1895.

IN THE MATTER OF HORMARJI ARDESIR HORMARJI.

to enter up judgment ought not to have been made, and must now be discharged except as to costs, but as the case was argued in the Insolvent Court on different grounds from what it has been here, each party will bear their own costs.

Order discharged.

Attorneys for the appellant:—Messrs. *Chalk, Walker and Smetham:*
Attorneys for the respondents:—Messrs. *Craigie, Lynch and Owen.*

ORIGINAL CIVIL.

Before Mr. Justice Parsons and Mr. Justice Starling.

DAGREE (ORIGINAL DEFENDANT,) APPELLANT, *v.* PACOTTI SAN JAO (ORIGINAL PLAINTIFF), RESPONDENT.*

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August 30.

Native Christian—Koli caste of fishermen—Converts to Christianity from Hinduism —Succession Act (X of 1865), *Secs.* 2 *and* 331*—Inheritance—Custom—Evidence of custom of inheritance—Practice—Koli caste.*

The Indian Succession Act (X of 1865) and the rules of inheritance prescribed by it, apply to Hindus who have become Christians; and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible.

APPEAL from Farran, J.

The plaintiff (respondent) was the husband of one Dumu, who died in October, 1891, leaving him by her will all her moveable and immoveable property. He alleged that she was entitled to a house which she inherited from her maternal grandfather (Dhurma) and to two-thirds of a house and certain moveable property left by her father (Dáma Budia), who died in December, 1890.

The defendant Dagree was the widow of Dáma Budia and the step-mother of Dumu. She had taken possession of all the property in question, and claimed, by the custom of the community, to have a life-interest in it.

The plaintiff contended that the property had devolved upon his wife Dumu under the rules of inheritance laid down in the Indian Succession Act (X of 1865), by which the community was governed, and he, therefore, brought this suit to recover it.

* Suit No. 268 of 1892.

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The parties were Christians and belonged to the Koli caste of fishermen in Bombay, who were all originally Hindus, but some of whom had become Christians[1]. The defendant alleged that the community to which she and the plaintiff belonged had retained the Hindu usage of inheritance, and that this usage had always been observed by its members.

At the hearing the following issue (*inter alia*) was raised by the defendant, *viz.*, whether the succession to the estate of Dharma and Dáma Budia respectively is not governed by the Hindu law, and not Act X of 1865, having regard to the custom of the caste to which they both belonged, or otherwise ?"

Thereupon counsel for the plaintiff raised the further issue "whether the alleged custom is one which can be proved, having regard to Act X of 1865." He contended that no evidence of the alleged custom could be admitted, and cited *Ponnusámi Nadan* v. *Dorásámi Ayyan*[2] and *Tellis* v. *Saldanha*[3].

The two sections of the Succession Act (X of 1865) upon which the plaintiff relied, were section 2 and section 331[4]. It was contended that under these sections the Act and the rules of inheritance prescribed by it were universally applicable in India except to such persons as were exempt by section 331; that the word "Hindu" in that section meant a person professing the Hindu religion; that as the parties did not belong to that class, but were Christians, they were not exempt under that section, and that, therefore, the property in question had devolved according to the rules laid down by the Act.

FARRAN, J., on the above authorities held that the Succession Act (X of 1865) applied to the parties, and that evidence in

(1) See Sherring on Caste, Vol. 2, p. 307, 313; and the Bombay Gazetteer, Vol. 13, Pt. I, p. 165.

(2) I. L. R., 2 Mad., 209. (3) I. L. R., 10 Mad., 69.

(4) Section 2 of the Succession Act.—Except as provided by this Act or by any other law for the time being in force, the rules herein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession.

Section 331 of the Succession Act.—The provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan or Buddhist; nor shall they apply to any will made, or any intestacy occurring, before the 1st day of January 1866.

proof of a custom of inheritance inconsistent with the provisions of that Act was inadmissible. He, therefore, passed a decree for the plaintiff.

The defendant appealed on the grounds (*inter alia*), (1) that the Court ought to have allowed her to call evidence to prove the customs of the Christian Koli community of Bombay (to which both the parties belonged) with regard to succession, and (2) that the Court was wrong in holding that the said community was governed, with regard to intestacy and succession, by the Indian Succession Act (X of 1865), section 331.

Macpherson (Acting Advocate General) and *Kirkpatrick* for the appellant:—The defendant's community although it has become Christian has retained the Hindu usage of inheritance. We submit that the defendant ought to be allowed to give evidence of this, and that the community is not necessarily bound by the rules of inheritance prescribed by the Succession Act X of 1865. We admit that the only decisions upon the point raised in this case are against us. But they are all cases decided by the Madras High Court and are not binding here. We contend that they are wrong. The effect of them is to make the Indian Succession Act a penal law. This could not have been intended by the Legislature. To substitute the English law of inheritance, as prescribed by that Act, for the Hindu law, would result in breaking up the social system of the Hindus. To enforce such a change by legislation as a consequence of adopting a particular form of religious faith, is to inflict a penalty upon a mere opinion, and amounts to religious persecution. The Legislature in 1865 could not have intended this. The Madras Courts have misconstrued section 331. They have held that the words "Mahomedan" and "Buddhist" are used in a theological sense in the section, and argue that, therefore, the word "Hindu" must be similarly construed. But these words are not used in that section in a theological sense. They are used merely to indicate the communities known by those names, and not with reference to the religious opinions professed by them. These communities happen to have adopted the names of their founders, and there was, therefore, no other possible way of describing them. Mahomedans are exempted by this section,

