and the time before then. The account books are few and defective. For these reasons I will give my reasons with some fullness for the conclusions to which the evidence has led me. [His Lordship discussed the evidence and continued.]

For the above reasons I find in favour of plaintiff as to the *nucleus* of the fortune bequeathed by Hubib to defendant having been inherited from Ibrahim. My findings on the issues are as follows:—On issues 1 and 8.—The property in the hands of Hubib Ibrahim and devised by his will was ancestral property and the profits thereof. On issues 2 and 3.—The plaintiff at birth became a co-parcener in the said property, with an interest therein, similar to that of a son in a family governed by the ordinary Hindu law and retain such an interest until partition. On issue 4.—The said property is not the sole and absolute property of the first defendant. On issue 9.—There is a distinction between ancestral and self-acquired property by the law and custom of Khojas in respect of the power of the owner thereof to devise or make a gift of the same, such distinction being similar to that obtaining at ordinary Hindu law. On issue 5.—Hubibhoy Ibrahim's will, dated the 29th December, 1864, did revoke all prior testamentary writings made by him. On issue 6.—Such revocation was not procured or induced by any

(1) 12 M.I.A. 523 (540).

(2) 11 B.L.R. 193.

(3) 6 M.I.A. 53.

(4) 10 M.I.A. 490.

(5) 10 B. 528.

(6) 10 B. 1.

(7) 9 B. 438.

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promise or representation of defendant 1 to the said Hubibhoy Ibrahim as alleged in para. 7 of the plaint. On issue 10.—I pass no finding, but refer it to the Commissioner for taking accounts. On issue 7.—The relief due to plaintiff is a decree for account and partition of his share after a reference to the Commissioner. It is not disputed that defendant's family consists of himself, the plaintiff, and the second defendant. Plaintiff is thus entitled to one-third share, and the two defendants each one-third share. I direct that the decree containing the following words:—That it should be referred to the Commissioner to take an account of the ancestral property, both moveable and immoveable, which has come into the possession of the first defendant, and of the [311] accumulations and accretions thereof, and to ascertain and report the amount of the said ancestral property with the said accumulations and accretions, which is now in the hands of the said first defendant, and to ascertain the amount of the plaintiff's one-third share therein, and also to ascertain the amount of the second defendant's one-third share therein. I order the first defendant to pay all the costs of the suit up till date; order as to subsequent costs reserved.

Attorneys for the plaintiff :—Messrs. *Ardesir, Hormasji, and Dinsha.*

Attorneys for the defendants :—Messrs. *Jefferson, Bhaishankar, and Dinsha*; and Messrs. *Thakurdas, Dharamsi, and Cama.*

12 B. 311.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

IN RE THE MACHINE EXCHANGE COMPANY, LIMITED,
IN LIQUIDATION.

RUSTOMJI FRAMJI WADIA'S CASE.

SHAPURJI BYRAMJI KATRUCK'S CASE. [19th December, 1887.]

Company—Memorandum of Association—Effect of signing Memorandum—Withdrawal of signature before registration of memorandum—Indian Companies Act VI of 1892, s. 45.

A person who signs a memorandum of association for a number of shares becomes absolutely bound to take those shares. The statutory liability, the creation of the agreement commences with the signature of the memorandum and is not held in suspense until the memorandum is registered. There is no *locus penitentie* up to the date of registration, and no person who has signed the memorandum, can, acting independently of the others, cancel his signature.

IN the winding up of the above company which had been registered on the 18th January, 1887, the Official Liquidator (Mr. T. Lidbetter) now brought in the list of contributories for settlement.

Rustomji Framji Wadia was entered on the list as the holder of forty shares and Shapurji Byramji Katruck as the holder of thirty shares. Both the said contributories had subscribed the [312] registered memorandum of association for the number of shares mentioned in the list.

Rustomji Framji Wadia, however, disputed his liability save as to five shares, on the ground, that on the 17th January, 1887, the day before the company was registered, he wrote to the agent of the company Mr. Drewett, withdrawing his subscription as to thirty-five of the forty shares