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not because they profess certain religious opinions, but because they have a law of succession of their own. It is for this same reason that Hindus are exempt. They, too, have their own law. It is not possible that the Legislature could have intended to deprive them of it and compel them to adopt a foreign law wholly repugnant to their ideas if they should change their opinions and become Christians. In all free countries, men may change their religion and yet remain in their communities, conforming to their usages and governed by their laws. That is what the parties to this case have done. To hold that merely because they have changed their religious views they have ceased to be Hindus, and are no longer entitled to the advantages of belonging to the Hindu community, is persecution of opinion never intended by the Legislature. The Indian Legislature has never desired to interfere with religious opinion in this country, or to make civil rights dependent on religion. See Act XXI of 1850. Why should the adoption of Christianity involve a change in the law of succession? The adoption of Mahomedanism necessarily involves such a change, because Mahomet taught not merely a system of religion, but also a system of law, and to become a Mahomedan implies the acceptance of both. But the Founder of Christianity taught no law, and the Christian faith may be accepted and professed under any system of law and without any change of law. Unless, therefore, we are to attribute to the Legislature the intention of enacting a penal law against Christianity in India it is impossible to accept the construction of the section adopted by the Madras Courts. The law as administered in the Bombay High Court allows Hindus to retain their own usages although they become Jains[1], Khoja Mahomedans[2], Memon Mahomedans[3], Boráh Mahomedans[4]. We contend that it allows them the same liberty if they become Christians.

(1) See 10 Bom. H. C. Rep., 241; see also I. L. R., 3 All., 55.

(2) See 12 Bom. H. C. Rep., 294; I. L. R., 3 Bom., 34; I. L. R., 12 Bom., 280, at p. 294; I. L. R., 13 Bom., 534.

(3) See Perry's Oriental Ca., p. 110, 115, 116; I. L. R., 6 Bom., 452; I. L. R., 9 Bom., 115; I. L. R., 9 Bom., 158; I. L. R., 10 Bom., 1.

(4) P. J. for 1894, p. 350, and see I. L. R., 20 Bom.

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Further we say that all native Hindu communities, whether they become Christian or not, are included in the term "Gentu" in Stat. 37 Geo. III, c. 142, sec. 13. The word is clearly used there with reference to race or community and not religion: see *Lopes* v. *Lopes*[1]. That Act preserved their usage of inheritance to all Gentus, and the Indian Legislature had no power to take it away. See Indian Councils Act (Stat. 24 and 25 Vic., c. 67) and see Stat. 21 and 22 Vic., cap. 106, sec. 64. If the Madras decisions rightly construe the Succession Act, that Act as to Hindus does take it away. It is, therefore, *ultra vires* and ought not to be enforced against them.

The Court below ought to have allowed the defendant to give evidence of the custom of inheritance prevailing in the community. The Succession Act was not intended to overrule *Abraham* v. *Abraham*[2].

Inverarity and *Russell* for the respondent:—We rely on the decisions of the Madras High Court—*Joseph Váthiar*, appellant[3]; *Ponnusámi Nádan* v. *Dorasámi A'yyan*[4]; *Administrator General of Madras* v. *Anandachari and others*[5]; *Tellis* v. *Saldanha*[6]. There is no hardship really imposed on this caste by enforcing the rules of the Succession Act upon them; for its members can escape from these rules by making wills, or they can procure exemption under section 332 of the Act—Stokes' Anglo-Indian Codes, Vol. I, p. 483.

PARSONS, J.:—The question for our determination is whether the Indian Succession Act, 1865, governs the succession in the family of the parties, who are Christians. The answer depends upon the meaning of the term "Hindus" in section 331 of the Act. It is admitted that the ancestors of the parties were long ago converted to the Christian religion, and that the parties are Christians, but it is argued that they have not on that account ceased to be Hindus, that they are not, therefore, subject to the provisions of the Succession Act, and that the term "Hindus" in section 331 is denominative of a race, and not of a religion. I think there is no ground for such an argument. There is no race of

(1) 5 Bom. H. C. Rep., p. 183, *et seq.*
(2) 9 Moo. Ind. Ap., 239.
(3) 7 Mad. H. C. Rep., 121.
(4) I. L. R., 2 Mad., 209.
(5) I. L. R., 9 Mad., 466.
(6) I. L. R., 10 Mad., 69.

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Hindus. It is not the inhabitants of Hindustán who are Hindus, but those only of them who profess a religion which is called the Hindu religion. Just so there is no race of Mahomedans, or of Buddhists, or of Christians. An argument that a Christian, who has adopted the Mahomedan religion, is nevertheless still a Christian, is on the face of it an absurdity; but it is as good an argument as one that a Hindu, who has been converted to the Christian religion, is still a Hindu.

The cases cited to show that Hindus, who have become Memons or Boráhs, may set up customs of inheritance, show that these customs must be evidenced by an observance after change of religion, and can only be proved as being different from the law of the new religion when there is no legislative enactment declaring the latter. They do not show that a Hindu, who has changed his religion, is still a Hindu, and as such is governed by Hindu law. They in fact show distinctly the contrary, *ex. gr.* I. L. R., 6 Bom. 460. Cutchi Memons are held to be Mahomedans.

I am, therefore, of opinion that the term "Hindus" in section 331 does not include persons who or whose ancestors were at one time Hindus, but who became, or are, at the time of inquiry, Christians. I fully agree on this point with the decisions of the Madras High Court (7 Mad. H. C. Rep., 121; I. L. R., 2 Mad., 209, 9 *ib.*, 466, 10 *ib.*, 69), which decisions the learned Judge below has unhesitatingly followed. We confirm the decree with costs.

STARLING, J.:—The sole point for determination in this appeal is whether the provisions of the Indian Succession Act, 1865, apply to those members of the Koli caste who profess the Christian religion, or whether it is open to them to prove that they have governed themselves, in matters of succession, by the Hindu law or some modification thereof. The Succession Act (X of 1865), section 2, provides that "except as provided by this Act or by any other law in force, the rules therein contained shall constitute the law of British India applicable to all cases of intestate or testamentary succession." It is thus of universal application, unless the person claiming to be excepted can show that by this or some other Act he specifically is excepted from the operation of its provisions.

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The appellant claims that the class to which she and the respondent belong, are thus specifically excepted by section 331, which provides that "the provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu, Mahomedan, or Buddhist," and the appellant claims that the class to which she belongs must be designated as Hindus. Now in the class of Kolis, some profess the Hindu religion, some the Mahomedan, and some the Christian, and probably all were originally Hindu by religion, but some have been converted to Christianity, and some to Mahomedanism. Mr. Stokes, in his notes on this section in his Anglo-Indian Codes, Vol. I, 483, is of opinion that, from the connection of Hindu with Mahomedan and Buddhist, that term is used as a theological term as denoting any person professing any form of the Brahminical religion or religion of the Puránas; and with this opinion I agree. It is evident with regard to Mahomedans that the Courts look at what they profess at the present time, and not at the stock whence they were derived, nor at the fact that they may, in matters of succession and inheritance, be governed by Hindu law in whole or in part: see *In re Háji Ismail Háji Abdulla*[1]. I think that the same principle must be applied to the parties in the present case. We must look at them as they are, and it is then clear that they, by embracing and following the Christian religion, have ceased to be Hindus, although they may be of Hindu descent, and may have retained some Hindu customs. Consequently they are not Hindus within the meaning of section 331 of the Indian Succession Act. This appears to have been the opinion of the Government of India shortly after the Succession Act was passed; for under the powers conferred by section 332, the native Christians of Coorg were, on the 25th July, 1868, exempted retrospectively from the 16th March, 1865, from the operation of that Act.

The same point has come up for consideration before the High Court of Madras on several occasions in the cases cited by counsel during the argument of this case, and that Court has always held that native Christians could not claim to be Hindus within the meaning of the Succession Act.

(1) I. L. R., 6 Bom., 452.

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On the authority of these decisions, the learned Judge in the Division Court passed a decree against the appellant, and I am of opinion for the reasons already given that his decision was according to law, and that the present appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for appellant :—Messrs. *Wádia and Gándhi.*

Attorneys for respondent :—Messrs. *Chalk, Walker and Smetham.*

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894. September 10.

BA'I DEVKORE (ORIGINAL PETITIONER), APPLICANT, v. LA'LCHAND JIVANDA'S AND ANOTHER (ORIGINAL OPPONENTS), OPPONENTS.*

Succession Certificate Act (VII of 1889), Secs. 9 and 19—Order granting certificate on the applicant's furnishing security—No appeal from such order—Practice—Procedure—Discretion—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 622—Extraordinary jurisdiction.

The widow of a deceased person having applied for a certificate under the Succession Certificate Act (VII of 1889), the Judge ordered the certificate to issue on the applicant's furnishing security under section 9 of the Act.

Held that such an order was not an order "granting, refusing or revoking a certificate" within the meaning of section 19 of the Act, and was, therefore, not appealable.

Bhagwáni v. *Manni Lál* (1) followed.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) to reverse the order of R. S. Tipnis, Assistant Judge, F. P., of Broach.

Applicant Bái Devkore applied under Act VII of 1889 to the Subordinate Judge for a certificate of succession to her husband, Mánekchand Jivandás, who died on the 16th December, 1892.

The opponents were brothers of the deceased Mánekchand. They objected to her obtaining the certificate unless substantial security were required from her, as they alleged she had been wasting the property in which they had a reversionary interest.

The Subordinate Judge ordered that a certificate should issue

* Application No. 3 of 1894 under the extraordinary jurisdiction.

(1) I. L. R., 13 All., 214.